

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

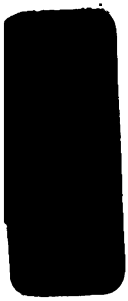
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`





THE

AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN.

VOLUME 125.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1909.

121950

JUL 29 1942

Copyright, 1909.

BY

BANCROFT-WHITNEY COMPANY.

SAN FRANCISCO:
THE FILMER BROTHERS ELECTROTYPE COMPANY,
TYPOGRAPHERS AND STEREOTYPERS.

AMERICAN STATE REPORTS.

VOLUME 125.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

		PAGE.
ALABAMA REPORTS	Vol. 151.	17-46
CALIFORNIA REPORTS	Vol. 152.	47-101
CONNECTICUT REPORTS	Vol. 80.	102-145
IDAHO REPORTS.	Vol. 14.	146-214
IOWA REPORTS	Vol. 136.	215-282
MAINE REPORTS	Vol. 103.	283-325
MASSACHUSETTS REPORTS	Vol. 197.	326-388
MICHIGAN REPORTS	Vol. 152.	389-435
NORTH CAROLINA REPORTS . . .	Vols. 146, 147.	436-573
NORTH DAKOTA REPORTS	Vols. 15, 16.	574-678
OHIO STATE REPORTS	Vol. 78.	679-716
RHODE ISLAND REPORTS	Vol. 28.	717-761
SOUTH CAROLINA REPORTS	Vol. 78.	762-827
UTAH REPORTS	Vol. 32.	828-883
WASHINGTON REPORTS	Vols. 47, 48.	884-953
WEST VIRGINIA REPORTS	Vol. 62.	954-996
WYOMING REPORTS	Vol. 16.	997-1060
FLORIDA REPORTS	Vol. 53.	1061-1101

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

ALABAMA.—(83) **3**; (84) **5**; (85) **7**; (86) **11**; (87) **13**; (88) **16**; (89) **18**; (90, 91) **24**; (92) **25**; (93) **30**; (94) **33**; (95) **36**; (96, 97) **38**; (98) **39**; (99) **42**; (100, 101) **46**; (102) **48**; (103) **49**; (104, 105) **53**; (106, 107, 108) **54**; (109, 110) **55**; (111) **56**; (112) **57**; (113) **59**; (114) **62**; (115, 116) **67**; (118, 119) **72**; (120) **74**; (121) **77**; (122, 123, 124, 125) **82**; (126, 127) **85**; (128) **86**; (129) **87**; (130) **89**; (131, 132) **90**; (133) **91**; (134) **92**; (135) **93**; (136) **96**; (137) **97**; (138) **100**; (139) **101**; (140) **103**; (141) **109**; (142) **110**; (143) **111**; (144) **113**; (145) **117**; (146, 147) **119**; (146, 148) **121**; (149) **123**; (150) **124**; (151) **125**.

ARKANSAS.—(48) **3**; (49) **4**; (50) **7**; (51) **14**; (52) **20**; (53) **22**; (54) **26**; (55) **29**; (56) **35**; (57) **38**; (58) **41**; (59) **43**; (60) **46**; (61, 62) **54**; (63) **58**; (64) **62**; (65) **67**; (66) **74**; (67) **77**; (68) **82**; (69) **86**; (70) **91**; (71) **100**; (72) **105**; (73) **108**; (74) **109**; (75) **112**; (76, 77) **113**; (78) **115**; (79) **116**; (80) **117**; (81, 82) **118**; (83) **119**; (84) **120**; (85) **122**.

CALIFORNIA.—(72) **1**; (73) **2**; (74) **5**; (75) **7**; (76) **9**; (77) **11**; (78, 79) **12**; (80) **13**; (81) **15**; (82) **16**; (83) **17**; (84) **18**; (85) **20**; (86) **21**; (87, 88) **22**; (89) **23**; (90, 91) **25**; (92, 93) **27**; (94) **28**; (95) **29**; (96) **31**; (97) **33**; (98) **35**; (99) **37**; (100) **38**; (101) **40**; (102) **41**; (103) **42**; (104) **43**; (105) **45**; (106) **46**; (107) **48**; (108) **49**; (109) **50**; (110, 111) **52**; (112) **53**; (113) **54**; (114) **55**; (115) **56**; (116) **58**; (117) **59**; (118) **62**; (119) **63**; (120) **65**; (121) **66**; (122) **68**; (123) **69**; (124) **71**; (125) **73**; (126) **77**; (127) **78**; (128, 129) **79**; (130) **80**; (131) **82**; (132) **84**; (133) **85**; (134) **86**; (135) **87**; (136) **89**; (137) **92**; (138) **94**; (139) **96**; (140) **98**; (141) **99**; (142) **100**; (143) **101**; (144) **103**; (145) **104**; (146) **106**; (147) **109**; (148) **113**; (149) **117**; (150) **119**; (151) **121**; (152) **125**.

COLORADO.—(10) **3**; (11) **7**; (12) **13**; (13) **16**; (14) **20**; (15) **22**; (16) **25**; (17) **31**; (18) **36**; (19) **41**; (20) **46**; (21) **52**; (22) **55**; (23) **58**; (24) **65**; (25) **71**; (26) **77**; (27) **83**; (28) **89**; (29) **93**; (30) **97**; (31) **102**; (32) **105**; (33) **108**; (34) **114**; (35) **117**; (36) **118**; (37) **119**; (38) **120**; (39) **121**; (40) **122**; (41) **124**.

CONNECTICUT.—(54) **1**; (55) **3**; (56) **7**; (57) **14**; (58) **18**; (59) **21**; (60) **25**; (61) **29**; (62) **36**; (63) **38**; (64) **42**; (65) **48**; (66) **50**; (67) **52**; (68) **57**; (69) **61**; (70) **66**; (71) **71**; (72) **77**; (73) **84**; (74) **92**; (75) **96**; (76) **100**; (77) **107**; (78) **112**; (79) **118**; (80) **125**.

DELAWARE.—(5 Houst.) **1**; (6 Houst.) **22**; (7 Houst.) **40**; (9 Houst.) **43**; (1 Marv.) **65**; (2 Marv.) **69**; (1 Pennewill) **73**; (2 Pennewill) **82**; (3 Pennewill) **94**; (4 Pennewill) **103**; (5 Pennewill) **119**.

FLORIDA.—(22) **1**; (23) **11**; (24) **12**; (25, 26) **23**; (27) **26**; (28) **29**; (29) **30**; (30) **32**; (31) **34**; (32) **37**; (33) **39**; (34) **43**; (35) **48**; (36) **51**; (37) **53**; (38) **56**; (39) **63**; (40) **74**; (41) **79**; (42) **89**; (43) **99**; (44) **103**; (45, 46, 47) **110**; (48, 49, 50) **111**; (51, 52) **120**; (53) **125**.

GEORGIA.—(76) **2**; (77) **4**; (78) **6**; (79) **11**; (80, 81) **12**; (82) **14**; (83, 84) **20**; (85) **21**; (86) **22**; (87) **27**; (88) **30**; (89) **32**; (90) **35**;

(91, 92, 93) 44; (94) 47; (95, 96) 51; (97) 54; (98) 58; (99) 59; (100) 62; (101) 65; (102) 66; (103) 68; (104) 69; (105) 70; (106) 71; (107) 73; (108) 75; (109) 77; (110, 111) 78; (112) 81; (113) 84; (114) 88; (115) 90; (116) 94; (117) 97; (118) 98; (119) 100; (120) 102; (121) 104; (122) 106; (123) 107; (124) 110; (125) 114; (126) 115; (127, 128) 119; (129) 121; (130) 124.

IDAHO.—(2) 35; (3, 4, 5) 95; (6) 96; (7) 97; (8) 101; (9) 108; (10) 109; (11) 114; (12) 118; (13) 121; (14) 125.

ILLINOIS.—(121) 2; (122) 3; (123) 5; (124) 7; (125) 8; (126) 9; (127) 11; (128) 15; (129) 16; (130) 17; (131) 19; (132) 22; (133, 134) 23; (135) 25; (136) 29; (137) 31; (138, 139) 32; (140, 141) 33; (142) 34; (143, 144, 145) 36; (146, 147) 37; (148) 39; (149, 150) 41; (151) 42; (152) 43; (154) 45; (153, 155) 46; (156) 47; (157) 48; (158) 49; (159) 50; (160, 161) 52; (162) 53; (163) 54; (164, 165) 56; (166) 57; (167) 59; (168, 169) 61; (170) 62; (171) 63; (172, 173) 64; (174) 66; (175) 67; (176) 68; (177, 178) 69; (179) 70; (180, 181) 72; (182) 74; (183, 184) 75; (185) 76; (186) 78; (187) 79; (188) 80; (189) 82; (190) 83; (191, 192) 85; (193) 86; (194, 195) 88; (196) 89; (197) 90; (198) 92; (199, 200), 93; (201) 94; (202) 95; (203) 96; (204, 205) 98; (206, 207) 99; (208) 100; (209) 101; (210) 102; (211, 212) 103; (213) 104; (214) 105; (215) 106; (216, 217) 108; (218, 219) 109; (220) 110; (221) 112; (222) 113; (223) 114; (224) 115; (225) 116; (226) 117; (227) 118; (228) 119; (229, 230) 120; (231) 121; (232, 233) 122; (234) 123.

INDIANA.—(112) 2; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10; (119) 12; (120, 121) 16; (122) 17; (123) 18; (124) 19; (125) 21; (126, 127) 22; (128) 25; (129) 28; (130) 30; (131) 31; (132) 32; (133) 36; (134) 39; (135) 41; (136) 43; (137) 45; (138) 46; (139) 47; (140) 49; (1, 2, 3 Ind. App.; 141) 50; (4, 5, 6 Ind. App.; 142) 51; (7, 8 Ind. App.; 143) 52; (9, 10 Ind. App.) 53; (11 Ind. App.) 54; (13 Ind. App.; 144) 55; (14 Ind. App.) 56; (15 Ind. App.; 145) 57; (146) 58; (16 Ind. App.) 59; (17 Ind. App.) 60; (147, 148) 62; (18 Ind. App.; 149) 63; (150; 19 Ind. App.) 65; (20 Ind. App.) 67; (151) 68; (21 Ind. App.) 69; (152) 71; (22 Ind. App.) 72; (153) 74; (23 Ind. App.; 154) 77; (24 Ind. App.) 79; (155) 80; (25 Ind. App.) 81; (156) 83; (26 Ind. App.) 84; (157; 27 Ind. App.) 87; (28 Ind. App.) 91; (158) 92; (29 Ind. App.) 94; (159) 95; (30 Ind. App.) 96; (160) 98; (31 Ind. App.) 99; (161) 100; (32 Ind. App.; 162) 102; (33 Ind. App.) 104; (163) 106; (34 Ind. App.) 107; (164) 108; (35 Ind. App.) 111; (165) 112; (36 Ind. App.) 114; (37 Ind. App.; 166) 117; (167) 119; (168) 120; (169) 124.

IOWA.—(72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32; (84) 35; (85) 39; (86) 41; (87) 43; (88) 45; (89, 90), 48; (91) 51; (92) 54; (93) 57; (94, 95) 58; (96, 97) 59; (98) 60; (99) 61; (100) 62; (101, 102) 63; (103) 64; (104) 65; (105) 67; (106) 68; (107) 70; (108) 75; (109) 77; (110) 80; (111) 82; (112) 84; (113) 86; (114) 89; (115) 91; (116) 93; (117) 94; (118) 96; (119) 97; (120) 98; (121) 100; (122, 123) 101; (124) 104; (125, 126) 106; (127) 109; (128) 111; (129) 113; (130) 114; (131) 117; (132, 133) 119; (134) 120; (135) 124; (136) 125.

KANSAS.—(37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34; (51) 37; (52) 39; (53) 42; (54) 45; (55) 49; (56) 54; (57) 57; (58) 62; (59) 68; (60) 72; (61) 78; (62) 84; (63) 88; (64) 91; (65) 93; (66) 97; (67) 100; (68) 104; (69) 105; (70) 109; (71) 114; (72) 115; (73) 117; (74) 118; (74, 75) 121; (76) 123.

KENTUCKY.—(83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 25; (90) 29; (91) 34; (92) 36; (93) 40; (94) 42; (95) 44; (96) 49; (97) 53; (98) 56; (99) 59; (100) 66; (101) 72; (102) 80; (103) 82; (104) 84; (105) 88; (106) 90; (107) 92; (108) 94; (109) 95; (110) 96; (111) 98; (112) 99; (113) 101; (114) 102; (115) 103; (116) 105; (117, 118) 111; (119) 115; (120) 117; (122) 121; (121) 123; (123, 124) 124.

LOUISIANA.—(39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17; (42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32; (45 La. Ann.) 40; (46, 47 La. Ann.) 49; (48 La. Ann.) 55; (49 La. Ann.) 62; (50 La. Ann.) 69; (51 La. Ann.) 72; (52 La. Ann.) 78; (104) 81; (105) 83; (106) 87; (107) 90; (108) 92; (109) 94; (110) 98; (111) 100; (112, 113) 104; (114) 108; (115) 112; (116) 114; (115, 117) 116; (118) 118; (119) 121; (120) 124.

MAINE.—(79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30; (85) 35; (86) 41; (87) 47; (88) 51; (89) 56; (90) 60; (91) 64; (92) 69; (93) 74; (94) 80; (95) 85; (96) 90; (97) 94; (98) 99; (99) 105; (100) 109; (101) 115; (102) 120; (103) 125.

MARYLAND.—(67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20; (73) 25; (74) 28; (75) 32; (76) 35; (77) 39; (78) 44; (80) 45; (79) 47; (81) 48; (82) 51; (83) 55; (84) 57; (85) 60; (86) 63; (87) 67; (88) 71; (89) 73; (90) 78; (91) 80; (92) 84; (93) 86; (94) 89; (95) 93; (96) 94; (97) 99; (98) 103; (99) 105; (100) 108; (101) 109; (102) 111; (103) 115; (104) 118; (105) 121; (106) 124.

MASSACHUSETTS.—(145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 31; (156) 32; (157) 34; (158) 35; (159) 38; (160) 39; (161) 42; (162) 44; (163) 47; (164) 49; (165) 52; (166) 55; (167) 57; (168) 60; (169) 61; (170) 64; (171) 68; (172) 70; (173) 73; (174) 75; (175) 78; (176) 79; (177) 83; (178) 86; (179) 88; (180) 91; (181) 92; (182) 94; (183) 97; (184) 100; (185) 102; (186) 104; (187) 105; (188) 108; (189) 109; (190) 112; (191) 114; (192) 116; (193) 118; (194) 120; (195) 122; (196) 124; (197) 125.

MICHIGAN.—(60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69, 75) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 26; (89) 28; (90, 91) 30; (92) 31; (93) 32; (94) 34; (95, 96) 35; (97) 37; (98) 39; (99) 41; (100) 43; (101) 45; (102) 47; (103) 50; (104) 53; (105) 55; (106) 58; (107) 61; (108) 62; (109) 63; (110) 64; (111) 66; (112, 113) 67; (114) 68; (115) 69; (116, 117) 72; (118) 74; (119) 75; (120) 77; (121, 122) 80; (123) 81; (124) 83; (125) 84; (126) 86; (127) 89; (128) 92; (129) 95; (130) 97; (131) 100; (132) 102; (133) 103; (134) 104; (135) 106; (137) 109; (138) 110; (139) 111; (136, 140) 112; (141, 142) 113; (143) 114; (144) 115; (145) 116; (146) 117; (147, 148) 118; (149) 119; (144, 150) 121; (146, 151) 123; (152) 125.

MINNESOTA.—(36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19; (44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32; (50) 36; (51, 52) 38; (53) 39; (54) 40; (55) 43; (56) 45; (57) 47; (58) 49; (59) 50; (60) 51; (61) 52; (62) 54; (63) 56; (64) 58; (65) 60; (66) 61; (67, 68) 64; (69) 65; (70) 68; (71) 70; (72) 71; (73) 72; (74) 73; (75) 74; (76, 77) 77; (78, 79) 79; (80) 81; (81, 82) 83; (83) 85; (84) 87; (85) 89; (86) 91; (87) 94; (88) 97; (89) 99; (90) 101; (91) 103; (92) 104; (93) 106; (94) 110; (95) 111; (96) 113; (97) 114; (98, 99) 116; (100) 117; (101) 118; (98, 102) 120; (103) 123; (104) 124.

MISSISSIPPI.—(65) 7; (66) 14; (67) 19; (68) 24; (69) 30; (70) 35; (71) 42; (72) 48; (73) 55; (74) 60; (75) 65; (76) 71; (77) 78;

(78) 84; (79) 89; (80) 92; (81) 95; (82) 100; (83) 102; (84) 105; (85) 107; (86) 109; (87) 112; (88) 117; (89) 119; (86, 89, 90) 122; (91) 124.

MISSOURI.—(92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17; (100) 18; (101) 20; (102) 22; (103) 23; (104, 105) 24; (106) 27; (107) 28; (108, 109) 32; (110, 111) 33; (112) 34; (113, 114) 35; (115) 37; (116, 117) 38; (118) 40; (119, 120) 41; (121) 42; (122) 43; (123) 45; (124, 125) 46; (126) 47; (127) 48; (128) 49; (129) 50; (130) 51; (131) 52; (132) 53; (133) 54; (134) 56; (135, 136) 58; (137) 59; (138) 60; (139) 61; (140) 62; (141, 142) 64; (143) 65; (144) 66; (145) 68; (146) 69; (147, 148) 71; (149, 150) 73; (151) 74; (152) 75; (153, 154) 77; (155) 78; (156) 79; (157) 80; (158, 159) 81; (160) 83; (161) 84; (162, 163) 85; (164) 86; (165) 88; (166) 89; (167, 168) 90; (169) 92; (170, 171) 94; (172) 95; (173) 96; (174, 175) 97; (176) 98; (177) 99; (178, 179) 101; (180, 181, 182) 103; (183, 184, 185, 186) 105; (187) 106; (188, 189) 107; (190, 191) 109; (192) 111; (193, 194) 112; (195, 196) 113; (197) 114; (198) 115; (199) 116; (200) 118; (201, 202) 119; (203, 204, 205) 120; (206) 121; (207, 208, 209) 123; (210, 211) 124.

MONTANA.—(9) 18; (10) 24; (11) 28; (12) 33; (13) 40; (14) 43; (15) 48; (16) 50; (17) 52; (18) 56; (19) 61; (20) 63; (21) 69; (22) 74; (23) 75; (24) 81; (25) 87; (26) 91; (27) 94; (28) 98; (29) 101; (30) 104; (31) 107; (32) 108; (33) 114; (34) 115; (35) 119; (36) 122.

NEBRASKA.—(22) 3; (23, 24) 8; (25) 13; (26) 18; (27) 20; (28, 29) 26; (30) 27; (31) 28; (32, 33) 29; (34) 33; (35) 37; (36) 38; (37) 40; (38) 41; (39, 40) 42; (41) 43; (42, 43) 47; (44) 48; (45, 46) 50; (47) 53; (47, 48) 58; (49) 59; (50) 61; (51, 52) 66; (53) 68; (54) 69; (55) 70; (56) 71; (57) 73; (58) 76; (59) 80; (60) 83; (61) 87; (62) 89; (63) 93; (64) 97; (65) 101; (66) 103; (67) 108; (68) 110; (69) 111; (70) 113; (71) 115; (72) 117; (73) 119; (74, 75) 121; (76, 77) 124.

NEVADA.—(19) 3; (20) 19; (21) 37; (22) 58; (23) 62; (24) 77; (25) 83; (26) 99; (27) 103; (28) 113; (29) 124.

NEW HAMPSHIRE.—(64) 10; (62) 13; (65) 23; (66) 49; (67) 68; (68) 73; (69) 76; (70) 85; (71) 93; (72) 101; (73) 111; (74) 124.

NEW JERSEY.—(43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51 N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 52 N. J. L.) 19; (47 N. J. Eq.) 24; (53 N. J. L.) 26; (48 N. J. Eq.) 27; (49 N. J. Eq.) 31; (54 N. J. L.) 33; (50 N. J. Eq.) 35; (55 N. J. L.) 39; (51 N. J. Eq.) 40; (56 N. J. L.) 44; (52 N. J. Eq.) 46; (57 N. J. L.; 53 N. J. Eq.) 51; (54 N. J. Eq.; 58 N. J. L.) 55; (59 N. J. L.) 59; (55 N. J. Eq.) 62; (60 N. J. L.) 64; (56 N. J. Eq.) 67; (61 N. J. L.) 68; (62 N. J. L.) 72; (57 N. J. Eq.) 73; (63 N. J. L.) 76; (58 N. J. Eq.) 78; (64 N. J. L.) 81; (59, 60 N. J. Eq.) 83; (65 N. J. L.) 86; (61 N. J. Eq.; 66 N. J. L.) 88; (62 N. J. Eq.) 90; (67 N. J. L.) 91; (63 N. J. Eq.) 92; (68 N. J. L.) 96; (64 N. J. Eq.) 97; (69 N. J. L.) 101; (65 N. J. Eq.; 70 N. J. L.) 103; (66 N. J. Eq.) 105; (71 N. J. L.) 108; (67 N. J. Eq.) 110; (68 N. J. Eq.; 72 N. J. L.) 111; (69 N. J. Eq.) 115; (73 N. J. L.; 70 N. J. Eq.) 118; (74 N. J. L.) 122; (71 N. J. Eq.) 124.

NEW YORK.—(107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122) 19; (123) 20; (124, 125) 21; (126) 22; (127) 24; (128, 129) 26; (130, 131) 27; (132, 133) 28; (134) 30; (135) 31; (136) 32; (137) 33; (138) 34; (139) 36; (140) 37; (141) 38;

(142) 40; (143) 42; (144) 43; (145) 45; (146) 48; (147) 49; (148) 51; (149) 52; (150) 55; (151) 56; (152) 57; (153) 60; (154) 61; (155) 63; (156) 66; (157) 68; (158, 159) 70; (160) 73; (161, 162) 76; (163, 164) 79; (165) 80; (166, 167) 82; (168) 85; (169, 170) 88; (171) 89; (172) 92; (173) 93; (174) 95; (175) 96; (176) 98; (177) 101; (178) 102; (179) 103; (180) 105; (181) 106; (182) 108; (183) 111; (184) 112; (185) 113; (186, 187) 116; (188) 117; (184, 189) 121; (190, 191) 123.

NORTH CAROLINA.—(97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104) 17; (105) 18; (106) 19; (107) 22; (108) 23; (109) 26; (110) 28; (111) 32; (112) 34; (113) 37; (114) 41; (115) 44; (116) 47; (117) 53; (118) 54; (119) 56; (120) 58; (121) 61; (122) 65; (123) 68; (124) 70; (125) 74; (126) 78; (127) 80; (128) 83; (129) 85; (130) 89; (131) 92; (132) 95; (133) 98; (134) 101; (135) 102; (136) 103; (137, 138) 107; (139, 140) 111; (137, 141, 142) 115; (143) 118; (144) 119; (145) 122; (146, 147) 125.

NORTH DAKOTA.—(1) 26; (2) 33; (3) 44; (4) 50; (5) 57; (6, 7) 66; (8) 73; (9) 81; (10) 88; (11) 95; (12) 102; (13) 112; (14) 116; (15, 16) 125.

OHIO.—(45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21; (48 Ohio St.) 29; (49 Ohio St.) 34; (50 Ohio St.) 40; (51 Ohio St.) 46; (52 Ohio St.) 49; (53 Ohio St.) 53; (54 Ohio St.) 56; (55, 56 Ohio St.) 60; (57 Ohio St.) 63; (58 Ohio St.) 65; (59 Ohio St.) 69; (60 Ohio St.) 71; (61 Ohio St.) 76; (62 Ohio St.) 78; (63 Ohio St.) 81; (64 Ohio St.) 83; (65 Ohio St.) 87; (66 Ohio St.) 90; (67 Ohio St.) 93; (68 Ohio St.) 96; (69 Ohio St.) 100; (70 Ohio St.) 101; (71 Ohio St.) 104; (72 Ohio St.) 106; (73 Ohio St.) 112; (74 Ohio St.) 113; (75 Ohio St.) 116; (76 Ohio St.) 118; (77 Ohio St.) 122; (78 Ohio St.) 125.

OREGON.—(15) 3; (16) 8; (17) 11; (18) 17; (19) 20; (20) 23; (21) 28; (22) 29; (23) 37; (24) 41; (25) 42; (26) 46; (27) 50; (28) 52; (29) 54; (30) 60; (31) 65; (32) 67; (33) 72; (34) 75; (35) 76; (36) 78; (37) 82; (38) 84; (39) 87; (40) 91; (41) 93; (42) 95; (43) 99; (44) 102; (45) 106; (46, 47) 114; (48) 120; (49) 124.

PENNSYLVANIA.—(115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121 Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126 Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17; (132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21; (139, 140, 141 Pa. St.) 23; (142, 143 Pa. St.) 24; (144, 145 Pa. St.) 27; (146 Pa. St.) 28; (147, 150 Pa. St.) 30; (151 Pa. St.) 31; (148 Pa. St.) 33; (149, 152, 153 Pa. St.) 34; (154, 155 Pa. St.) 35; (156 Pa. St.) 36; (157 Pa. St.) 37; (158 Pa. St.) 38; (159 Pa. St.) 39; (160 Pa. St.) 40; (161 Pa. St.) 41; (162 Pa. St.) 42; (163 Pa. St.) 43; (164, 165 Pa. St.) 44; (166 Pa. St.) 45; (167 Pa. St.) 46; (168, 169 Pa. St.) 47; (170, 171 Pa. St.) 50; (172, 173 Pa. St.) 51; (174, 175 Pa. St.) 52; (176 Pa. St.) 53; (177 Pa. St.) 55; (178 Pa. St.) 56; (179, 180 Pa. St.) 57; (181 Pa. St.) 59; (182 Pa. St.) 61; (183, 184 Pa. St.) 63; (185 Pa. St.) 64; (186 Pa. St.) 65; (187 Pa. St.) 67; (188 Pa. St.) 68; (189 Pa. St.) 69; (190 Pa. St.) 70; (191 Pa. St.) 71; (192 Pa. St.) 73; (193 Pa. St.) 74; (194 Pa. St.) 75; (195 Pa. St.) 78; (196 Pa. St.) 79; (197 Pa. St.) 80; (198 Pa. St.) 82; (199 Pa. St.) 85; (195, 200 Pa. St.) 86; (201 Pa. St.) 88; (202 Pa. St.) 90; (203, 204 Pa. St.) 93;

(205 Pa. St.) 97; (206 Pa. St.) 98; (207 Pa. St.) 99; (208 Pa. St.) 101; (209 Pa. St.) 103; (210 Pa. St.) 105; (211 Pa. St.) 107; (212 Pa. St.) 108; (213 Pa. St.) 110; (214 Pa. St.) 112; (215 Pa. St.) 114; (216 Pa. St.) 116; (217 Pa. St.) 118; (217, 218 Pa. St.) 120; (219, 220 Pa. St.) 123.

RHODE ISLAND.—(15) 2; (16) 27; (17) 33; (18) 49; (19) 61; (20) 78; (21) 79; (22) 84; (23) 91; (24) 96; (25) 105; (26) 106; (27) 114; (28) 125.

SOUTH CAROLINA.—(26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26; (34) 27; (35) 28; (36) 31; (37) 34; (38) 37; (39) 39; (40) 42; (41) 44; (42) 46; (43) 49; (44) 51; (45) 55; (46) 57; (47) 58; (48) 59; (49) 61; (50) 62; (51) 64; (52) 68; (53) 69; (54) 71; (55) 74; (56, 57) 76; (58) 79; (59) 82; (60, 61) 85; (62) 89; (63) 90; (64) 92; (65) 95; (66) 97; (67) 100; (68) 102; (69) 104; (70) 106; (71) 110; (73, 74) 114; (75) 117; (73, 76) 121; (77) 122; (78) 125.

SOUTH DAKOTA.—(1) 36; (2) 39; (3) 44; (4) 46; (5) 49; (6) 55; (7) 58; (8) 59; (9) 62; (10) 66; (11) 74; (12) 76; (13) 79; (14) 86; (15) 91; (16) 102; (17) 106; (18) 112; (19) 117.

TENNESSEE.—(85) 4; (86) 6; (87) 10; (88) 17; (89) 24; (90) 25; (91) 30; (92) 36; (93) 42; (94) 45; (95) 49; (96) 54; (97) 56; (98) 60; (99) 63; (100) 66; (101) 70; (102) 73; (103) 76; (104) 78; (105) 80; (106) 82; (107) 89; (108) 91; (109) 97; (110) 100; (111) 102; (112) 105; (113) 106; (114) 108; (115) 112; (116) 115; (117) 119; (117, 118) 121; (119) 123.

TEXAS.—(68) 2; (69; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex. App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27; (30 Tex. App.) 28; (83) 29; (84) 31; (85) 34; (31 Tex. Cr. Rep.; 86) 37; (86; 32 Tex. Cr. Rep.) 40; (87; 33 Tex. Cr. Rep.) 47; (34 Tex. Cr. Rep.; 88) 53; (89, 90) 59; (35 Tex. Cr. Rep.) 60; (36 Tex. Cr. Rep.) 61; (91; 37 Tex. Cr. Rep.) 66; (38 Tex. Cr. Rep.) 70; (92) 71; (39 Tex. Cr. Rep.) 73; (40 Tex. Cr. Rep.) 76; (93) 77; (94) 86; (95) 93; (41, 42, 43 Tex. Cr. Rep.) 96; (96) 97; (44 Tex. Cr. Rep.) 100; (97) 104; (98) 107; (45, 46 Tex. Cr. Rep.) 108; (99; 47, 48, 49 Tex. Cr. Rep.) 122; (100; 50, 51 Tex. Cr. Rep.) 123; (52 Tex. Cr. Rep.) 124.

UTAH.—(13) 57; (14) 60; (15) 62; (16) 67; (17) 70; (18) 72; (19) 75; (20) 77; (21) 81; (22) 83; (23) 90; (24) 91; (25) 95; (26) 99; (27) 101; (28) 107; (29) 110; (30) 116; (31) 120; (32) 125.

VERMONT.—(60) 6; (61) 15; (62) 22; (63) 25; (64) 33; (65) 36; (66) 44; (67) 48; (68) 54; (69) 60; (70) 67; (71) 76; (72) 82; (73) 87; (74) 93; (75) 98; (76) 104; (77) 107; (78) 112; (79) 118.

VIRGINIA.—(82) 3; (83) 5; (84) 10; (85) 17; (86) 19; (87) 24; (88) 29; (89) 37; (90) 44; (91) 50; (92) 53; (93) 57; (94, 95) 64; (96) 70; (97) 75; (98) 81; (99) 86; (100) 93; (101) 99; (102) 102; (103) 106; (104) 113; (105) 115; (106) 117; (107) 122.

WASHINGTON.—(1) 22; (2) 26; (3) 28; (4) 31; (5) 34; (6) 36; (7) 38; (8) 40; (9) 43; (10) 45; (11) 48; (12) 50; (13) 52; (14) 53; (15) 55; (16) 58; (17) 61; (18) 63; (19) 67; (20) 72; (21) 75; (22) 79; (23) 83; (24) 85; (25) 87; (26) 90; (27) 91; (28, 29) 92; (30) 94; (31) 96; (32) 98; (33) 99; (34) 101; (35) 102; (36) 104; (37, 38) 107; (39) 109; (40, 41) 111; (42) 114; (43) 117; (44) 120; (45) 122; (46) 123; (47, 48) 125.

WEST VIRGINIA.—(29) 6; (30) 8; (31) 13; (32, 33) 25; (34) 26; (35) 29; (36) 32; (37) 38; (38, 39) 45; (40) 52; (41) 56; (42) 57; (43) 64; (44) 67; (45) 72; (46) 76; (47) 81; (48) 86; (49) 87;

(50) 88; (51) 90; (52) 94; (53) 97; (54) 102; (55) 104; (56) 107; (57) 110; (58) 112; (59) 115; (60) 116; (61) 123; (62) 125.

WISCONSIN.—(69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76, 77) 20; (78) 23; (79) 24; (80) 27; (81) 29; (82) 33; (83) 35; (84) 36; (85, 86) 39; (87) 41; (88) 43; (89) 46; (90) 48; (91) 51; (92) 53; (93) 57; (94) 59; (95) 60; (96, 97) 65; (98, 99) 67; (100) 69; (101) 70; (102) 72; (103) 74; (104, 105) 76; (106) 80; (107, 108) 81; (109) 83; (110) 84; (111) 87; (112) 88; (113) 90; (114) 91; (115) 95; (116) 96; (117) 98; (118) 99; (119) 100; (120) 102; (121) 105; (122) 106; (123) 107; (124) 109; (125, 126) 110; (125, 127) 115; (128, 129) 116; (130) 118; (131) 120; (132) 122.

WYOMING.—(3) 31; (4) 62; (5) 63; (6) 71; (7) 75; (8) 80; (9) 87; (10) 98; (11) 100; (12) 109; (13) 110; (14) 116; (15) 123; (16) 125.

AMERICAN STATE REPORTS.

VOLUME 125.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Aetna Fire Ins. Co. v. Jones	*Const. Law*	78 S. C. 445	818
Andrews v. Hoeslich	*Replevin*	47 Wash. 220	896
Arnold v. Rhode Island Co	*Carriers*	28 R. I. 118	721
Atlantic etc. R. R. Co. v. Atlantic etc. Co	*Contracts*	147 N. C. 368	550
Bachinski v. Bachinski's Estate	*Wills*	152 Mich. 693	427
Baird Bros. v. Chambers	*Negligence*	15 N. D. 618	620
Baldwin, In re	*Wills*	146 N. C. 25	466
Bank of Lisbon v. Bank of Wyndmere	*Forged Check*	15 N. D. 299	588
Bates v. Hacking	*Wills*	28 R. I. 523	759
Bennett v. Randall	*Certiorari*	28 R. I. 360	743
Bice v. Boothville Tel. Co	*Judgments*	62 W. Va. 521	986
Birmingham Ry. etc. Co. v. Moran	*Pub. Nuisance*	151 Ala. 187	21
Bitello v. Lipson	*Private Way*	80 Conn. 497	126
Blakemore v. Cooper	*Taxation*	15 N. D. 5	574
Board of Education v. Berry	*Equity*	62 W. Va. 433	975
Bonneau v. North Shore R. R. Co.	*Carriers*	152 Cal. 406	68
Bova v. Norigian	*Notice*	28 R. I. 319	741
Boylan v. Hines	*Garnishment*	62 W. Va. 486	983
Braddy v. Elliott	*Estates*	146 N. C. 578	523
Brooke v. Laurens Milling Co	*Sales*	78 S. C. 200	780
Brown v. Probate Court	*Certiorari*	28 R. I. 370	747
Brynjolfson v. Dagner	*Evidence*	15 N. D. 332	595
Burdell v. Grandi	*Deeds*	152 Cal. 376	61
Cameron v. Lewiston etc. Ry. Co.	*St. Railroad*	103 Me. 482	315
Carl v. Young	*Negligence*	103 Me. 100	290
Charles v. Atlantic etc. R. R. Co.	*Carriers*	78 S. C. 36	762
Cherry v. Williams	*Nuisance*	147 N. C. 452	566
City of Bellevue v. Daly	*Easement*	14 Idaho, 545	179
City of Seattle v. Puget Sound etc. Co.	*Negligence*	47 Wash. 22	884
Collins v. Abel	*Contracts*	151 Ala. 207	24
Collins v. Gleason	*Judgments*	47 Wash. 62	891
Columbia Canal Co. v. Benham	*Jurisdiction*	47 Wash. 249	901
Commonwealth v. Acker	*Parent & Child.*	197 Mass. 91	328

NAME.	SUBJECT.	REPORT.	PAGE.
Commonwealth v. Morrison	*Public Streets.*	197 Mass. 199	338
Critcher v. Watson	*Land. & Tenant.*	146 N. C. 150	570
Cushing-Wetmore Co. v. Gray	*Nuisance*	152 Cal. 118	47
Dalton v. Knights of Columbus	*Appeal*	80 Conn. 212	56
Dantzler v. McInnis	*Trusts*	151 Ala. 293	28
Davy v. Fidelity etc. Co	*Atty. & Client.*	78 Ohio St. 256	694
Dean & Co. v. Collins	*Partnership*	15 N. D. 535	610
Dedrick v. Charrier	*Parties*	15 N. D. 515	608
Doherty v. Inhabitants of Ayer	*Automobiles*	197 Mass. 241	355
Donaldson v. Eaton	*Champerty*	136 Iowa, 650	275
Donaldson v. Winningham	*Guardian*	48 Wash. 374	937
Driggs v. Bush	*Stat. of Frauds.*	152 Mich. 53	389
Dyer v. City of Melrose	*Taxation*	197 Mass. 99	330
Eames v. Armstrong	*Deeds*	146 N. C. 1	436
Edgar v. Rio Grande etc. Ry. Co.	*Railways*	32 Utah, 330	867
Ehrlich v. Jennings	*Bills & Notes.*	78 S. C. 269	795
Eureka Hill Min. Co. v. Bullion etc. Min. Co	*Evidence*	32 Utah, 236	835
Fellows v. City of Charleston	*Equity Jurisd'n.*	62 W. Va. 665.	990
Fenton v. Minnesota etc. Co	*Summons*	15 N D. 365	599
Field v. Leiter	*Partition*	16 Wyo. 1	997
Getchell v. Page	*Arrest*	103 Me. 387	307
Gordon v. Levine	*Sunday*	197 Mass. 263	361
Grady v. Schweinler	*Bailment*	16 N. D. 452	674
Grand Forks Co. v. Frederick	*Taxation*	16 N. D. 118	621
Granger v. French	*Mandamus*	152 Mich. 356	416
Green v. State	*Mayhem*	151 Ala. 14	17
Gulledge v. Seaboard etc. Ry. Co.	*Death*	147 N. C. 234	544
Hammond v. State	*Evidence*	78 Ohio St. 15	684
Harrell v. Hagan	*Wills*	147 N. C. 111	539
Hatch v. United States etc. Co.	*Insurance*	197 Mass. 101	332
Hebert v. Portland R. R. Co.	*Carriers*	103 Me. 315	297
Hench v. Pritt	*Const. Law.*	62 W. Va. 270.	966
H. F. Watson Co. v. Citizens' Concrete Co	*Judgment*	28 R. I. 472	749
Hoffman v. Dickson	*Party-walls*	47 Wash. 431	907
Hoffmaster v. Black	*Payment*	78 Ohio St. 1	679
Hogan v. Holderby	*Ejectment*	62 W. Va. 106.	960
Hornblower v. Banton	*Adv. Possession.*	103 Me. 375	300
Hough Avenue etc. Co. v. Anderson	*Savings Banks.*	78 Ohio St. 341.	707
Hovey v. Sheffner	*Habeas Corpus.*	16 Wyo. 254	1037
Huntington etc. Co. v. Parsons	*Damages*	62 W. Va. 26	954
Johnson v. Grand Forks Co	*Elections*	16 N. D. 363	662
Jones v. Hoge	*Automobiles*	47 Wash. 663	915

NAME.	SUBJECT.	REPORT.	PAGE.
Kalama Electric etc. Co. v. Kalama etc. Co.	*Ripar. Rights*	48 Wash. 612	948
Kimball v. Salt Lake City	*Mun. Corp.*	32 Utah, 253	859
Kimpton v. Studebaker Bros. Co.	*Negotiable Inst.*	14 Idaho, 552	185
King v. Raleigh etc. R. R. Co.	*Contracts*	147 N. C. 263	546
Kuite v. Lage	*Ejectment*	152 Mich. 638	421
Lake Drummond etc. Co. v. Burnham	*Waters*	147 N. C. 41	527
Lancaster v. Ames	*Evidence*	103 Me. 87	286
Lennon, Estate of	*Wills*	152 Cal. 327	58
Lithuanian etc. Soc. v. Tunila	*Judgment*	80 Conn. 642	138
Los Angeles Ry. Co. v. Los Angeles	*Franchise*	152 Cal. 242	54
Marriott v. Williams	*Evidence*	152 Cal. 705	87
Marsh v. Koons	*Animals*	78 Ohio St. 68	688
Mason v. Intercolonial Ry	*Jurisdiction*	197 Mass. 349	371
Mason v. Peaks	*Judgments*	103 Me. 430	311
Matson v. Johnson	*Deeds*	48 Wash. 256	924
Mayor etc. v. Goldstein	*License Tax*	151 Ala. 473	33
McGovern v. Interurban Ry. Co.	*Railways*	136 Iowa, 13	215
McKee v. Dodd	*Lim. of Actions*	152 Cal. 637	82
McKnight v. Parsons	*Bills & Notes*	136 Iowa, 390	265
Meier v. Way etc. Co	*Evidence*	136 Iowa, 302	254
Miller's Estate	*Wills*	47 Wash. 253	904
Miller v. Baltimore etc. R. R. Co.	*Negligence*	78 Ohio St. 309	699
Miller v. Mayor of Birmingham	*Jury Trial*	151 Ala. 469	31
Milton v. Bangor Ry. etc. Co	*Negligence*	103 Me. 218	293
Mitchell v. Donanski	*Mal. Prosecut'n.*	28 R. I. 94	717
Mosher v. Mosher	*Divorce*	16 N. D. 269	654
Nelson v. Blinn	*Const. Law*	197 Mass. 279	364
Nichols v. Doak	*Bankruptcy*	48 Wash. 457	942
North End Sav. Bank v. Snow	*Mortgage*	197 Mass. 339	368
O'Neil v. New England Trust Co.	*Banks*	28 R. I. 311	740
Palatine Ins. Co. v. Kehoe	*Insurance*	197 Mass. 354	375
Palmer v. Mayo	*Bailee*	80 Conn. 353	123
Patapsco Guano Co. v. Bowers etc. Co.	*Deeds*	146 N. C. 187	473
Patrick v. Kirkland	*Parol Trust*	53 Fla. 768	1096
Pederson v. Lease	*Executions*	48 Wash. 253	922
People v. Kerber	*Public Lands*	152 Cal. 731	93
Phillips v. Phillips	*Exemptions*	151 Ala. 527	40
Pilmer v. Boise Traction Co	*Nonsuit*	14 Idaho, 327	161
Platt Bros. & Co. v. Waterbury	*Nuisance*	80 Conn. 179	111
Price v. Parker	*Partnership*	197 Mass. 1	326
Price v. Rhode Island Co	*R. R. Crossing*	28 R. I. 220	736
Providence Journal Co., In re	*Contempt*	28 R. I. 489	755
Puckhaber v. Henry	*Pledge*	152 Cal. 419	75

NAME.	SUBJECT.	REPORT.	PAG
Richbourg v. Rose	*Deeds*	53 Fla. 173	106
Ridenbaugh v. Sandlin	*Attachment*	14 Idaho, 472	17
Rogers v. Rio Grande etc. Ry. Co.	*Railways*	32 Utah, 367	87
Ross v. Loescher	*Damages*	152 Mich. 386	41
Salt Lake Inv. Co. v. Fox	*Adv. Possession.*	32 Utah, 301	86
Scott v. University etc. Assn.	*Athletic Assn.*	152 Mich. 684	42
Sheffield v. Franklin	*Adoption*	151 Ala. 492	3
Shelton v. Wolthausen	*Interpleader*	80 Conn. 599	131
Silander v. Gronna	*Contracts*	15 N. D. 552	616
Sistare v. Sistare	*Maintenance*	80 Conn. 1	102
Skjelbred v. Shafer	*Process*	15 N. D. 539	614
Smith v. John L. Roper Lumber Co.	*Physicians*	147 N. C. 62	535
Smith v. Werkheiser	*Fraud*	152 Mich. 177	406
State v. Cook	*Homicide*	78 S. C. 253	788
State v. Howell	*Contempt*	80 Conn. 668	141
State v. Mullin	*Sales*	78 Ohio St. 358	710
State v. Nohle	*Laches*	16 N. D. 168	628
State v. Rosenbaum	*License*	80 Conn. 327	121
State v. Superior Court	*Em. Domain*	48 Wash. 277	927
State Finance Co. v. Mulberger	*Taxation*	16 N. D. 214	650
Stimson v. Brookline	*Watercourse*	197 Mass. 568	382
Sturgeon v. Tacoma etc. R. R. Co.	*Emp. Liability.*	48 Wash. 366	934
Sullivan v. Old Colony St. Ry. Co.	*Damages*	197 Mass. 512	378
Supreme Council C. K. of A. v. Fitzpatrick	*Ben. Societies*	28 R. I. 486	752
Talbert v. Mason	*Deeds*	136 Iowa, 373	259
Tarr v. Oregon Short Line R. R. Co.	*Railways*	14 Idaho, 192	151
Thomas v. Seattle etc. Co.	*Chattel Mort.*	48 Wash. 560	945
Tuttle v. Tuttle	*Partition*	146 N. C. 484	481
Union Stock Yards Nat. Bk. v. Bolan	*Pleading*	14 Idaho, 87	146
Union Stockyards Nat. Bank v. Maika	*Lim. of Actions.*	16 Wyo. 141	1032
Van Horn v. Van Horn	*Alimony*	48 Wash. 388	940
Venning v. Atlantic etc. R. R. Co.	*Carriers*	78 S. C. 42	768
Volker etc. Co. v. Vance	*Homestead*	32 Utah, 74	828
Ward v. Commissioners etc.	*Mandamus*	146 N. C. 534	489
Watson Co. v. Citizens' Concrete Co.	*Judgment*	28 R. I. 472	749
Webb v. Depew	*Contract*	152 Mich. 698	431
Western Union Tel. Co. v. Milton	*Pleading*	53 Fla. 484	1077
White v. City of New Bern	*Mun. Corp.*	146 N. C. 447	476

NAME.	SUBJECT.	REPORT.	PAGE.
Whitehouse v. Whitehouse	*Wills*	136 Iowa, 165	250
Wood v. Wood	*Judgment*	136 Iowa, 128	223
Wood, for an Opinion	*Wills*	28 R. I. 290	738
Woodcock's Appeal	*Wills*	103 Me. 214	291
Young v. Hillier	*Wills*	103 Me. 17	283
Young v. Stein	*Bldg. Contract*	152 Mich. 310	412

AMERICAN STATE REPORTS.

VOLUME 125.

AMERICAN STATE REPORTS.

VOLUME 125.

CASES

IN THE

SUPREME COURT

OF

ALABAMA.

GREEN v. STATE.

[151 Ala. 14, 44 South. 194.]

MAYHEM—What Constitutes.—To constitute mayhem, an injury to an ear must be such as disfigures to ordinary observation, as distinguished from a wounding which simply mars the member. (p. 18.)

MAYHEM.—Self-defense is available in justification of the crime of mayhem, providing the resistance is proportionate to the injury offered. (p. 18.)

TRIAL EXAMINATION of Witnesses.—If an improper question to a witness is allowed by the court over objection, there is no prejudicial error if the answer is favorable to the objecting party. (p. 19.)

MAYHEM—Self-defense—Faulty Instructions.—Instructions asserting that if the accused and the person injured were engaged in mortal strife, and the person injured was armed with a deadly weapon and the accused was unarmed, and that while so engaged the accused bit off only a small portion of such injured person's ear, the accused must be acquitted is erroneous as not including all the elements of self-defense. (p. 19.)

MAYHEM—Self-defense.—Instructions that if the accused cut, bit, struck off, or mutilated the ear of the injured person while fighting with him in self-defense, and that, if the accused was free from fault in bringing on the difficulty, he is not guilty, is erroneous as omitting certain elements of self-defense. (p. 19.)

CRIMINAL LAW—Malice.—An instruction that before the accused can be convicted the jury must be satisfied beyond a reasonable doubt that the act was done unlawfully, intentionally, and with malice aforethought, is erroneous in the use of the words "malice aforethought," as they are not necessarily synonymous with the word "maliciously" as used in the statute. (p. 19.)

Indictment for mayhem charging that the accused unlawfully, maliciously and intentionally cut off, bit or struck off the ear of one McCalmon. The accused and the injured person engaged in a fight when no one was present. The accused knocked the injured person down and was on top of

him, beating him, when certain persons came along and took him off, and as they were taking him off, he bit off a portion of the injured person's ear. The court refused the following charges requested by the accused:

"(2) If the jury find from the evidence that defendant and McCalmon were engaged in mortal strife, and that said McCalmon was armed with a deadly weapon, and that the defendant was unarmed, and while so engaged in said strife the defendant bit off only a small portion of said McCalmon's ear, they must acquit the defendant. (13) If the jury believe from the evidence that the defendant cut, bit, struck off, or mutilated the ear of McCalmon while fighting with said McCalmon in self-defense, and if they believe further from the evidence that the defendant was free from fault in bringing on said difficulty, they must find him not guilty. (31) I charge you, gentlemen of the jury, that before you can convict the defendant you must be satisfied from the evidence, beyond a reasonable doubt, that the act was done unlawfully, intentionally and with malice aforethought, and unless you are so satisfied, you must acquit the defendant."

The defendant was convicted and appealed.

Baker & Stephens, for the appellant.

A. M. Garber, attorney general, for the state.

[16] McCLELLAN, J. Mayhem, as defined, in the presently pertinent aspect, by section 5095 of the Code, is committed when any person "unlawfully, maliciously and intentionally cuts, bites or strikes off an ear" of another person. This statute has been partially construed in Molette v. State, 49 Ala. 18. The essential ingredients of the offense, the necessary disfigurement of the person maimed being given, are that the act was done without authority of law and with evil intent and by design. In this instance the disfigurement, necessary to justify conviction, must have been such as would afford to the casual observer of the person injured, and not such as requires a close or unusual inspection to detect. In other words, the injury to the ear must be such as disfigures to ordinary observation, as distinguished from a wounding which simply mars the member: State v. Abram, 10 Ala. 928. Whether the injury is of the necessary [17] character must ordinarily be determined by the jury.

We can conceive of no reason why self-defense may not be available in justification of the act, providing, of course,

the resistance is proportionate to the injury offered: State v. Crawford, 13 N. C. 425; State v. Evans, 2 N. C. 281; State v. Skidmore, 87 N. C. 509; 20 Am. & Eng. Ency. of Law, 250, and notes. What is spoken of in State v. Abram, 10 Ala. 928, as the instinct of self-defense, is, of course, entirely distinct from the doctrine above stated. That instinct cannot mitigate or justify the offense, whatever the circumstances attending.

Where there is allowed by the court, over objection, an improper question to a witness, no prejudicial error is committed if the answer is favorable to the objecting party: Southern Ry. Co. v. Crowder, 135 Ala. 417, 33 South. 335. Many of the exceptions noted in this record were thus rendered innocuous as reversible errors, if, indeed, they were primarily erroneous.

The questions propounded relative to the character and extent of the injuries received by McCalmon in the altercation, as well as the treatment and duration by the physician and his professional opinion thereon, were unobjectionable.

There was, so far as we can discern from this record, no legal testimony tending to show a preconceived plan or purpose to harm McCalmon. The question and its answer, both seasonably sought to be kept from the jury, by which it was shown that someone, not remembered by the witness, had informed him that an attack was to be made by the defendant and others on McCalmon, the witness, was pure hearsay, and patently inadmissible. The allowance of the question, as also the overruling of the motion to exclude, must work a reversal of the judgment.

[18] Charges 2, 13 and 31 were properly refused. Those numbered 2 and 13 sought the benefit of self-defense, and each pretermitted entirely necessary elements thereof. While "maliciously," as used in this statute, and "malice aforethought," a term used in charge 31, are in some respects synonymous, yet they are not always so, and for that reason, if not others, the charge was bad.

For the error noted, and we discover no other, the judgment will be reversed and the cause remanded.

Tyson, C. J., and Dowdell and Anderson, JJ., concur.

The Crime of Mayhem is the subject of a note to State v. Johnson, 65 Am. St. Rep. 771.

The Law of Self-defense is discussed in the notes to State v. Gordon, 109 Am. St. Rep. 804; State v. Sumner, 74 Am. St. Rep. 717.

HIGHTOWER v. COALSON.

[151 Ala. 147, 44 South. 53.]

JUDGMENTS—Vacation—Equitable Relief.—If a person embodies in a usurious note a power of attorney to confess judgment, and judgment is confessed without notice to him, though in other respects the judgment is as valid as any other judgment, yet as the power of attorney is a part of the usurious contract, a court of equity will vacate the judgment and purge the transaction of usury. (p. 20.)

M. L. Ward, for the appellant.

Stallings, Nesmith & Drennen, for the appellee.

148 SIMPSON, J. The bill in this case was filed by the appellant against the appellee, seeking relief against a judgment on the ground that the judgment was rendered by confession under a power of attorney, which was embodied 149 in the note, authorizing judgment to be confessed by an attorney if the note was not paid at maturity. A demurrer to the bill was sustained by the chancellor, and the question presented by the appeal is whether a court of equity can grant relief in such a case.

The general principle is that if a party has permitted a judgment to be taken against him, without interposing the defense of usury, he cannot invoke the powers of a court of equity for relief: 29 Am. & Eng. Ency. of Law, 2d ed., 557; Jones v. Watkins, 1 Stew. 81; Jones v. Kirksey, 10 Ala. 579; Mallory v. Matlock, 10 Ala. 595; McCollum v. Prewitt, 37 Ala. 573. This principle has been declared applicable to judgment by confession; but an examination of the cases reveals the fact that those were cases in which a party had been brought into court by regular process and had confessed judgment. The better opinion is that where a party embodies in his note a power of attorney to confess judgment, and the judgment is confessed, without other notice to him, while in other respects the judgment is as valid as any other judgment, yet as the power of attorney is a part of the usurious contract, and as it would be a convenient method of evading entirely the usury laws, a court of equity will open the judgment, and purge the transaction of usury: 1 Pomeroy's Equity Jurisprudence, 3d ed., p. 461, sec. 278; Cook v. Jones, 1 Cow. 727; Thompson v. Berry, 3 Johns. Ch. (N. Y.) 359; Twogood v. Pence, 22 Iowa, 543; Mullen v. Russell, 46 Iowa, 386; Kendig v. Marble, 55 Iowa, 386, 7 N. W. 630; Bell v. Fergus, 55 Ark. 536, 18 S. W. 931;

Moses v. McDivitt, 88 N. Y. 62; Fanning v. Dunham, 5 Johns. Ch. (N. Y.) 122, 9 Am. Dec. 283; 29 Am. & Eng. Ency. of Law, 2d ed., p. 558.

It results that the chancellor erred in sustaining the demurrer to the bill, and a judgment will be here rendered [150] reversing said decree of the chancery court and overruling the demurrer.

Tyson, C. J., and Haralson and Denson, JJ., concur.

Relief in Equity Against Judgments and other judicial determinations is the subject of a note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 218.

Usury is as much a Matter for Affirmative Relief as it is a ground of defense: Vandergrif v. Swinney, 158 Mo. 527, 81 Am. St. Rep. 325. Courts of equity give the borrower any relief against a usurious transaction to which he may be entitled: See the note to Davis v. Garr, 55 Am. Dec. 400.

BIRMINGHAM RAILWAY, LIGHT AND POWER COMPANY v. MORAN.

[151 Ala. 187, 44 South. 152.]

PUBLIC NUISANCE—What is.—A railroad constructed and operated on the streets and alleys of a city without authority constitutes a public nuisance, as does also the erection of a fence and gate by it across such street or alley. (p. 22.)

NUISANCE, PUBLIC—Abatement—Special Damages.—A public nuisance may be enjoined or abated by an individual property owner who suffers injury thereby of a special nature, separate and distinct from that which the public generally sustains. (p. 22.)

NUISANCE, PUBLIC—Special Damages—Injunction.—If a railroad company, operating its road on the alley of a city without authority of law, builds a fence and gate across it, thus closing it and entirely shutting off the communication of abutting lot owners with another street, this constitutes a public nuisance which they are entitled to enjoin. (p. 23.)

Tillman, Grubb, Bradley & Morrow, for the appellants.

Caldwell & Carmichael, for the appellees.

[188] SIMPSON, J. The bill in this case was filed by the appellees (complainants) against appellant, alleging ownership of certain lots in Birmingham by complainants, back of which there is an alley, which alley, it is claimed, has been obstructed by the building and operation of a railroad thereon, and by the building of a fence and gate across it, thus

inclosing said alley. It also makes other allegations about obstructing said alley by allowing cars to stand thereon, and also by leaving accumulations of coal thereon, so as to completely obstruct it. From the descriptions of the obstructions it appears that, while the alley is left clear and unobstructed immediately in the rear of complainants' lots, with an outlet eastwardly on Fourteenth street, yet from the northwest corner of complainants' lots westwardly to Thirteenth street said alley is obstructed and practically closed. The bill also alleges that no right or franchise has been granted by the city of Birmingham to respondent to erect and maintain a railroad on said alley, or to place the other named obstructions thereon, and that said city has no power to grant any such rights.

It is settled law that a railroad, constructed and operated on the streets and alleys of a city without authority of law, constitutes a public nuisance, as does also [189] the erection of a fence and gate across any such street or alley. It is also settled law that a public nuisance may be abated or enjoined by an individual property owner who suffers injury thereby of a special nature, separate and distinct from that which the public generally sustains: 27 Am. & Eng. Ency. of Law, 2d ed., 176; Elliott on Roads and Streets, p. 500; Louisville etc. R. R. v. Mobile etc. R. R., 124 Ala. 162, 26 South. 895; Weiss v. Taylor, 144 Ala. 440, 39 South. 519. The appellant does not controvert the above propositions, but insists that the bill in this case does not show that the complainants suffer such special and irreparable damage, distinct from that which the public generally suffers, as to entitle them to injunctive relief.

In the case of Dennis v. Mobile etc. Ry. Co., 137 Ala. 649, 97 Am. St. Rep. 69, 35 South. 30, the complainant's lot was six hundred feet from the Union Depot, and the warehouse access to and egress from Lee street and complainant's lot was (is) afforded, not only by way of the private streets which defendant agreed with the city council to keep open along the warehouse, but by way of Tallapoosa street and its connections. Injunctive relief was denied, on the ground that the damage or inconvenience suffered by the complainant was such as was suffered by the public in general, and because, if any special damage was suffered, an action at law would furnish an adequate remedy. In the case of Baker v. Selma Street Ry. Co., 135 Ala. 552, 93 Am. St. Rep. 42, 33 South. 685, the street railroad, which was complained of, was built under authority of law, and was de-

cared not to be a nuisance. In the case of Douglass v. City Council of Montgomery, 118 Ala. 599, 24 South. 745, 43 L. R. A. 376, it was held that one whose home was one hundred and ten feet from a park was an "adjacent proprietor," and could maintain a bill [190] to enjoin the diversion of it to other uses. Again, it was held by this court that an adjacent proprietor could have injunctive relief to prevent the erection of pillars projecting twenty-two inches on the sidewalk as part of an adjacent building, which it was claimed interrupted the view to and from complainant's building; and the court said (quoting the opinion of another court) that the rights of property owners to streets are, "first, a right of access from the abutting property, and a passage to and from over it in all its extent; and, second, a right of light, air, prospect and ventilation": First Nat. Bank v. Tyson, 133 Ala. 459, 477, 91 Am. St. Rep. 46, 32 South. 144, 59 L. R. A. 399, 144 Ala. 457, 39 South. 560.

As has been shown, while the obstruction of the alley in the present case does not close it in the immediate rear of complainants' lots, and they still have access to Fourteenth street, yet the obstruction is at the corner of their lots, and cuts off entirely their communication through the alley with Thirteenth street. If it was an obstruction of some other block, leaving them still in the use of the streets and alleys adjacent to them, there might be reason for saying that the inconvenience or damage suffered by them was not different from that suffered by the public generally. Yet, being situated as it is, it is necessarily a nuisance which affects their property particularly, and the chancellor held that the bill made out a case for relief.

The decree of the court is affirmed.

Tyson, C. J., and Haralson and Denson, JJ., concur.

The Owner of Property Abutting on a Public Street has a right and interest in the street distinct and different from that of the general public: Long v. Wilson, 119 Iowa, 267, 97 Am. St. Rep. 315; note to Wright v. Austin, 101 Am. St. Rep. 106. And where an obstruction to the street occasions him an injury differing not merely in degree but in kind from the damages sustained by the general public, he is entitled to relief: State v. Goodwin, 145 N. C. 461, 122 Am. St. Rep. 467; Sloss-Sheffield Steel etc. Co. v. Johnson, 147 Ala. 384, 119 Am. St. Rep. 89; Tilly v. Mitchell & Lewis Co., 121 Wis. 1, 105 Am. St. Rep. 1007. An individual may maintain an action against one who constructs a building across the street some two hundred feet from his residence between it and the business part of the street: O'Brien v. Central Iron etc. Co., 158 Ind. 218, 92 Am. St. Rep. 305. A private individual may maintain a bill to enjoin the erection of a building on an adjoining lot, so as to extend into the street, and

thereby obstruct his easement of view and of light and air: First Nat. Bank v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144. And a private person may sue to enjoin the obstruction of a public highway as a public nuisance where he owns a farm, orchard and nursery adjacent to the road, and there is no outlet for his products except by such highway: Smith v. Mitchell, 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 667. But see Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 87 Am. St. Rep. 600, 62 N. E. 341. One who owns real property fronting upon public streets and maintaining a business on his property may sustain an action for damages resulting from the obstruction of such streets at points not opposite his property, but so situated as to prevent all ingress and egress to and from his property and business: Cushing-Wetmore Co. v. Gray, 152 Cal. 118, post, p. 47. Of the right of a private person to abate a public nuisance, without suit, see note to Fell v. Elmquist, 124 Am. St. Rep. 588.

COLLINS v. ABEL.

[151 Ala. 207, 44 South. 109.]

CONTRACTS, UNILATERAL—Cancellation.—A lease to mine and take oil from specified land upon a small consideration and a certain royalty on the coal and oil taken therefrom, and which provides that a mine shall be begun and operated at the sole discretion of the lessee, and that no cessation of operation in mining, or availing himself in any other manner of any of the privileges of the lease, shall operate as a forfeiture thereof, such lease being signed by the lessor and not by the lessee, is a unilateral contract, voidable for want of consideration, and subject to cancellation. (p. 27.)

R. N. Bell and Caldwell & Carmichael, for the appellant.

Vaughan & Davidson, and Smith & Smith, for the appellee.

208 HARALSON, J. The bill was filed by Joseph B. Abel against James A. Collins, and sought the cancellation of a certain written lease of two hundred and fifty-five acres of coal land. The consideration expressed in the lease was one dollar. The lands were leased for the purpose of mining the coal thereunder and all other minerals, and was for the term of ninety-nine years, from the date of the lease, it being the intention of the 209 parties, as expressed in the lease, that the lessee, Collins, should have the exclusive right to the privileges granted, "and that the operation of said mines shall be begun and continued at the discretion of the party of the second part (Collins), and no cessation of operation in mining or availing himself in any other manner of the privileges of the lease shall operate as a forfeiture thereof," and party of the second part agreed to pay, each month, to

the party of the first part, their heirs, etc., the sum of three cents per ton for all coal, ore or oil mined or taken by the party of the second part, and pay the sum of one dollar per thousand for all timbers used as props or caps off of said land, and that party of second part, his successors and assigns, should have the exclusive right to operate sawmills on said lands. The lease was signed by complainant but not by respondent.

The bill alleges that defendant had never taken any steps whatever, for over three years, to mine said coal, nor in any manner, or to any extent, made any effort to comply with any of the provisions of said lease; that said agreement does not show on its face that its terms have not been complied with, nor that it has been forfeited by the lessor; but the failure thereof are matters to be proven by extrinsic parol evidence; that said instrument is a unilateral agreement, and voidable at the option of the lessor, before work has been commenced by the lessee under the agreement; that complainant, before filing this bill, revoked said lease contract and declared the same forfeited, and notified the lessee thereof, and demanded a cancellation and surrender of the same, and, at the same time, tendered to him the said sum of one dollar and the interest thereon to date, and that the respondent refused said tender, and refused to cancel and surrender said lease contract. Complainant also averred that he was now, and has been, in the adverse and peaceable [210] possession of said land, and that said instrument was a cloud on his title, and depreciated the market value of his lands, and further, that the defendant did not in good faith procure the lease for the purpose of operating the mines, but only for speculation thereon, and the said agreement and the action of defendant in respect thereof are grossly inadequate and unconscionable.

The prayer of the bill is for a decree adjudging that said instrument is unilateral and void; that the same be removed as a cloud upon complainant's title, adjudging that the same was procured by a fraud practiced upon complainant in its procurement, and ordering that the same be surrendered to the register for cancellation, and that said lease contract be held to be void; and that defendant be perpetually enjoined from transferring or assigning the same, and for general relief.

The defendant moved to dismiss the bill for want of equity, which motion was overruled by the court. The appeal is to reverse that decree.

The insistent of the defendant is, that the instrument is not unilateral, but binding on him, and that he should be allowed a reasonable time to open and develop the mines, and that the lease, as for anything set up, should not be decreed to be forfeited. That of the complainant is, that the instrument of lease is unilateral, and without mutuality of obligation on the part of the defendant.

In 1 Parsons on Contracts, 449, note 20, it is said: "One party to a contract is not bound thereby and it does not bind the other party; when there is no liability there is no obligation." The author states that, in concluding a valuable article in 32 American Law Review, 409, 419, the author of that article says: "I assert, unhesitatingly, the rule, supported alike by reason and authority, that where a consideration is sought for to uphold a promise to perform given acts, that consideration must be something [211] of value; is a promise, one capable of enforcement in some tribunal, legal or equitable, and that failing, the agreement is a mere nude pact, void for want of mutuality in the obligation, lacking the reciprocal tie, and consequently without avail in any forum." "To be binding on one, it must be binding on the other. Each party assumes fixed and definite obligations": Howard v. East Tennessee etc. R. Co., 91 Ala. 268, 8 South. 868; Comer v. Bankhead, 70 Ala. 136; Evans v. Cincinnati etc. R. Co., 78 Ala. 341; Fulenwider v. Rowan, 136 Ala. 287, 34 South. 975.

In Petroleum Co. v. Coal C. & M. Co., 89 Tenn. 381, 18 S. W. 65, similar in its main features to the case before us, it was held: "This (contract) becomes nudum pactum, if construed to impose no legal obligation upon the lessee to explore and discover mines or to work them when discovered. That construction would convert it into a mere voluntary option, that the lessors could withdraw at any time before acceptance."

In the course of the opinion it is said: "A fair construction of this lease would leave it optional as to whether the lessees should make any effort whatever to discover the mineral value of any particular lease, and if tested and minerals developed, it seems to depend upon their judgment as to whether said mines should be worked. No other consideration for these leases is pretended than a share in the net profits resulting from such mines, as they shall deem it advisable to test the work. No penalty is agreed on if they shall fail to 'test,' and no rent or other compensation is provided if they shall fail to work developed mines of minerals. If

this construction be the right one, then these contracts, when actual mining has not been begun, are void for want of any consideration to support them."

In Bluestone Coal Co. v. Bell, 38 W. Va. 293, 18 S. E. 497, quoting from the case of Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285, 2 [212] S. E. 713, it was said: "The lease was for a term of twenty years (here it is for ninety-nine years). Yet, looking to its nature and object, it cannot be contended that the lessees had the option to work or not to work the ore mines for an indefinite time, and thus convert what was designed to yield a handsome daily income to the lessor into a mere barren encumbrance on his land—a cloud on his title—an incubus and a manacle, which would oppress him, and destroy the marketable value of his land. No lease of land for a rent for a return to the landlord out of the land which passes can be constructed to be intended to enable the tenant merely to hold the lease for the purpose of speculation, without doing and performing in connection therewith what the lease contemplated. Such a construction would indeed make all such contracts a snare for the entrapment and injury of the unwary landlord."

To the same effect is the case of Geiger v. Green, 4 Gill (Md.), 472, where it was held that a contract "unequal in its stipulations and bearing, which binds one party and leaves the other unfettered, as it respects the observance of its terms, in which there are to be seen no mutual or reciprocal engagements, and which must be regarded, therefore, as unreasonable and inequitable, can never be enforced by a court of equity."

The lease contract in this case expressly provides that the operation of the mines shall be begun and continued at the sole discretion of the lessee, and that no cessation of operation in mining, or availing himself in any other manner of any privileges of the lease, shall operate a forfeiture thereof. There is no binding obligation on him to mine any coal or to cut any timber from the land. The discretion of the lessee is to govern, as to whether or not the mines shall be operated during the whole period of ninety-nine years; as to when the work shall be begun, within a [213] reasonable or unreasonable time. As has been said, the defendant has mined no coal from said land, and has exercised none of the privileges of said lease, and has not in any manner or to any extent complied with any of the provisions of said lease, and has refused, on tender of the one dollar and interest thereon

from the date of the lease to the demand for its surrender to surrender said lease.

From what has been said sufficient reasons appear for affirming the decree of the chancellor, overruling the motion to dismiss the bill for want of equity: Collins v. Smith, 151 Ala. 133, 43 South. 838.

Affirmed.

Tyson, C. J., and Simpson and Denson, JJ., concur.

A Contract Lacking in Mutuality is not enforceable: Semon Bache & Co. v. Coppes & Mutschler Co., 35 Ind. App. 351, 111 Am. St. Rep. 171; Co-operative Telephone Co. v. Katus, 140 Mich. 367, 112 Am. St. Rep. 414; Higbie v. Rust, 211 Ill. 333, 103 Am. St. Rep. 204. The principle that contracts must be mutual—must bind both parties or neither—does not mean that in every case each party must have the same remedy for a breach by the other, but that the contract is enforceable on both sides, in some manner—not necessarily enforceable on both sides by specific performance: Northern Central Ry. Co. v. Walworth, 193 Pa. 207, 74 Am. St. Rep. 683; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 90 Am. St. Rep. 627.

A Lease of Land to Enter and Prospect for oil or gas is a grant of a privilege to enter and prospect, but does not give the title to the oil or gas until such products are found: Watford Oil etc. Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, and see the cases cited in cross-reference note thereto.

DANTZLER v. McINNIS.

[151 Ala. 293, 44 South. 193.]

TRUSTS—Liability for Taxes.—A cestui que trust or beneficiary is not directly liable to one who advances money to the trustee to pay taxes on the trust property. (p. 29.)

TRUSTS—Loan to Trustee to Pay Taxes—Acknowledgment of Liability by Beneficiary.—If a stranger loans money to a trustee to pay taxes on the trust estate, the beneficiary does not acknowledge liability for the loan, making him personally liable therefor, by covenanting in a deed made by him to such estate that he will not demand payment of a part of the purchase money until a disputed tax matter between him and the lender is settled. (pp. 29, 30.)

Thornton & Inge, for the appellant.

McIntosh & Rich, for the appellee.

295 McCLELLAN, J. The action is assumpsit against appellants by appellee as surviving partner of the late firm of McInnis & Dantzler. Stating the matter with perhaps undeserved favor to appellee, the asserted right to recover

arises out of the fact that the appellee's firm, throughout many years, advanced to Susan A. Loper, who was the trustee of or for appellants of certain real estate in Mobile, and charging the same to her individually on their books of account, various sums of money which was sued for and did pay the taxes due on such real estate. It is the positive duty of a trustee to pay the taxes accruing against the corpus of the trust estate; and if without funds of the estate in his hands, he may advance the necessary funds out of his own to pay the taxes, which, when done by him, becomes a charge on the property: 2 Beach on Trusts, sec. 510. The rule is settled in this state that a stranger who makes advancements, or extends credit, or renders services, or furnishes necessaries to trustees, though made in execution of the trust, or to enable them to perform their legal duties under the trust, creates only a personal liability against the trustees. The creditors "can look to them (trustees) only for payment and they (trustees) must look for reimbursement, after making the payment, to the trust estate": Mosely v. Norman, 74 Ala. 422; Sanford v. Howard, 29 Ala. 684, 68 Am. Dec. 101; Askew v. Myrick, 54 Ala. 30; Jones v. Dawson, 19 Ala. 672, and authorities therein cited; Taylor v. Crook, 136 Ala. 354, 96 Am. St. Rep. 26, 34 South. 905. And it is further settled that (unless otherwise provided by section 4183 et seq. of the Code of 1896, which is unnecessary to be considered) the trust estate can be made liable in equity by subrogation to the trustee's rights only where the trustee is insolvent, as established by the exhaustion of all legal remedies, and on settlement of [296] his administration the estate is indebted to him, and only then when the advancement or property made or furnished by the creditor has inured to the benefit of the trust estate or to the cestuis que trust: Mosely v. Norman, 74 Ala. 422; Askew v. Myrick, 54 Ala. 30; and other authorities supra. It results from the principle above announced that the cestui que trust is not liable directly, even though he and his estate were beneficiaries of the creditor's funds or property.

But it is insisted by appellee that there may be recovery in this action of assumpsit, because the appellants expressly or impliedly ratified the obligation incurred as stated by Mrs. Loper to the late firm, and so assumed its repayment to the firm as the result of this stipulation in a conveyance to a stranger of the property to retain which the taxes were paid, viz.: "A vendor's lien is hereby retained to secure the payment of the said four hundred dollars ($400.00) purchase

money, without interest, as evidenced by said promissory note hereinabove particularly described." The reference to the note first above made relates to the following language found in the conveyance, the purchase price being one thousand dollars: " And four hundred dollars as evidenced by a certain promissory note of even date herewith, ... payable on demand to the order of G. Bruner Dantzler, agent; demand for payment not to be made until a settlement of a certain tax matter pending between the parties of the first part and the firm of McInnis & Dantzler is had and determined." This deed is executed by appellants. In the body of the deed the real estate in question is taken by them (appellants) as cestuis que trust in lieu of funds theretofore in the hands of Susan A. Loper in trust for them. Without prolonging this opinion in an argument of the effect of the language quoted from the deed, we hold that it was [297] nothing more than a requirement to forbear the collection of enough of the purchase money to cover the amount of the claimed indebtedness for taxes by the firm, and by no means is an acknowledgment of the grantors' (therein) liability for the same. The obvious purpose of the arrangement was that the grantee's interest might also be conserved in the respect that she (the grantee) might not buy and pay for encumbered or liable property. No right of any party interested was or is affected by the language quoted or its effect. The same may be said of the power of attorney.

There being, then, no liability of appellants enforceable against them in this action, the general affirmative charge requested by them should have been given. The judgment will be reversed and the cause remanded.

Tyson, C. J., and Dowdell and Anderson, JJ., concur.

The Contracts of Trustees are binding upon them, but ordinarily they do not bind the beneficiaries or the trust estate: Taylor v. Crook, 136 Ala. 354, 96 Am. St. Rep. 26; note to Schmidt v. Shaver, 98 Am. St. Rep. 284.

MILLER v. MAYOR OF BIRMINGHAM.

[151 Ala. 469, 44 South. 388.]

JURY TRIAL—Violation of Municipal Ordinances.—The constitutional guaranty of a trial by jury does not apply to the violation of a municipal ordinance, unless the violation of such ordinance is also a violation of the criminal laws of the state. (p. 31.)

MUNICIPAL CORPORATIONS—Ordinances—Presumption as to Reasonableness.—If a question arises as to the reasonableness of a municipal ordinance which relates to a subject within the corporate jurisdiction, it is presumed to be reasonable unless the contrary appears on the face of the law itself. (p. 31.)

LICENSE TAXES—Selling of Milk.—An ordinance requiring a license of fifteen dollars for each wagon peddling milk or butter is not unreasonable nor void. (p. 31.)

CONSTITUTIONAL LAW.—Due Process of Law and the equal protection of the laws are secured if the laws operate upon all alike, and do not subject the individual to an arbitrary exercise of the powers of the government. (p. 32.)

W. Vaughan and J. W. Davidson, for the appellant.

E. D. Smith and J. Q. Smith, for the appellee.

[470] HARALSON, J. The appeal in this case is prosecuted from a judgment of conviction against the defendant for the violation of an ordinance of the city of Birmingham, requiring a license for milk or butter peddlers. The appellant was convicted in the police court, and appealed to the criminal court of Jefferson county, where he demanded a trial by jury, which demand was denied.

The law is well settled in this state that the constitutional guaranty of a trial by jury does not apply to the violation of a municipal ordinance, at least, where such [471] ordinance is not of itself also a violation of the criminal laws of the state: Bray v. State, 140 Ala. 172, 37 South. 250, and authorities cited.

It is contended that the ordinance requiring a license of fifteen dollars for each wagon peddling milk or butter is unreasonable, discriminative and void.

Whenever a question arises as to the reasonableness vel non of a municipal ordinance, which relates to a subject within the corporate jurisdiction, it will always be presumed to be reasonable unless the contrary appears on the face of the law itself, or is established by proper evidence: Van Hook v. City of Selma, 70 Ala. 361, 45 Am. Rep. 85.

Whether this license be regarded as a mere police regulation, or the exercise of the taxing power for the purpose of revenue, certainly it does not appear upon the face of the ordinance itself that it is at all unreasonable.

We cannot affirm as a matter of law, if it be considered as a police regulation, that the sum of fifteen dollars is an exorbitant amount, in a city of the size of Birmingham, for the proper exercise of the police power in the regulation of this necessary article of food which is supplied to its inhabitants. Nor can we affirm, if it be regarded as a source of revenue, that this amount is unreasonable, and the evidence in this case does not furnish us any proof tending to establish such a result.

We are inclined to think that the purpose of this license was to obtain revenue rather than to regulate the sale of milk and butter by peddlers.

The appellant introduced in evidence certain other licenses found in the same schedule with the one in controversy—the purpose being, we suppose, to show that the latter was unreasonable. We do not think this evidence can be credited with such result. The fact in evidence [472] that peddlers of furniture, clocks, jewelry, dress goods, etc., are charged the sum of fifty dollars as license, certainly does not tend to show that fifteen dollars' license for peddlers of milk and butter is unreasonable. The fact that a peddler on foot, of articles not otherwise licensed, is charged with the sum of ten dollars; and a peddler with a one-horse wagon, of articles not otherwise licensed, is charged twenty dollars; and a peddler with a two-horse wagon, of articles not otherwise licensed, is charged twenty-five dollars—rather tends to show that the license of fifteen dollars for each wagon peddling milk or butter is reasonable and not discriminative than otherwise.

We know of no rule of law which prevents a municipality, in establishing a license schedule, from placing peddlers of one article in a class by themselves, while peddlers of other articles are also classified together. It certainly cannot be stated that there is any discrimination against peddlers of milk or butter when they are placed in the same class, and the same license is required of all who are engaged in that particular business.

"Due process of law and the equal protection of the laws are secured if the laws operate upon all alike, and do not subject the individual to an arbitrary exercise of the powers of government": Duncan v. Missouri, 152 U. S. 377, 14 Sup. Ct. Rep. 570, 38 L. ed. 485; Lowe v. Kansas, 163 U. S. 81, 16 Sup. Ct. Rep. 1031, 41 L. ed. 78.

Nor can this be considered a tax upon persons living beyond the city limits, for the tax is restricted to wagons

peddling milk and butter within the limits of the city of Birmingham.

This disposes of all the questions raised by the appellant, and, finding no error in the record, the judgment of the court is affirmed.

Tyson, C. J., and Dowdell and Anderson, JJ., concur.

Trial by Jury is not a matter of constitutional right in prosecutions for the violation of municipal ordinances: State v. Fourcade, 45 La. Ann. 717, 40 Am. St. Rep. 249; Hunt v. City of Jacksonville, 34 Fla. 504, 43 Am. St. Rep. 214; Liberman v. State, 26 Neb. 464, 18 Am. St. Rep. 791; City Council of Anderson v. O'Donnell, 29 S. C. 355, 13 Am. St. Rep. 728.

The Validity of Municipal Ordinances as denying the equal protection of the law is discussed in the note to City Council of Montgomery v. West, 123 Am. St. Rep. 36.

An Ordinance Providing for the Inspection of Milk and requiring milk venders to take out a license is valid as a legitimate exercise of the police power: Deems v. Mayor, 80 Md. 164, 45 Am. St. Rep. 339, 30 Atl. 648; Littlefield v. State, 42 Neb. 223, 47 Am. St. Rep. 697, 60 N. W. 724. In State v. Nelson, 66 Minn. 166, 61 Am. St. Rep. 399, 68 N. W. 1066, it is held that a city may require that any person desirous of selling milk within its limits shall procure a license, and submit to inspection the herd from which he supplies milk, whether it is kept in the city or not. A municipal ordinance requiring the payment of a license fee by milk venders to pay the salary and expenses of a milk inspector is not in conflict with a statute forbidding a municipality to impose any tax, fine or penalty on persons selling their own farm or domestic products in the city. Charges thus imposed are in no sense a tax, fine or penalty, but a legitimate fee charged for services rendered: City of Norfolk v. Flynn, 101 Va. 473, 99 Am. St. Rep. 918.

MAYOR AND ALDERMEN OF BIRMINGHAM v. GOLDSTEIN.

[151 Ala. 473, 44 South. 113.]

LICENSE TAX—Occupation Tax.—An ordinance imposing a license tax on persons engaged in the dairy business is an occupation license tax and not a property tax. (p. 34.)

LICENSE TAX on Sale of Milk and Butter—Power to Impose.—Power conferred on a city to license, tax and regulate all kinds of business and to inspect food products and dairies, and exact a reasonable compensation therefor, authorizes it to impose a license tax on dairymen selling milk and butter within the city. (p. 35.)

LICENSE TAX on Cows—Validity.—A municipal ordinance imposing a reasonable license tax on each cow used in the production of milk sold within the city is simply adopted for differentiating dairymen according to the amount of business done, and is valid. (p. 36.)

E. D. Smith and J. Q. Smith, for the appellant.

W. Vaughan and J. W. Davidson, for the appellee.

[474] SIMPSON, J. The defendant was arrested and tried for a violation of the city ordinance requiring persons engaged in the dairy business to take out a license. The [475] ordinance of the city fixes the amount of license tax to be paid by persons pursuing certain vocations in the city of Birmingham, and one clause is as follows: "Dairy. Each dairyman, person, firm or corporation, who sells sweet milk, skim milk, butter-milk or butter, any or all, produced from cows owned or used by him or it, for each cow used in the production of such milk or butter, fifty cents." The complaint was demurred to by the defendant, and the demurrer was sustained by the court.

The matter in controversy is as to the validity or invalidity of the ordinance in question. The appellee (sustaining the action of the court below) contends that the ordinance "is in contravention of public policy, is unreasonable, in restraint of trade, is class legislation, it attempts to impose unequal taxation, does not impose a fair and equal tax upon all persons and all property alike, is an attempt to tax cows, whether owned in or out of the city, regardless of their value, and regardless of the amount of milk or butter produced."

The first point to be decided is whether or not this is a tax on property. The wording of the ordinance itself answers that question very clearly. It does not provide that there shall be levied upon the following property a tax, etc., but ordains a schedule of license for divers "business, vocations, occupations and professions, engaged in or carried on in the city of Birmingham, Alabama, and each and every person," etc., "engaged," etc., "shall pay for and take out a license," etc.; and in the clause above set out it is the dairyman who takes out the license, and the amount to be paid is regulated by the number of cows used in the production of the milk or butter. So it is clearly a license tax on the occupation. In a case in which banks were required to pay a license tax, graduated by the amount of paid-up capital [476] stock of the corporation, this court held that it was not a tax on the property, but a franchise tax; and the court, quoting from a previous case, says: "The usual and most certain test is whether the tax is upon the capital stock eo nomine, without regard to its value or at its assessed valua-

tion. If the former, it is a franchise tax; if the latter, a tax upon the property": Phoenix Carpet Co. v. State, 118 Ala. 143, 72 Am. St. Rep. 143, 22 South. 627. The same reasoning would differentiate a license tax from a tax on the property, and show that the tax in this case is a license tax on the occupation.

The charter of the city of Birmingham confers ample power to license, tax and regulate all kinds of business, and provides that this power "may be used in the exercise of the police powers, as well as for the purpose of raising revenue, one or both." It also confers full powers for the inspection of food products, mentioning specially "all dairies in the county of Jefferson, the owner of which in any manner disposes of milk in said city," and to require the payment of reasonable charges for such inspection: Local Acts 1898-99, p. 1391. There can be no question, then, of the power of the city of Birmingham to tax this occupation, either as a police measure or a revenue measure, or for both. In further illustration of the principle that this is merely a license tax on the occupation, and not in any sense a tax on the property, this court has held that a tax on the gross amount of the sales of a merchant is not a tax on the goods themselves, or on the fruits of the sales, but on the business of selling: Goldsmith v. City of Huntsville, 120 Ala. 182, 24 South. 509; Saks v. City of Birmingham, 120 Ala. 190, 24 South. 728.

Wherein, then, consists the unconstitutionality? It is settled that our constitutional provision with regard [477] to uniformity in taxation does not apply to license taxes. The only uniformity required in license taxation is "in the imposition of the like tax upon all who engage in the avocation, and who may exercise the privilege taxed": Phoenix Carpet Co. v. State, 118 Ala. 143, 72 Am. St. Rep. 143, 22 South. 627. In fact, perfect equality is unattainable, and the only limitation on license taxation seems to be that it must not be so unreasonable as to show a purpose to prohibit a business which is not in itself injurious to public health or morals: 1 Cooley on Taxation, 3d ed., p. 258 et seq.; 2 Cooley on Taxation 3d ed., p. 1133 et seq. While there must be a proper classification, yet that very classification suggests that it is often proper to make a distinction between those engaged in the same business according to the amount of business done, and in thus classifying a large discretion must be left to the legislative department. Unless it is unreasonable,

arbitrary or oppressive, it will not be interfered with by the courts.

Where a license tax was imposed on railroad companies doing business in the state, it was held that a license tax "for each main line of railroad used in connection with such business" was legal, and that one company operating several lines must pay the license tax for each line: City of Anniston v. Southern Ry. Co., 112 Ala. 557, 20 South. 915. Also, that a license tax on retail merchants, graded according to the amount of stock employed in the business, is a tax on the business, and valid: Saks v. City of Birmingham, 120 Ala. 190, 24 South. 728; Goldsmith v. City of Huntsville, 120 Ala. 182, 24 South. 509. Likewise, where a license tax for vehicles used in transportation was fixed at seven dollars and fifty cents for each vehicle so used, it was held that the tax was not on the vehicle, but was simply a means for ascertaining the tax to be imposed [478] against the owner for engaging in the business: Browne v. City of Mobile, 122 Ala. 159, 25 South. 223. It is true that there are some expressions in the case of Police Jury v. Nougues, 11 La. Ann. 739, which seem to take a different view as to such a tax being on the property, yet, in addition to the fact that that case is not authority in this jurisdiction, and could not have any weight against the principles established by our own court, there was also another principle which had weight in that case, to wit, that it did not levy the tax on all dairymen similarly situated. On the other hand, the supreme court of appeals of Virginia held that a license tax on milk venders, which required each applicant for license to pay fifty cents per cow and two dollars per milk stand, was not a tax assessed, but an inspection fee, and was valid: City of Norfolk v. Flynn, 101 Va. 473, 99 Am. St. Rep. 918, 44 S. E. 717, 62 L. R. A. 771.

It has long been the law in this state that peddlers traveling in a wagon drawn by two horses paid a different license tax from that paid by those who use a one-horse wagon. We hold, then, that in this case the fifty cents per cow was simply a method adopted for differentiating the dairymen according to the amount of business done, and that the ordinance is valid.

The judgment of the court is reversed and the cause remanded.

Tyson, C. J., and Haralson and Anderson, JJ., concur.

A Municipal Ordinance Requiring the Payment of a License Fee by milk venders to pay the salary and expenses of a milk inspector is not in conflict with a statute forbidding a municipality to impose any tax, fine or penalty on persons selling their own farm or domestic products in the city. Charges thus imposed are in no sense a tax, fine or penalty, but a legitimate fee charged for services rendered: City of Norfolk v. Flynn, 101 Va. 473, 99 Am. St. Rep. 918. See, also, Miller v. Mayor of Birmingham, 151 Ala. 469, ante, p. 31, and cases cited in the cross-reference note thereto.

SHEFFIELD v. FRANKLIN.

[151 Ala. 492, 44 South. 373.]

ADOPTION OF ADULT.—The word "child," as used in an adoption statute without limitation as to age, has reference to the child as a relational status, and does not control the age of the subject of adoption. Hence under such statute an adult may be the subject of adoption. (pp. 38, 39.)

Inzer & Montgomery, for the appellant.

Goodhue & Blackwood, for the appellee.

493 McCLELLAN, J. This is a statutory action of ejectment by appellants against appellee. The affirmative charge was given for the defendant, appellee. The plaintiffs asserted their right to a recovery to be as heirs at law of Edna Franklin, deceased, and the defendant maintained his contention as grantee of John Franklin, not a natural heir at law of intestate, but who was, it is alleged, adopted by the said Edna in 1896; he being then twenty-six years of age.

The pivotal question in the case is: Was the adoption of the grantor of defendant by the intestate a valid act to effect the inheritance by John Franklin of the land and estate of Edna Franklin, deceased? The decision of the question depends upon the construction of section 2367 of the Code of 1886, in force at the time the adoption was undertaken. Appellants insist that the adoption was abortive, because the subject, John Franklin, was not an infant, in legal parlance, but an adult, at that time. The appellee contends that the section under consideration uses the word "child" as a term of relation and not as indicative of age.

494 The section to be construed relates to a subject purely statutory, unknown to the common law—that of adoption of children; and to render a proper construction of the statute, an understanding of the legal meaning and effect of such

adoption will greatly aid. In the case of Russell v. Russell, 84 Ala. 48, 3 South. 900, it is said: "Adoption of children is 'an act by which a person appoints as *his heir* the *child* of another.' 'To receive and to treat as a son or daughter one who is the child of another.' 'To take into one's family as a son and heir; to take and treat as a child, giving a title to the *privileges* and *rights* of a *child.*'" (Italics supplied.) Reading the statute under the influence of these approved definitions, to draw its purpose in enactment, it necessarily results that the act of adoption fixes a status, to accomplish which minority is not essential, unless so limited by the terms thereof. In short, it is apparent that the intent of the section at hand was to provide a means "by which a person appoints as his heir the child of another" (Abney v. De Loach, 84 Ala. 393, 4 South. 757); and the result of the act to that end erected a status from which the rights of an inheritance naturally flow. Thus far there can be no dispute.

But here the controverted question arises: Do the terms of the statute limit the act to a person who is a child at the time of the attempted adoption? The word "child" has two generally understood meanings—one, that of relationship; and the other, minority. The inquiry here narrows to this: Does the word, as used in the statute, have reference to the former as a relational status, or to the age of the subject of the adoption? If the latter meaning be attributed to the word, it is a consequence that some line of demarcation between the childhood and youth, two periods in life, must [495] be drawn. Youth is specified by Webster to be the "part of life that succeeds childhood." The same author defines childhood, the state of being a child, as "the condition or time from infancy to puberty." So we may here say that the period of twenty-one years, fixed by law as the time when full legal powers and responsibilities attach, has no bearing in this instance. And, further, if the word is taken to declare the period of life of the subject of the adoption, and to prohibit an adoption of one not within that period at the time thereof, it is readily conceivable that the greatest uncertainty would attend the very serious relation, and its accompanying rights and privileges, attempted to be created by the act of adoption. The issue would often be, especially where considerable property interests were involved, whether at the time of supposed adoption the subject was a child. Surely no such condition of uncertainty was intended to be invited, if not actually created, by the enactment of this statute.

We do not think there can be any doubt that the legislative purpose in the use of the word "child" was to refer to the relation—the status. If the primal idea in the enactment of the statute is given due consideration—that clearly implied in the term "adoption"—it is not qualified in purpose or effect by the use of the word "child." It is true, in many senses, the word imports minority, infancy, the early years of life; but the lexicographers put, as its first meaning, that of relationship, and to give it that meaning conserves the end sought to be attained by the section, and also eliminates the effect of a limitation on the right of adoption. And it should be added that, had so important a limitation on the right of adoption as there created been in legislative contemplation, it would not have been wholly committed to the use of the word "child," the chief acceptation [496] of which is that descriptive relationship. The statute would be rendered so uncertain as to be practically nugatory if it were otherwise held. The reference in Abney v. De Loach, 84 Ala. 393, 4 South. 757, to the question here considered is, as there said, dicta. In Re Estate of Moran, 151 Mo. 555, 52 S. W. 377, in which that court, construing a practically similar statute, passed upon the question we have here, said: "The law has placed no limitation as to the age of the child to be adopted, and there is no reason why such a restriction should be placed on the choice of the adopting parent." To the same effect in Markover v. Krauss, 132 Ind. 297, 31 N. E. 1047, 17 L. R. A. 806. See, also, Collamore v. Learned, 171 Mass. 99, 50 N. E. 518.

It results that the judgment must be affirmed.

Dowdell, Simpson, and Anderson, JJ., concur.

Tyson, C. J., and Haralson and Denson, JJ., entertain the opinion that the legislative purpose as shown by the statute was not only to fix the status or relation of the parties, but that it was to fix a limitation upon the right of adoption, and that it does in fact so limit it with respect to the kind of person who may be adopted, to wit, a child. It seems to us clear that a mere casual reading of the statute is all that is required to show this. Its language is: "Any person desirous to adopt a *child* so as to make *it* capable of inheriting his estate, real and personal, or to change the name of *one* previously adopted, may make a declaration in writing, attested by two witnesses, setting forth the name, sex, and age of *the child* he wishes to adopt, and the name he wishes *it* thereafter to be known by, which, being acknowledged by the

declarant before the judge of probate of the county of his residence, filed and recorded as [497] in the two preceding sections, has the effect to make *such child* capable of inheriting such estate, and of changing *its name* to the one stated in the declaration." We have italicized the words which we think clearly show, when the whole context is read, that the person to be adopted must be a child. It does not seem to us that it could be possible to make language plainer descriptive of the person subject to adoption. The uncertainty which would follow from the holding, suggested by our brothers as a reason justifying their construction of the statute, is imaginary, rather than real. If it be conceded that such consequences would flow, this would afford no sufficient reason for eliminating by construction the plain words of the statute. But no such serious results would be occasioned by our holding, since the word "child" can be, and should be, held to mean infant—a person under twenty-one years of age. Such a meaning does no violence to the statute, and gives full effect and meaning to its language. The dicta in Abney v. De Loach, 84 Ala. 393, 4 South. 757, was, in our opinion, correct. We therefore think the judgment appealed from should be reversed, instead of affirmed.

The Adoption by one Person of the children of another is the subject of a note to Van Matre v. Sankey, 39 Am. St. Rep. 210. In some states an adult may be adopted as well as an infant: Markover v. Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806; Succession of Caldwell, 114 La. 195, 108 Am. St. Rep. 341, 38 South. 140; In re Moran's Estate, 151 Mo. 555, 52 S. W. 377.

PHILLIPS v. PHILLIPS.

[151 Ala. 527, 44 South. 391.]

EXEMPTIONS—Jewelry as Wearing Apparel.—A gold ring and watch and chain may be set apart to the widow as exempt from execution under a statute providing that "all of the wearing apparel of the decedent" is exempt from seizure. (p. 42.)

EXEMPTIONS—Furniture.—A silver card receiver and a piano may be set apart to the widow of a decedent as exempt from execution as "household furniture necessary for the use and comfort of the family." (pp. 42, 43.)

F. S. Ball, for the appellant.

F. W. Lull, Jr., and L. H. Weil, for the appellee.

528 DOWDELL, J. The articles in question, and which were set apart and decreed to be exempt to the widow and minor children under the statute, consisted of a finger ring, valued at twenty dollars, a watch and chain, valued at thirty-five dollars, a silver card receiver, and a piano and piano stool, valued at fifty dollars. The question presented for our consideration and determination is whether or not a finger ring and a watch and chain are, or rather may be, covered by the terms "wearing apparel," and a silver card receiver and a piano and piano stool are covered by the terms "household furniture," as employed in the statute. The statute (Code 1896, sec. 2072) reads as follows: "In favor of the widow and minor child or children, or either, of such decedent, there shall also be exempt from administration and the payment of debts contracted after the twenty-third day of April, 1873, all the wearing apparel of the decedent, and of the widow and minor children, all yarn and cloth on hand intended for their use and consumption, all books kept for use in the family, all family portraits and pictures, all grain, stores and groceries on hand, necessary for the support of the family for twelve months after the decedent's death, and all bedding and household and kitchen furniture, necessary 529 for the use and comfort of the family, to be selected by the widow, if there be one, or if there be no widow, or she fail to act, by the guardian of the minor child or children."

In the absence of evidence to the contrary, in order to uphold the judgment of the court below, we will assume that the ring and watch set apart as exempt were worn by the deceased during his lifetime. Whether such articles can be regarded as included in the term "wearing apparel" has been variously decided by the courts of the different states: 12 Am. & Eng. Ency. of Law, 2d ed., p. 117, and notes; 30 Am. & Eng. Ency. of Law, 2d ed., p. 445, and notes. We have no doubt that this apparent want of harmony in the decisions is to some extent, at least, due to a difference in phraseology in the exemption statutes of the various states. In the case of In re Steele, 2 Flip. (U. S.) 324, Fed. Cas. No. 13,346, cited in 12 Am. & Eng. Ency. of Law, supra, it was said: "It would not be doing any great violence to the term 'wearing apparel,' as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word 'apparel,' as given by lexicographers, is not confined to clothing. The idea of ornamentation seems to be a rather prominent element in the word, and it is not improper to say that a man wears a watch or wears a cane." And we may

add to this that it is a proper and common expression to say that one wears a ring or a watch. In the case of Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, the court, construing section 2037 of the Code of 1896 which contains the provision as to exemption from levy and sale, "all necessary and proper wearing apparel," held that a watch was embraced within these terms of the statute. It was there said: "The phrase 'wearing apparel,' as used in exemption laws, has its proper sense, and includes all the articles [530] of dress generally worn by persons in the calling and condition of life and in the locality of the residence of the person claiming the exemption. It includes whatever is necessary to a decent appearance and protection against exposure to the changes of weather, and also what is reasonably proper and customary in the way of ornament." To the same effect are the following cases: Neasham v. McNair, 103 Iowa, 695, 64 Am. St. Rep. 202, 72 N. W. 773, 38 L. R. A. 847; In re Smith, (D. C.), 96 Fed. 832; Brown v. Edmonds, 8 S. D. 271, 59 Am. St. Rep. 762, 66 N. W. 310; McCormick v. Hudson River R. R., 4 E. D. Smith (N. Y.), 181. See, also, 1 Words and Phrases, p. 440.

It is to be noted that the phrase as employed in the section (section 272) now under consideration as to exemptions in favor of the widow and minor children is broader than in section 2037. In the former the phrase is, "all the wearing apparel of the decedent," while in the latter it is qualified and limited, "all *necessary and proper* wearing apparel." (Italics ours.) Exemption laws are founded in humanity and benevolence, and in the interpretation of these statutes it has been the rule of the courts to give to them a broad and liberal construction, not, however, such as may be inconsistent with the manifest intention of the lawmakers. According to this rule of construction, and under the above-cited decisions of the courts, we are of the opinion that the ring and watch set apart as exempt to the widow and minor children are embraced in the phrase "all wearing apparel of the decedent," employed in the statute.

This brings us to the question as to whether the "silver card receiver used on hat rack" and the "piano and piano stool," set apart as exempt under the statute, are included in the phrase "household furniture necessary [531] for the use and comfort of the family." No value of the card receiver is stated. The value of the piano and stool is given at fifty dollars. As to the card receiver, there can hardly

arise a doubt of its coming within the classification of household furniture. It is an article of too common use in the household to admit of question. The question as to the piano being included in the terms "household furniture" is one upon which the courts are divided. In Von Storch v. Winslow, 13 R. I. 23, 43 Am. Rep. 10, it was held that a piano was included in the term "household furniture." In Alsup v. Jordan, 69 Tex. 300, 5 Am. St. Rep. 53, 6 S. W. 831, it was ruled that the term "all household and kitchen furniture" may include a piano kept and used for the purpose of instructing the children of the family in music, if the statute places no limit on the value of the household and kitchen furniture which it declares shall be exempt. There are other decisions which hold that a piano is not included in the term "household furniture": See 4 Words and Phrases, pp. 3364, 3365. Our statute places no limit of value on the household furniture exempted, but does say, "necessary for the use and comfort of the family." There is no evidence in the record for what purpose or what use the piano was kept. We can readily imagine a case of a piano being the means of support by the widowed mother of her minor children. In such a case it would be necessary both for the use and comfort of the family. Applying the rules of liberal construction, we hold that the court below committed no error in overruling the executor's exceptions to the report setting aside the piano as exempt.

Affirmed.

Tyson, C. J., and Anderson and McClellan, JJ., concur.

WEARING APPAREL AS EXEMPT.

I. Wearing Apparel as Such.
a. The General Rule, 43.
b. Goods not Yet Made into Garments, 44.
c. Articles not Used as Garments, 44.
II. Jewelry as Wearing Apparel.
a. Cases Denying Exemption, 44.
b. Watches, 45.
c. Jewelry Habitually Worn, 45.

I. Wearing Apparel as Such.

a. **The General Rule.**—What is wearing apparel as such and the amount thereof which may be claimed as exempt from execution depend entirely upon the provisions of the statutes of the different states: Cooke v. Gibbs, 3 Mass. 193; Hall v. Penn, 11 Wend. 44, 25 Am. Dec. 60; Brackett v. Watkins, 21 Wend. 68; Shaw v. Davis, 55 Bart. 389. Thus, the wearing apparel and tools of a laborer are

exempt from attachment: Gould v. Barnard, 3 Mass. 199. The statute exempting from attachment the necessary wearing apparel for immediate use of the debtor exempts suitable apparel for labor, with an extra suit for days of religious worship, and an overcoat for all seasons of the year: Peverly v. Sayles, 10 N. H. 356. But the wearing apparel and ornaments of a deceased husband will not be set off to the widow as exempt: Griffith's Estate, 49 Met. 405, 100 N. Y. Supp. 215.

b. **Goods not Yet Made into Garments.**—The fleeces or the yarn or cloth manufactured from the fleeces of ten sheep are exempted from execution while in the hands of a householder, whether or not he is the owner of the sheep: Hall v. Pennee, 11 Wend. 44, 25 Am. Dec. 611. The yarn owned by a householder is exempt from execution to a certain amount although he did not own the sheep upon which grew the wool used in the manufacture of the article: Brackett v. Watkins, 21 Wend. 68. Cloth cut into the shape of a coat is exempt from execution or attachment although it may not be at the time in a condition to be worn: Ordway v. Wilbur, 16 Me. 263, 33 Am. Dec. 663. And the cloth and trimmings left in the hands of a tailor by a debtor to be made into clothes necessary for him are within that clause of a statute exempting from execution the necessary wearing apparel of a debtor: Richardson v. Buswell, 10 Met. Rep. 506, 43 Am. Dec. 450.

c. **Articles not Used as Garments.**—Bags are not articles of wearing apparel, or bedding; nor do they fall within the statutory designation as articles as exempt under execution, and they are not necessary for actual use in the preservation of articles declared by statute to be exempt: Shaw v. Davis, 55 Barb. 389. But the protection from seizure of cloth manufactured in a family, given by statute, extends to carpeting, though the thread may have been purchased and the weaving done in a different family: Sims v. Reed, 12 B. Mon. 51. A trunk, cabinet-box and breastpin are not exempt from attachment either as household furniture or wearing apparel necessary for the debtor and his family under the New Hampshire statute: Towns v. Pratt, 33 N. H. 345, 66 Am. Dec. 726.

II. Jewelry as Wearing Apparel.

a. **Cases Denying Exemption.**—As a general rule, all articles of jewelry, whether worn as adornment of the person or for a useful purpose, such as watches, are not exempt from attachment or execution, nor are they exempt under the bankrupt laws as articles of wearing apparel. "Articles of jewelry, designed to be worn upon the person as ornaments, are not wearing apparel in the popular sense of the term. As understood in its ordinary signification, it means clothing, garments worn to protect the person from exposure and not articles used for ornament merely": Towns v. Pratt, 33 N. H. 345, 66 Am. Dec. 726. Hence a breastpin is not exempt as wearing apparel: Towns v. Platt, 33 N. H. 345, 66 Am. Dec. 726. Rings and

jewelry are not wearing apparel, and are liable to seizure upon execution for debt, and though it may be out of the sheriff's power to levy on or take them into his possession, as they are generally worn upon the person, the court may appoint a receiver and order a delivery of them made to him: Frazier v. Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666. A watch is not "necessary wearing apparel" nor exempt from execution: In re Turnbull, 106 Fed. 667.

b. **Watches.**—In holding that a watch and chain were not exempt from execution the court in Rothschild v. Boelter, 18 Minn. 361, said that the fact "that an article may be worn does not make it wearing apparel within this statute. The words are to be construed, in this case, according to the common and approved usage of the language, namely, as referring to garments or clothing generally designed for wear of the debtor or his family." Various articles of property, however, have, from time to time, been exempted by the legislature. But among these articles is not to be found watches, unless they come under the head of wearing apparel. It is doubtful whether they can be made to come under that head. If, however, they can, we think that not more than one can be made to do so": Smith v. Rogers, 16 Ga. 479.

On this question, as to whether a watch is exempt as wearing apparel there is undoubtedly conflict of authority, as it has been decided that neither a watch or its key and seals nor the finger ring which were usually worn by a person when living are to be deemed as part of his wearing apparel, which after his decease are to go to his widow: Sawyer v. Sawyer, 28 Vt. 249. A watch and chain valued at fifty dollars or over reserved by a debtor from the property assigned for the benefit of his creditors is not exempt from attachment or execution: Stewart v. McClung, 12 Or. 431, 53 Am. Rep. 374, 8 Pac. 447. A watch is not necessary wearing apparel and exempt from execution: In re Turnbull, 106 Fed. 667. A watch and breastpin of a bankrupt cannot be considered as necessary wearing apparel, and set off to the bankrupt as exempt as such: In re Ludlow, N. Y. Leg. Obs. 322, Fed. Cas. No. 8599.

c. **Jewelry Habitually Worn.**—On the other hand it has been decided that a watch and chain habitually worn by a debtor and owned by him is exempt as wearing apparel of his family: Brown v. Edmonds, 8 S. D. 27, 59 Am. St. Rep. 762, 66 N. W. 310. It has also been considered that under a statute exempting from execution personal property to the extent of one thousand dollars, and, in addition thereto, "all necessary and proper wearing apparel, a watch may be included in the term 'wearing apparel,' and consequently where the schedule of a voluntary bankrupt disclosed no assets except as appeared in the item 'personal wearing apparel, one hundred dollars,' which he claimed as exempt, he is not guilty of making a false oath in such schedule so as to bar his discharge, although it be shown that he owned a gold watch worth fifty dollars, which he was in the habit of wearing and which he intends to include in the item

mentioned": Seelers v. Bell, 94 Fed. 801, 36 C. C. A. 502. If a register in bankruptcy allows a bankrupt, who is engaged in commerce, a watch of small value as exempt, this is proper, as such watch is a necessary article of wearing apparel: In re Steele, 2 Flip. 324, Fed. Cas. No. 13,346.

Articles of jewelry belonging to a bankrupt do not come under the description of wearing apparel, and if not set apart by the assignee, must be surrendered by him, but articles of a similar nature, belonging to the wife of the bankrupt, if belonging to her before her marriage, do not vest in the assignee or, if presented to her after her marriage, and are suitable to her condition and circumstances in life, may likewise be retained by her: In re Kassen, 4 L. R. 489, Fed. Cas. No. 7616. If the statute exempts from exemption all wearing apparel of the debtor, a bankrupt is entitled to claim as exempt a diamond stud valued at two hundred and fifty dollars habitually worn by him for years past in the front of his shirt, and for the purpose of fastening it together when there is no circumstance connected with its acquisition or use tending to show fraud or bad faith toward his creditors: In re Smith, 96 Fed. 832; contrary to the holding in Towns v. Pratt, 33 N. H. 345, 66 Am. Dec. 726. A bosom pin worn by the widow of a deceased is deemed wearing apparel and exempt, and should be set off to her: Sawyer v. Sawyer, 28 Vt. 249. On the other hand, it has also been decided that the breastpin of the wife of a bankrupt cannot be considered as wearing apparel or necessaries and as such exempt: In re Ludlow, 1 N. Y. Leg. Obs. 322, Fed. Cas. No. 8599.

CASES

IN THE

SUPREME COURT

OF

CALIFORNIA.

CUSHING-WETMORE CO. v. GRAY.

[152 Cal. 118, 92 Pac. 70.]

NUISANCE, Action to Recover Damages for.—An action at law may be maintained for damages caused by a nuisance without seeking its abatement. (p. 48.)

PRACTICE—Findings, Want of.—In an action wherein findings by the court are essential, if the record does not show that they were not waived, it will be presumed that they were made so far as required. (p. 48.)

NUISANCE, Public, Special Injury Warranting the Maintaining of an Action for Damages.—One who owns real property fronting upon public streets and maintaining a business on his property may sustain an action for damages resulting from the obstruction of such streets at points not opposite his property, but so situated as to prevent all ingress and egress to and from his property and business. (p. 50.)

EASEMENT in Public Street.—The owner of property abutting on a public street has, by reason of such ownership, a special easement in such street for purposes of ingress and egress, which is property as much as the lot itself. (p. 51.)

NUISANCE, When Both Public and Private.—An obstruction in a public street which has the effect of preventing access to the premises along the street is a private as well as public nuisance, to the same extent as one which prevents access from the premises to the streets immediately in front of the land. (p. 51.)

STREETS, Public, When Open Sufficiently to Sustain an Action for Obstructing.—If it appears that a sufficient width along a street was open for use as a roadway, and was in fact so used, an action is sustainable for obstructing the street, although the part so used was where the sidewalk would be if any were constructed. (p. 52.)

DAMAGES for Obstructing Public Street—Value of the Time of the Plaintiff's Officers.—In an action by a corporation to recover damages for the obstructing of a public street so that plaintiff's access to its property and business was cut off and its business destroyed,

it cannot recover for the value of the time of its officers on the ground that such time was wholly occupied in defending the corporation against the attacks of the defendant and in preparation for the trial of the action, where there is also a recovery for loss of profits, expenses incurred, and the injury to plaintiff resulting from the obstruction. (p. 52.)

Fisher Ames and J. E. Manning, for the appellants.

Wright & Lukens, for the respondent.

[119] ANGELLOTTI, J. These are appeals from a judgment in favor of plaintiff for five thousand dollars' damages and from an order denying defendants' motion for a new trial.

1. Counsel for the respective parties differ as to the character of the case made by the complaint, counsel for plaintiff claiming that the action is one at law for damages for injury to plaintiff's business, caused by malicious and oppressive conduct of defendants deliberately intended to injure such plaintiff and "drive plaintiff out of the field as a competitor with the defendants," while counsel for defendants claim that the action is one in equity for the abatement of an alleged nuisance, and incidentally for the damage caused thereby. We regard this question as immaterial on these appeals, even if it be conceded that an action for the abatement of a nuisance is, under our present constitution, an action within the equitable jurisdiction of the court, and to be governed by the principles prevailing in that jurisdiction: See McCarthy v. Gaston etc. Co., 144 Cal. 542, 78 Pac. 7. The case was tried upon the theory that it was solely an action at law for damages, and the judgment given was one for damages only, no abatement of any nuisance being decreed. It is, of course, not disputed that one may maintain an action at law [120] for damages caused by a nuisance, without seeking an abatement of the nuisance. We are satisfied from the record before us that this must be treated as such an action. Under these circumstances the objection that no findings of fact were made and filed by the judge, and that the judgment was wholly based on the verdict of the jury, is without force. In this connection, however, it is proper to say that if findings by the court were essential, the record does not affirmatively show that such findings were not waived, and, under such circumstances, the presumption is that findings were made so far as required: See Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. 965; Baker v. Baker, 139 Cal. 626, 73 Pac. 469; Tomlinson v. Ayres, 117 Cal. 568, 49 Pac. 717.

2. It is contended that the complaint failed to state a cause of action. This contention is based on the fact that the alleged acts causing the injury to plaintiff were the placing of obstructions in certain public streets of the city and county of San Francisco. The obstruction of a public street or highway constituting a public nuisance, and the law authorizing a private person to maintain an action for a public nuisance only where it is specially injurious to himself (Civ. Code, sec. 3493), it is urged that the complaint fails to show any cause of action in favor of plaintiff.

The complaint shows plaintiff to be the owner of certain real property on Lombard and Winthrop streets (the obstructed streets), on which it was engaged in the business of quarrying, crushing and selling rock, and that the obstructions alleged, while not immediately in front of plaintiff's property, and therefore not impeding plaintiff in the right to go upon the obstructed streets from its property, or upon its property from the obstructed streets, were so placed upon said streets at other points as to prevent all ingress to and egress from plaintiff's quarries by plaintiff's wagons, teams, carts and appliances of its business. It is alleged that plaintiff had for several years been engaged in its business on this property, operating a rock-crusher and reduction works with a capacity of one hundred and eighty tons of rock per day, and delivering therefrom to customers an average quantity of seventy-five tons each day; that defendants, on May 3 and 5, 1899, wantonly and maliciously, and for the purpose of 121 injuring plaintiff's business, obstructed said Lombard street in such a way as to totally obstruct all passage and access of plaintiff's wagons, etc., to and from its quarry, and that plaintiff having thereupon procured a private right of way leading from Winthrop street, defendants for the same purpose, on May 20, 1899, and again on July 30, 1899, obstructed said Winthrop street, with the same result, thus totally stopping the business of plaintiff. It is further alleged that by reason of such obstruction plaintiff has been compelled to repair and reopen the roadways, and to purchase rights of way over private lands and purchase rock and material, to its damage in the sum of five thousand dollars, has been prevented from fulfilling contracts, lost custom and trade, and been deprived of profits in the further sum of ten thousand dollars, and that the credit and business of the plaintiff has been injured in the further sum of ten thousand dollars.

We are of the opinion that this shows such special injury to plaintiff as authorized the maintenance of the action by it. The case is practically the same as that made by the complaint in the case of Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618, where the injury complained of was an obstruction in a public highway between the plaintiff's slaughter-house and a connecting highway, which completely prevented plaintiff, maintaining a meat market in the town of Oroville, from bringing his meat to town to supply his customers, to the injury and destruction of his business. It is said that this decision is in conflict with the doctrine of the earlier cases of Aram v. Schallenberger, 41 Cal. 449, and San Jose Ranch Co. v. Brooks, 74 Cal. 463, 16 Pac. 250, wherein it was held that allegations simply to the effect that the plaintiff had no means of access to his land except over and along the obstructed road did not show such special injury, in addition to that suffered by the public, as would authorize the maintenance of the action. The former of these cases was an action for an injunction to prevent a proposed obstruction of a highway affording the only means of access to the plaintiff's property. The only allegation of damages was that plaintiffs had no other means of access, neither injury to the property nor interference with any use plaintiffs were making or desired to make of the land being averred. In San Jose Ranch Co. v. Brooks, 74 Cal. 463, 16 Pac. 250, the allegation was simply that the [122] obstruction prevented the plaintiff "having ingress or egress to and from a tract of land which it owned situated at a point in a canyon above the place where the obstruction is placed, and which prevents it from making any use of its land which it desires." It did not affirmatively appear that any use was then being made of the property, or that any particular use was then contemplated. The theory upon which these decisions is based is that the only injury done in such a case is the obstruction of the party in his right of passage over the highways, and that this injury is the same in kind as that suffered by all of the general public who may have occasion to travel over the road, although the inconvenience may be greater in degree in the one case than in the other. Neither of these cases goes to the extent of holding that an obstruction in a public highway absolutely preventing all access to and egress from one's land may not cause such an interference with the use of the land for the purposes to which it is devoted, and the injury to, and suspension of, a business there established and carried on as will constitute special injury to the owner of the property different in kind

from that suffered by the public at large, authorizing a private action, although some expressions in the opinion in the later case may tend to support such a view. So far as they do this they are opposed to the general current of authority. The injury to the general public is simply the deprivation of the right of passage over the streets. The additional injury to the owner of the property is the interference with the use of his land for the purpose to which it is adapted, and the suspension of his business there carried on. It cannot reasonably be said that these results are not caused by the obstructions alleged. For all practical purposes they are directly caused by the obstructions.

It has several times been declared by this court that the owner of a lot abutting upon a public street has, by reason of such ownership, a special easement in such street for the purpose of ingress and egress, which is property as fully as the lot itself: See Eachus v. Los Angeles etc. Ry. Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307; Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. 570; Symons v. San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; Williams v. Los Angeles R. Co., 150 Cal. 592, 89 Pac. 330. See, also, McLean v. [123] Llewellyn Iron Works, 2 Cal. App. 346, 83 Pac. 1082, 1085. This right of property is as much invaded by obstructions which have the effect of absolutely preventing access to the premises along the street as it is by obstructions preventing access from the premises to the street immediately in front of the land. As to the latter, it is thoroughly established that the obstruction constitutes a private as well as a public nuisance. The attempted distinction between the two cases appears to us to be too technical to afford a sufficient basis for a rule granting the relief in the one case and denying it in the other. So far as the comfortable enjoyment and use of the land itself are concerned, the owner is not perceptibly advantaged by being allowed to get the portion of the street immediately in front of his property if he can go no farther. In each case there appears to us to be an invasion of his rights as a property owner, and an interference with his use and enjoyment of his property differing in kind from the injury common to the general public occasioned by the obstruction. This view may be conceded to be in conflict with the doctrine of the two cases heretofore referred to. But it is in accord with the later expressed views of this court as to the rights of an owner of property abutting on a street, and also with the overwhelming weight of authorities elsewhere: See note

to Stetson v. Faxon, 19 Pick. (Mass.) 147, 31 Am. Dec. 123; Fossion v. Landry, 123 Ind. 136, 24 N. E. 96; Indiana etc. v. Eberle, 110 Ind. 542, 59 Am. Rep. 225, 11 N. E. 467; Venard v. Cross, 8 Kan. 248; Jackson v. Kiel, 13 Colo. 378, 16 Am. St. Rep. 207, 22 Pac. 504, 6 L. R. A. 254; Bannon v. Murphy, 18 Ky. Law Rep. 989, 38 S. W. 889; Brakken v. Minnesota etc., 29 Minn. 41, 11 N. W. 124; Wood on Nuisances, secs. 648, 657, 680. See, also, Blanc v. Klumpke, 29 Cal. 156; Buchholz v. New York etc. R. R. Co., 148 N. Y. 640, 43 N. E. 76.

3. The contention that the evidence was insufficient to justify the verdict is principally based upon the objection to the complaint already discussed. It is further claimed that the evidence shows that the streets had not been so improved as to be capable of use by the public. It was shown that a sufficient width along the streets was open for use as a roadway and was capable of being used as such, and was in fact being used by the public. The case of George v. North Pacific Transportation Co., 50 Cal. 589, is therefore not in point. [124] The fact that the portion so open for use was in what would be the sidewalk portion of the streets, if ultimately sidewalks were constructed, is immaterial.

4. Under the circumstances appearing in the record, the claim that the platform construction placed in Winthrop street by defendants, covering the whole space which was open for travel or passage, was a sidewalk, and not a construction designed solely to obstruct travel by wagons and other vehicles, was, upon the record before us, so obviously a mere pretense that the trial court was perfectly justified in disregarding it altogether.

5. We have discussed the foregoing matters solely for the purposes of a new trial, as the judgment and order must be reversed because of improper evidence admitted on the question of damages.

In the face of proper objection an officer of plaintiff corporation was allowed to testify that the value of the time of himself and another officer from the time of the first obstruction, May 3, 1899, to the date of the commencement of the trial, March 26, 1900, was six thousand five hundred and sixty dollars, the theory advanced by the witness being practically that the whole of the time of himself and fellow-officer between those dates was occupied in defending the plaintiff corporation against the attacks of defendants, in consultation with plaintiff's attorney, and preparations for the trial of this action. We know of no theory upon which plaintiff could be

held entitled to a recovery for such loss of time of its officers, in addition to the whole loss suffered by it by reason of loss of profits, expenses incurred, and injury to plaintiff resulting from the obstructions, as to all of which it introduced evidence and claimed the right to recover, a claim sanctioned by the court in its rulings both in the matter of evidence and instructions. Counsel for respondent have not attempted to justify this ruling of the trial court.

6. The court erred in refusing to strike out the portion of an answer given by Mr. Phelan as to his opinion of the nature of the structure placed by defendants on Winthrop street, and also in overruling an objection to a question asked him as to what instructions he had given to subordinates after examining the structure, but it is doubtful if these errors should be held to have been prejudicial.

125 We find no other matter requiring notice.

The judgment and order are reversed and the cause remanded.

Sloss, J., Shaw, J., McFarland, J., and Lorigan, J., concurred.

The Owner of Property Abutting on a Public Street has a right and interest in the street distinct and different from that of the general public: Long v. Wilson, 119 Iowa, 267, 97 Am. St. Rep. 315; note to Wright v. Austin, 101 Am. St. Rep. 106. And where an obstruction to the street occasions him an injury differing not merely in degree but in kind from the damages sustained by the general public, he is entitled to relief: State v. Goodwin, 145 N. C. 461, 122 Am. St. Rep. 467; Sloss-Sheffield Steel etc. Co. v. Johnson, 147 Ala. 384, 119 Am. St. Rep. 89; Tilly v. Mitchell & Lewis Co., 121 Wis. 1, 105 Am. St. Rep. 1007. An individual may maintain an action against one who constructs a building across the street some two hundred feet from his residence between it and the business part of the street: O'Brien v. Central Iron etc. Co., 158 Ind. 218, 92 Am. St. Rep. 305. A private individual may maintain a bill to enjoin the erection of a building on an adjoining lot, so as to extend into the street, and thereby obstruct his easement of view and of light and air: First Nat. Bank v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144. And a private person may sue to enjoin the obstruction of a public highway as a public nuisance where he owns a farm, orchard and nursery adjacent to the road, and there is no outlet for his products except by such highway: Smith v. Mitchell, 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 667. But see Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 87 Am. St. Rep. 600, 62 N. E. 341.

LOS ANGELES RAILWAY COMPANY v. CITY OF LOS ANGELES.

[152 Cal. 242, 92 Pac. 490.]

FRANCHISE, Forfeiture of Ipso Facto.—A statute providing for the obtaining of street railway franchises, specifying certain provisions, and declaring that a failure to comply with either of the provisions or with any of the provisions of any ordinance granting the franchise works a forfeiture of the right of way and franchise, is self-executing, and no adjudication or other judicial proceeding is necessary to declare the forfeiture. (p. 56.)

STREET RAILWAYS, Forfeiture of Right to Lay Track of.—Upon the breach of a condition or provision which, by the statute, has the effect of forfeiting its franchise, a street railway has no more right to lay its track than if it never had been granted such right. (pp. 56, 57.)

STREET RAILWAYS, Right of Municipality to Resist by Force.—If the right of a street railway company to lay additional track has been forfeited by the lapse of time, the municipality has the right to resist by force any attempt to lay such additional track. (p. 57.)

Bicknell, Gibson, Trask, Dunn & Crutcher, for the appellant.

W. B. Mathews, Leslie R. Hewitt, Herbert J. Goudge and Lewis R. Works, for the respondent.

243 BEATTY, C. J. This is an appeal by the plaintiff—a street railway corporation—from a judgment of the superior court denying its prayer for an injunction restraining the defendant from interfering with the exercise of an alleged franchise. The record consists of the pleadings, certain stipulated facts, and the decree, from which it appears that, by an ordinance of the city of Los Angeles, duly adopted May 11, 1897, the predecessors of plaintiff were granted a franchise to construct and operate a street railway over and along certain streets of that city—the work of construction to be commenced within six months, and completed within eighteen months from the passage of the ordinance. By a subsequent ordinance the time of completion was extended six months, but at the end of this extended time—May 11, 1899—only one and three-quarter miles out of four and three-quarter miles of the projected road had been built, leaving one mile at one end and two miles at the other end of the route covered by the franchise entirely vacant and unoccupied, in which condition it remained until May 1, 1903, a period of four years. One of the express conditions contained in the ordinance granting the franchise was the following: "If said

road is not fully completed and in operation within said time, then this franchise shall be forfeited as to the portion thereof uncompleted." The grantees of the franchise paid the city therefor the sum of five thousand dollars. No ordinance declaring the franchise forfeited was ever passed or adopted, but, on May 15, 1903, while the plaintiff was engaged in the work of extending its tracks over a portion of the route described in the ordinance which had been left unoccupied from May 11, 1899 to May 1, 1903, the defendant, by its police officers and superintendent of streets, entered upon this new construction, compelled plaintiff to suspend work, and threatened to tear up and remove the newly laid tracks.

To enjoin this proceeding the present action was commenced May 15, 1903. It appears from the decree that an injunction pendente lite was issued restraining defendant, its officers, agents, etc., from tearing up, removing, destroying or in any wise interfering with the new portion of the track then in process of construction, and this temporary injunction remained in force until October 12, 1905, when it was dissolved by the final decree from which this appeal is prosecuted.

[244] The question whether the superior court erred in dissolving the temporary injunction and denying a permanent injunction depends mainly upon the further question whether the franchise of plaintiff was forfeited ipso facto by its failure to complete the road within the time limited by the grant. The respondent claims that it was so forfeited under the provisions of section 502 of the Civil Code, while the appellant contends that without a decree declaring a forfeiture in an action by the attorney general in behalf of the state, the franchise remained unimpaired. It is argued in support of this view that nothing is involved in this controversy beyond the respective rights of the plaintiff and defendant growing out of and dependent upon the ordinance granting the franchise, which, it is contended, embraces all the terms of the contract, and which upon the received construction of grants providing for forfeitures upon breach of conditions subsequent means no more than that their breach entitles the grantor to maintain an action to enforce the forfeiture. The respondent, on the other hand, contends that section 502 of the Civil Code in force at the date of the grant is a part of the contract, and that it is self-executing in working a forfeiture for failure to complete the construction of the road within the time specified in the ordinance.

We agree with the appellant that the rights of the parties are measured by the terms of their contract, but we think the

statute (Civ. Code, sec. 502) enters into the contract, and that its provisions must be taken into account in construing the contract. The city in granting a street railway franchise is but an agency of the state, and if there were any conflict between the ordinance containing the grant and the general laws of the state, the latter would govern. In this case, however, there is no conflict. The ordinance provides that in case of a failure to complete the work within the time limited the franchise shall be forfeited, but if this provision is not self-executing, it is not in conflict with a provision of the statute which is self-executing, and so the only question is as to the proper construction of these words of section 502 of the Civil Code: "A failure to comply with either of the foregoing provisions of this section, or with either of the provisions of the ordinance granting said right of way, *works a forfeiture* of the right of way and also of the franchise," etc.

[245] We are of the opinion that the words italicized make the statute self-executing. A judgment declaring and enforcing a forfeiture does nothing more than work a forfeiture, and when a breach of condition works a forfeiture there is no office for a judgment to perform, except perhaps to supply conclusive evidence of the fact—evidence which may in certain contingencies be useful, though not for all purposes essential.

Our conclusion upon this point is fully supported by the cases of Oakland R. Co. v. Oakland B. B. & F. V. Co., 45 Cal. 365, 13 Am. Rep. 181, and Upham v. Hosking, 62 Cal. 250. In neither case was the language providing for a forfeiture any stronger or more explicit than the language of section 502 of the Civil Code, but in both it was held that the forfeiture was complete upon failure to comply with the conditions of the respective grants. Those decisions have been frequently cited and never overruled by this court, though questioned in other jurisdictions.

Borland v. Lewis, 43 Cal. 569, is another case in which the provision for a forfeiture was held to be self-executing, but there the language of the statute was different and stronger than that in question here. A large number of decisions in other jurisdictions are cited by the appellant, many of which support its contention—and many of an opposite tendency are cited by respondent. We do not consider it necessary to review these cases, since our own decisions must control. The decision in People v. Los Angeles Electric Ry. Co., 91 Cal. 338, 27 Pac. 673, so far as it touches the question we are considering, implies that if the time allowed for construction had

expired before the commencement of the action, the franchise would have been forfeited, but the question whether the provision of section 502 of the Code of Civil Procedure, for forfeiture of the franchise for failure to complete the work in time, is self-executing would not have been involved.

In Santa Rosa etc. Co. v. Central Co., 112 Cal. 436, 44 Pac. 733, the question was involved, and the final affirmance of the judgment of the superior court by reason of the equal division of the qualified justices of this court was in effect a decision that the forfeiture in such cases is self-executing.

It follows from this conclusion that the plaintiff having forfeited its right to use or occupy the street which it had left vacant for four years after the expiration of the time limited
246 for the completion of its road, had no more right to lay its track there than one who had never been granted a right of way, and the city was clearly within its right in preventing the trespass.

Some cases are cited in support of the contention that even if the right of way was forfeited ipso facto on the 12th of May, 1889, the city could not lawfully oust plaintiff from the possession of the street by force. But those cases are not in point. The plaintiff was not in possession. It was attempting unlawfully to take possession, and the city was merely resisting an unlawful entry upon a street which its duty to the public required it to keep clear of unauthorized obstructions.

The judgment of the superior court is affirmed.

Shaw, J., McFarland, J., Sloss J., Angellotti, J., and Lorigan, J., concurred.

The Charter of a Corporation has been Held not to Expire by reason of an omission or commission of acts on the part of the company for declaring a forfeiture, but such franchises continue in full force until the penalty of forfeiture is claimed by the state, by and through legal proceedings by which the cause of forfeiture is legally declared: Higgins v. Downward, 8 Houst. 227, 40 Am. St. Rep. 141.

ESTATE OF LENNON.

[152 Cal. 327, 92 Pac. 870.]

WILLS, Revocation of Probate of, What is not a Ground for. That a will is invalid and contrary to the laws of the state relating to charitable uses is not a ground for revocation of its probate. (p. 59.)

A CHARITABLE TRUST is a Gift for the Benefit of Persons, either by bringing their hearts and minds under the influence of education or religion, by relieving their bodies of disease, suffering or constraint, by assisting to establish them for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public, or some class of the general public, indefinite as to names and numbers. (pp. 59, 60.)

WILLS—Bequests for Masses.—A bequest to the bishop of a Catholic church of a specific sum "to have the same amount of masses celebrated as soon as possible" for the soul of the testator is not a bequest for a charitable use, and is valid. It does not fall within the provisions of the statute restricting devises and bequests for charitable uses. (p. 60.)

WILLS—Bequests for Superstitious Uses.—Bequests are not Prohibited as Superstitious if they are mere observances of any ceremonial, the efficacy of which is recognized by the church of which the donor is a member. "No religious observances can be deemed as a matter of law superstitious. (p. 60.)

O. V. Eaton, E. T. Maples and F. D. McClure, for the appellants.

H. C. Dillon and J. Wiseman Macdonald, for the respondent.

328 HENSHAW, J. The will of the deceased having been admitted to probate, appellants, as next of kin, filed a petition asking for the revocation of the probate upon three grounds: "First, that said alleged last will and testament is invalid and contrary to the laws of the state of California as made and provided by section 1313 of the Civil Code of said state relating to charitable uses; second, that the decedent was unduly influenced in the making of the will; third, that the will was not entirely written, dated and signed by the hand of the testator." The second and third grounds were not supported by evidence, and seem to be abandoned upon this appeal. The first is not a ground for revocation of the probate of a will, since, if any will falls under the inhibition of section 1313 of the Civil Code, that section itself provides for the disposition of the assets of the estate which must follow: Estate of Willey, 128 Cal. 1, 60 Pac. 471.

Appellants undertake to bring to this court two appeals, one apparently from the decree settling the final account and

ordering distribution; the other from the judgment of the court following their petition to have the will of the deceased set aside upon the grounds above stated. The record upon these appeals is fragmentary, uncertain and incomplete. No evidence is presented against the rulings and decision of the court. Yet the record does contain the statement that proofs were taken upon the account and petition for distribution and submitted to the court, and that oral and documentary [329] evidence was introduced which the court considered, a trial by jury was expressly waived and the matter was heard and tried before the court without a jury. The statement of the appellants "that the will is contrary to the laws of the state of California as made and provided by section 1313, Civil Code," is not the allegation of any fact, but is merely a legal conclusion which the pleader draws, a conclusion which, even if sound, as has been said, does not call for the revocation of the probated instrument. Section 1313 restricts charitable devises and bequests, and provides that if such bequests are found in a will made within thirty days of the testator's death they are void. If in a will executed more than thirty days before the testator's death, they are valid to the value of one-third of the testator's estate. If he has left more than one-third of his estate to such charities, a pro rata reduction from them all shall be made to the value of one-third of his estate. But notwithstanding the condition of the record, we proceed to consider the proposition which in the transcript and in the appellants' brief is declared to be "the nub of the case," namely, whether a bequest to Bishop Conaty of three thousand five hundred dollars, "to have the same amount of masses celebrated as soon as possible for my soul," is a charitable bequest.

It will be noticed that the limitation and restriction imposed by section 1313 of the Civil Code is upon charitable uses and trusts. The reason for the law has often been expounded. It is that a man's fears or superstition, or his deathbed hope of purchasing a blissful immortality, shall not be allowed to influence the disposition which he may thus make of his property, to the injury of his heirs. The law, therefore, limits the time within which such a testamentary disposition may be made, and also limits the value and amount of such disposition. But the only inhibition of the section is that such devises or bequests shall not be made to charity, or in trust for charitable and benevolent purposes. Charity and a charitable use have often been defined by this and other courts. A charitable trust is a gift for the benefit of persons, either

by bringing their hearts and minds under the influence of education or religion, by relieving their bodies of disease, suffering or constraint, by assisting to establish them for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public, or some class of [330] the general public, indefinite as to names and numbers. In short, it is a gift to a general public use: Eaton on Equity, sec. 181; Perry on Trusts, sec. 697. The bequest here lacks every element of a bequest for charity or charitable use. It is not for the benefit of the public or of any class or division of the public. It is entirely lacking in the element of continuance and perpetuity which characterize a charitable use. It is a bequest, not for the benefit of the bishop, but for the benefit alone of the testator, and the direction is that the money shall be expended as expeditiously as possible in the saying of masses for the testator's soul. Such a bequest, as has been said, is lacking in every attribute which characterizes a charity. In England, masses for the dead are called "a superstitious use," and are forbidden by statute: 1 Edward VI, c. 14; In re Blundell's Trust, 30 Beav. 360. But in this state, and in the states of this Union generally, there is no statute designating such bequests superstitious uses, and such bequests are not prohibited as superstitious if they are for the observance of any ceremonial, the efficiency of which is recognized by the church of which the donor is a member. "No religious observances can be deemed as matter of law superstitious": Holland v. Alcock, 108 N. Y. 312, 2 Am. St. Rep. 420, 16 N. E. 305. In this state there is no law prohibiting such a bequest, and no law which declares such a bequest to be in its nature a superstitious use, and as clearly it is not a charitable use, it does not come within the inhibition of section 1313 of the Civil Code, although the amount should exceed one-third of the value of the testator's estate.

If authority were needed in support of a proposition so plain, it may be found in abundance. Thus, in the case of Sherman v. Baker, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717, Baker by his will gave one hundred dollars to the parish priest of St. Patrick's church to say masses for the repose of his soul, and one hundred dollars, the income of which was to be used in ornamenting and keeping in proper repair his burial lot. The court said: "This will presents an example both of a gift in perpetuity for a private trust, that is, for the care of the testator's burial lot, and an outright gift for masses. The former is invalid (citing cases); the latter, the

gift for masses, is valid as one which takes effect at once like any personal bequest for a legal object": See, also, Harrison [331] v. Brophy, 59 Kan. 7, 51 Pac. 883, 40 L. R. A. 721; In re Howard's Estate, 25 N. Y. Supp. 1111, 5 Misc. Rep. 295; Moran v. Moran, 104 Iowa, 216, 65 Am. St. Rep. 443, 73 N. W. 617, 39 L. R. A. 204; In re Zimmerman, 22 Misc. Rep. 411, 50 N. Y. Supp. 395; Hoeffer v. Clogan, 171 Ill. 462, 63 Am. St. Rep. 241, 49 N. E. 527, 40 L. R. A. 730

The judgment and orders appealed from are therefore affirmed.

Lorigan, J., Angellotti, J., Shaw, J., and McFarland, J., concurred.

Bequests for Masses are discussed in the note to McHugh v. McCole, 65 Am. St. Rep. 118. A bequest to a Catholic priest, who is the pastor of a particular church, "that masses may be said for me," is not a charity, but the bequest is, nevertheless, valid, and creates a valid private trust, if the priest accepts the money: Moran v. Moran, 104 Iowa, 216, 65 Am. St. Rep. 443.

Charitable Uses and Trusts are discussed in the note to Hoeffer v. Clogan, 63 Am. St. Rep. 248. On the certainty and unity required in charitable trusts, see the note to Fifield v. Van Wyck, 64 Am. St. Rep. 756.

BURDELL v. GRANDI.

[152 Cal. 376, 92 Pac. 1022.]

DEEDS, Conditions in Against the Sale of Liquors.—A condition in a conveyance that intoxicating liquors shall not be sold on the premises conveyed is lawful and enforceable. (pp. 63, 64.)

DEEDS, Conditions in Against Sale of Intoxicating Liquors Intended Merely to Create a Monopoly.—If a person subdivides his lands into town lots, which he sells, inserting a condition in each deed against selling intoxicating liquors on the premises conveyed, and providing that the estate granted shall be forfeited on a breach of the condition, and the object of the grantor is merely to reserve to himself, or in favor of property not sold by him, a monopoly of the sale of such liquors, the condition is void as against public policy, and its breach does not work a forfeiture. (p. 67.)

J. R. Brandon, for the appellant.

E. B. Martinelli, for the respondents.

[377] LORIGAN, J. This is an action of ejectment wherein plaintiff seeks to recover possession of a lot of land in the town of Point Reyes station, in Marin county, for an alleged

breach of a condition subsequent imposed in a deed made by plaintiff to the predecessor in title of the defendant.

The court found that in June, 1883, plaintiff was the owner of a tract of land in Marin county, upon which the town of Point Reyes station now stands, and that upon said date, for the purpose of establishing and building up said town, he laid out said tract into blocks and lots and made sales of the latter to individuals; that all deeds executed by plaintiff of lots therein contained the following clause: "It is hereby expressly understood and agreed between the parties hereto and their respective heirs, executors, administrators and assigns, and all claiming or to claim under them, that this conveyance is made and received solely and expressly on the condition that no saloon, bar-room, liquor store, beer-hall or any place where intoxicating liquors or beer shall be sold at retail, shall be opened, established, allowed or permitted to exist on the said premises conveyed or any part thereof; nor shall any liquor, beer, wine or intoxicating drink be sold, bartered or exchanged thereon at retail without the express permission in writing of the party of the first part, his heirs, executors or administrators, and that upon the breach of said condition the estate hereby granted shall immediately cease, determine and be void and revert to the grantor, his heirs or assigns, together with all improvements which may have been erected on the premises"; that said condition was not inserted in said deeds to said lots pursuant to any general scheme or plan of building up said town, or for the benefit of the lands therein, or for the benefit of persons who purchased lots therein, or as an inducement for persons to purchase the same; that in July, 1883, plaintiff, in consideration of the construction and erection of a store by one A. P. Whitney on a lot in said town (being the same premises involved in this action) made a grant of said lot to him, the deed containing the condition and provision heretofore referred to; that said Whitney constructed [378] and erected a store on the said premises, and thereafter by sundry mesne conveyances the title to said lot passed from said Whitney to the defendant, S. Grandi, who, in 1888, conveyed a portion thereof to his codefendant, Q. Codoni; that in March, 1902, the defendant Grandi, without the consent of plaintiff, opened and established a saloon on the portion of the lot retained by him for the sale of intoxicating liquors, and has since continued to conduct said saloon thereon and to sell intoxicating liquors therein, without the consent of plaintiff; that no saloon exists or has existed on the portion of the lot sold by said Grandi to said

Codoni, nor is the latter at all interested in the saloon business carried on by the former; that for many years immediately preceding the commencement of this action plaintiff was the owner of a hotel situated on a lot owned by him in said town of Point Reyes station as originally platted and laid out by him, and for many years the plaintiff leased said hotel building to divers tenants successively, who, with the consent and permission of plaintiff, opened and maintained continuously a saloon and bar-room in said hotel where intoxicating liquors were sold at retail; that at all times from the said nineteenth day of July, 1883, while intoxicating liquors were sold at said hotel as aforesaid, plaintiff refused to permit any other persons who had bought lots from him in said town to open or establish saloons or bar-rooms thereon, where intoxicating liquors might be sold at retail; that during all said time plaintiff reserved to his several tenants the exclusive right and privilege of opening and maintaining a saloon and bar-room where intoxicating liquors were sold at retail at said hotel, and reserved for the said tenants the exclusive right to sell intoxicating liquors at said hotel, and during all said time the exclusive sale of intoxicating liquors in said town was reserved to be carried on at said hotel; that it was the intent and purpose of the plaintiff in inserting said clause in the conveyance from himself to Whitney, and in all other conveyances made by him to lots in said town of Point Reyes station, to thereby reserve to himself the exclusive control of the sale of intoxicating liquors in said town.

As a conclusion of law from said findings the court decided that the purpose and effect of said condition, as set forth in the deed from plaintiff to Whitney, was to create a monopoly in the sale of intoxicating liquors in the town of Point Reyes [379] station in the plaintiff, and in consequence thereof said condition was and is against public policy and void, and judgment was accordingly entered for defendants.

The plaintiff appeals from this judgment, and the question of its validity is presented here upon the judgment-roll alone. There is no bill of exceptions or any statement accompanying the appeal, the sole point urged being that the findings do not warrant the judgment. Under these circumstances it must be assumed that the evidence in the case was amply sufficient to sustain the findings as made by the court.

It is insisted by appellant that a condition inserted in a deed that intoxicating liquors shall not be sold on the conveyed premises, and providing that for a breach thereof the estate granted shall be forfeited is entirely lawful, and that

there is nothing in the other findings made by the court in this case—the condition and the breach being found—which warranted the court in awarding judgment for the defendants and in refusing to sustain the forfeiture. As an abstract proposition, the contention of appellant that such conditions are lawful and enforceable is undoubtedly correct. The books are full of cases in which restrictions as to the use of property have been sustained. It has been uniformly held that conditions inserted in deeds precluding the establishment of various occupations or industries—as, for instance, distilleries, machine-shops, livery-stables, and saloons, or places where intoxicating liquors might be obtained—in certain specified localities intended for and desirable as places of residence have been sustained, the intent and purpose of the restriction being, as to the industries, to free such localities from offensive sights, disturbing noises, or noxious vapors, and, as to saloons, in aid of the social and moral welfare of the community by preventing intemperance, which is universally recognized as a social evil. Under this general rule, and confining ourselves now to the condition in the deed relative to the sale of intoxicating liquors, broken by the defendant Grandi, if the plaintiff in the formation of the town of Point Reyes station, and in pursuance of a scheme to prevent intoxicating liquors being sold within its limits, had by condition in all deeds made by him provided against it, and for forfeiture of the land conveyed in case it was done, no contention could arise as to the validity of such condition and the consequent forfeiture of the property if it [880] were violated. Or if the plaintiff, under a general scheme for establishing such town, had contemplated and intended that the sale of intoxicating liquors should be confined and restricted to some given locality or territory within the town, and restricted it to such given locality by imposing conditions against its sale elsewhere, we are not prepared to say that such a scheme would not be entirely proper, and conditions in deeds harmonizing therewith lawful and enforceable. But nothing of this kind appears to have been intended or designed by the plaintiff, according to the findings. Whatever his views may have been on the question of temperance, or the restriction of the liquor traffic, he neither intended by the imposition of these conditions to entirely prohibit the sale of such liquor within the town laid out by him, nor to confine its sale within any given district or locality for the benefit of the community or its individual members. His purpose was, so the court finds, and we must assume it has so found on sufficient evi-

dence, that he intended by the imposition of such conditions to reserve and create solely in himself a monopoly of the sale of intoxicating liquors within the town of Point Reyes station. The court not only finds that this was the intent of the plaintiff, but that in effect he, through his agents, was in the actual enjoyment of a monopoly as to such business. It hardly needs any citation of authority to the proposition that in the scheme of establishing a town or village, all forfeitures inserted in deeds to lots therein solely for the purpose of restricting a lawful occupation, in order that the grantor may himself enjoy a monopoly in it, is against public policy and void. The retail liquor business, conducted under such restrictions and limitations as are imposed by law, is a lawful business in this state, and no more subject to monopoly by restrictive conditions imposed for such purpose, as the lower court finds they were here, than restrictive conditions affecting any other lawful business, and when the intent and purpose of such conditions is to effect a monopoly of any lawful business or occupation in the person imposing them, they are void.

This question, under practically the same circumstances as it is presented here, was before the supreme court of Michigan in the case of Chippewa Lumber Co. v. Tremper, 75 Mich. 36, 13 Am. St. Rep. 420, 42 N. W. 532, 4 L. R. A. 373. There the manager of the Chippewa Lumber Company, by consent of the company, [381] plotted the village of Chippewa Lake in Mecosta county in that state. The company sold lots and inserted in its deeds a condition that intoxicating liquors of any kind should not be sold on any lot conveyed by the company for thirty years after the date of the conveyance, with a provision for forfeiture should the condition be violated. The owner of a lot conveyed by the company and containing the said provision having violated it by the sale of intoxicating liquors, suit was brought by the company to recover the lot for breach of the condition. Evidence was offered on the trial by defendant for the purpose of showing that this condition in the deeds to lots in the village, including the deed to him, was inserted for the purpose of giving the company, or its manager, the right of exclusive sale of liquor in the village, and that the company or its manager were interested in a drug-store enjoying such exclusive sale. The lower court rejected the evidence offered. The supreme court held that it should have been received. In discussing the matter, one of the justices, speaking for the

court, said: "The selling or giving away of intoxicating liquor in this state is a lawful business if carried on in conformity with the statutes governing the traffic in intoxicating liquors. It does not seem to me that the Chippewa Lumber Company could, in the platting and sale of lots in the village of Chippewa Lake, so convey its lots as to grant for thirty years, in effect, a monopoly of the sale of liquor in themselves, or any other person or persons. This would be contrary to public policy. I am satisfied that no forfeiture of lots under the condition in defendant's deed, or the deed to his grantor, should be permitted for any such purpose, and that the facts offered, if proven, would have been a perfect defense to this action. It would appear that the alleged benefit of this condition to the company in preventing the sale of liquor to its mill hands was not the reason of the insertion of the condition, or for its enforcement, but that the condition was for the purpose of profit to the company or its manager in the exclusive sale of liquor in the village. I am well satisfied it would be against public policy to permit an owner of a village plot to insert a condition in the conveyance of his lots that no bread should be sold upon the premises for thirty years, in order that he might himself have a monopoly in the village of the sale of bread. Liquor is not a necessity like bread, and is [382] generally regarded as of damage by the general community, but I know of no good reason why a person should be permitted to have a monopoly in selling *poison* to a community any more than food, unless it be that no other person can be found fit to handle and dispense it. I do *not* believe, however, that any man or company should be permitted by the law and aided by the courts to create a monopoly in himself, either in the sale of bread or whisky. The right to insert such a condition as the one in this case, for an honest and beneficial purpose, cannot be denied, and is within the public policy of the state. But courts will not enforce such a condition, inserted for a dishonest purpose, and to the end that the grantor may thereby obtain a monopoly in any business and all others be restrained therefrom; and there can be no difference in this regard, whether the business so sought to be centered in one person in a community is one acknowledged by everyone to be of great benefit to mankind, or one regarded by many good people of detriment to the community, provided both are lawful. Courts will not enforce forfeitures for any such purpose."

This authority appears to have direct application to the case at bar. The reasoning is clear and the doctrine an-

nounced is sound. In fact it is the only authority cited on either side (and the citations are few) which has any direct application to the principle involved under the findings in the case at bar.

Counsel for appellant suggests many reasons which may have actuated the plaintiff in imposing the condition in question in his deeds. We make no question but that such considerations as he urges might influence one laying out a village or town. Entertaining the view, which is unquestionably sound, that intemperance is a social evil, the founder of a town, in his general scheme to establish it, would have a right to protect against intemperance therein by inserting conditions in his deeds to lots prohibiting the establishment thereon of any place where intoxicating liquors might be sold. He would be justified in the view that prohibiting its sale on the lots he disposed of would increase the value of his remaining property; that persons would be more disposed to purchase property and build and improve it for residence purposes in a community where the liquor traffic was prohibited than where it was not. Many other equally good considerations might actuate him in [883] imposing the condition. The property was his, and he could dispose of its as he saw fit, imposing such restrictions upon its use as he chose, his right to impose them being limited only to the extent that such conditions should be imposed to effect a lawful purpose. The trouble, however, in the present case is that the proper and lawful motives which might have actuated the plaintiff were not those which governed him in the imposition of these conditions. The court finds that he imposed them to create a monopoly in his own behalf in the sale of intoxicating liquors upon other property in the town owned and leased by him to those who, with his consent and protection, did sell it and enjoyed under his leave the exclusive right to do so. Conditions imposed to attain that end are, as we have seen, against public policy and void.

It follows, therefore, that the judgment of the lower court declaring this condition in the deed of defendants void was correct, and the judgment in their favor is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in bank denied.

A Condition in a Deed Against the Sale of Liquors on the Premises conveyed will be upheld, unless inserted for some purpose which the law condemns, such as to enable the grantor to obtain a monopoly of the prohibited sale: See the note to Wakefield v. Van Tassell, 95 Am. St. Rep. 222.

BONNEAU v. NORTH SHORE RAILROAD COMPANY.

[152 Cal. 406, 93 Pac. 106.]

A CARRIER OF PASSENGERS is Held to the Exercise of the Highest Degree of Care for their safety and transportation, and liable for any injuries sustained by them in the course of transportation through the failure to exercise such care. (p. 70.)

CARRIERS, Negligence of, Prima Facie Evidence of.—A passenger makes out a prima facie case against a carrier when he shows that he was injured by an accident happening to the train in which he was riding in the course of its operation by the carrier. (p. 70.)

CARRIER'S NEGLIGENCE—Burden of Proof.—A carrier must assume the burden of proof in an action by a passenger to recover for injuries suffered by an accident happening on the train on which he was riding, in the course of its operation by the carrier, to rebut the presumption of negligence arising from the accident. (p. 70.)

CARRIERS, Burden of Proof as to the Cause of an Accident. In an action to recover for injuries suffered by a passenger from the overturning of a car, it is not error to instruct the jury that the carrier must show that the overturning was the result of inevitable casualty, or of some cause which human care and foresight could not prevent, and if the carrier does not explain how the overturning occurred, the presumption of negligence remains. The only explanation which such an instruction calls for is that the accident was the result of some cause other than the negligence of the carrier. (p. 70.)

CARRIERS—Negligence, Instruction as to Burden of Proof.—In an action by a passenger to recover for injuries suffered from the overturning of a car, an instruction is not erroneous which states that the plaintiff was a passenger of the defendant, and that the car in which he was riding was derailed and overturned without his fault, is all that the plaintiff need establish, in the first instance, in order to entitle him to recover for such injuries as may have been proximately caused him thereby, and that when the plaintiff has done this, the legal presumption arises that the derailment or overturning was through the negligence of the defendant, and the burden of proving that there had been no negligence is cast on the defendant. (p. 71.)

JURY TRIAL—Refusing Instruction Already Given.—If all that is pertinent in an instruction asked for has already been embodied in an instruction given, the court may properly refuse to give it. (p. 73.)

DAMAGES for Personal Injuries—Evidence of Earnings of the Plaintiff.—In an action to recover for injuries suffered by the plaintiff while a passenger on the defendant's railway train, he may be permitted to prove that at the time of the accident, and for many years prior thereto, he was an insurance solicitor and what were the commissions earned by him for several years. (p. 74.)

DAMAGES for Personal Injuries—Verdict for, When not Excessive.—In an action for personal injuries suffered by the plaintiff when a passenger on the defendant's railway train, a verdict for seven thousand five hundred dollars cannot be held excessive when the evidence shows that he was damaged upward of two thousand dollars for expenses, including nursing, medical attendance and loss

of time, and aside from pain and suffering endured from his injuries, and that they were of a permanent character, and materially impaired his capacity for the future pursuit of his vocation as a solicitor of insurance. (pp. 74, 75.)

Jesse W. Lilienthal and J. W. Cochrane, for the appellant.

John Flournoy and Thomas P. Boyd, for the respondent.

[408] LORIGAN, J. This action was brought by plaintiff to recover damages for personal injuries sustained by him on June 21, 1903, through the derailment, overturning and wrecking of one of defendant's passenger-cars in which he was a passenger, occasioned, it is alleged, through the negligence of defendant in operating its train between Tomales and San Anselmo, in Marin county. Plaintiff obtained a verdict and judgment for seven thousand five hundred dollars, and defendant appeals from an order denying its motion for a new trial.

The points made on appeal relate to certain instructions given and to other certain instructions refused; rulings as to evidence offered and the sufficiency of the evidence to justify the amount of the verdict.

The evidence showed that the train of defendant on which plaintiff was a passenger consisted of an engine, tender and one passenger-coach; that as the train was passing over a bridge across a small creek near Point Reyes, the passenger-coach, in which plaintiff was riding, left the rails, turned over and was precipitated into the creek, the plaintiff sustaining thereby the injuries for which he sought compensation.

As to the instructions attacked by appellant: The court instructed the jury that "the fact that the train did so overturn is all that he (plaintiff) need establish in order to recover for such injuries as he may have sustained unless his want of ordinary care contributed to such overturning or to his injury. In order to rebut this presumption of negligence the defendant must show that the overturning [409] was the result of inevitable casualty, or of some cause which human care and foresight could not prevent, for the law holds it responsible for the slightest negligence, and will not hold it blameless except upon the most satisfactory proofs. In doing this the defendant must necessarily explain how the overturning occurred, and if it fails to do this, the presumption of negligence remains."

There can be no question of the accuracy of the general principle of law contained in this instruction. A carrier of

passengers is held to the exercise of the highest degree of care for their safety and transportation, and liable for any injury sustained by them in the course of transportation through failure to exercise such care. And where an action is brought by a passenger against a carrier to recover for injuries, he makes a prima facie case against the carrier when he shows that his injuries were sustained by some accident happening to the train on which he was riding in the course of its operation by the carrier. Such proof raises a presumption of negligence on the part of the carrier, in the operation of the train, and the burden is then thrown on it to show that the injury sustained by plaintiff was without negligence on its part. This has been the rule in this state for upward of forty years, being first announced in Boyce v. California Stage Co., 25 Cal. 460, and since reaffirmed, among other cases, in the recent case of McCurrie v. Southern Pacific Co., 122 Cal. 558, 55 Pac. 324.

Counsel for appellant, however, criticise the last portion of the instruction given, in which it is declared to be the duty of the defendant to explain the cause of the overturning of the car, insisting that the defendant was not called on to prove how it overturned—what was in fact the cause of its overturning—but only that it occurred without any negligence on the part of the defendant. But taking into consideration the entire instruction, it is apparent that the portion criticised only casts on the defendant the duty of showing that fact. The explanation that the defendant is required to make, as the instruction states it, is one which will show that the accident was the result of inevitable casualty, or that it resulted from some cause which care and prudence on the part of the carrier could not have prevented; in other words, that the accident was the result of some cause other than [410] the negligence of the carrier itself. This is the only explanation the instruction calls for; was the only one which was stated and reiterated in the other instructions to the jury given by the court of its own motion and at the instance of the defendant; and was the one to which the evidence on the part of defendant was addressed. The instruction as given was taken from the language of the court in the Boyce case, and is in the exact language of an instruction given in the case of Mitchell v. Southern Pacific Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130, and approved by this court as a correct statement of the law.

It is also insisted that the court erred in giving another instruction. It told the jury: "That the plaintiff was a

passenger of the defendant, and that the car in which he was riding was derailed or overturned without his fault, is all that the plaintiff need establish in the first instance in order to recover for such injuries as may have been proximately caused him thereby. When the plaintiff has done this, the legal presumption arises that the derailment or overturning of the car occurred through the negligence of the defendant, and the burden of proving that there has been no negligence is cast upon the defendant." Complaint is made that this instruction incorrectly declares the rule as to the burden of proof, the position of the appellant being that in an action where the only question is as to the negligence of the defendant, the burden of proof is always upon the plaintiff to show by a preponderance of the evidence such negligence; that the burden of proof never shifts, and that it was error to instruct the jury that "the burden of proving that there has been no negligence is cast upon the defendant"; that, in effect, this was to instruct the jury that the burden was cast upon it to prove by a preponderance of evidence that it was not negligent. But it is quite clear that this instruction had nothing to do with declaring any rule as to the burden of proof in the case; that is, the burden of proving by a preponderance of evidence the negligence of defendant; this is always on the plaintiff and never shifts. All that is declared by the instruction criticised is that as a presumption of negligence on the part of the carrier arises from proof of the overturning of the car in which plaintiff was riding, which, in the absence of any evidence on the part of defendant meeting it, would entitle the plaintiff to recover, it is incumbent on the defendant, [411] if it would avoid the effect of the presumption, to produce evidence of equal or greater weight to meet or overcome it, or it will prevail.

That there was no error in the giving of the instruction complained of, and that the construction placed upon it by appellant is unwarranted, is so clearly established by the authorities in this state that further general discussion of the proposition would be unprofitable. In the recent case of Cody v. Market St. Ry. Co., 148 Cal. 90, 82 Pac. 666, the following instruction given by the trial court was presented for review: "Hence, when it is shown that the injury to the passenger was caused by the act of the carrier, in operating the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part." It will be observed that there is no

essential difference between the instruction immediately quoted and the one involved at bar; there is a difference in phraseology only.

In the Cody case (148 Cal. 90, 82 Pac. 666), discussing the objection urged against the instruction there presented, this court said: "It is claimed that the court erred in giving this instruction. It is suggested that the effect of this instruction was to make it incumbent on defendant to overcome the showing of plaintiff by a preponderance of evidence, whereas, under the universally recognized rule, no verdict could be rendered for plaintiff in the absence of a preponderance of evidence showing negligence on the part of defendant. That this contention is not well founded is shown by the opinion of this court in several cases where the question has been discussed. Such an instruction simply informs the jury that when the facts stated therein are shown, a presumption of negligence on the part of the carrier arises, which is sufficient to make out a prima facie case for the plaintiff, and requires the defendant to meet the case thus made, or, in other words, to answer the prima facie case, or it will prevail. But it does not require a defendant to show want of negligence by a preponderance of evidence. It does no more than to require him to make such showing as to want of negligence as will leave the jury, with all the evidence before it, unsatisfied as to whether there was negligence on defendant's part, and if, on the whole [412] case, the scale does not preponderate in favor of the presumption of negligence, and against the defendant's proof, plaintiff is not entitled to a verdict, for he has not established his case by a preponderance of evidence, as he was compelled to do under the well-settled rule. The term 'burden' or 'burden of proof' is frequently used to signify simply the burden of meeting a prima facie case, rather than the burden of producing a preponderance of evidence, and as used in the instruction in question imported nothing more."

The distinction pointed out is equally shown in previous decisions (Scott v. Wood, 81 Cal. 398, 22 Pac. 871; Kahn v. Triest etc. Co., 139 Cal. 340, 73 Pac. 164; Patterson v. San Francisco etc. Ry. Co., 147 Cal. 178, 81 Pac. 531; Valente v. Sierra Ry. Co., 151 Cal. 534, 91 Pac. 481), which are conclusive against the objection to the validity of the instruction urged by appellant.

Neither, when we examine the entire charge of the court, is there any room for reasonable contention that the jury could have understood the instruction in question to mean

anything more than that the defendant was required to meet by evidence the presumption of negligence arising from the derailment and overturning of the car, or that it should prevail and warrant a verdict for the plaintiff. In eight separate instructions the jury was told by the trial court that the plaintiff, in order to recover, must prove negligence on the part of the defendant by a preponderance of the evidence. They were also told three several times in the instructions that if they found that the evidence in the case on the question of negligence was equally balanced, they should return a verdict for defendant, and, at the request of the defendant, the court instructed the jury that the presumption of negligence arising from the happening of the accident was not a conclusive presumption, but might be rebutted by the defendant; that in rebutting the presumption it was not necessary for the defendant to overcome it by a preponderance of evidence; that it was sufficient if it introduced enough evidence simply to balance the presumption. for on that event the presumption was overcome in the eye of the law. With these instructions before them there could be no misconstruction by the jury of the instruction we have been considering.

413 It is next claimed that the court erred in refusing to give the following instruction tendered by defendant: "If the railroad company has shown the exercise of the required degree of care, it is not obliged to go further and explain the cause of the accident."

All that was pertinent in this instruction was, however, embodied in the instructions given. The jury was told that the law permits the defendant, in answer to any presumption of negligence, to show the facts connected with the accident, and if it appear from them and on the whole evidence that the company had used proper care, the presumption of negligence was overcome, and that if at the time of such derailment the train was being operated with proper care, and, further, that the roadbed, ties and rails at such time and place were constructed, laid and maintained with proper care, and that, from some unforeseen cause, not to be anticipated by the defendant in the exercise of the required degree of care, the wheels left the rail, the railroad company would not be responsible. This was a correct statement of what showing would relieve the defendant from liability, and embraced all that was really material in the instruction refused.

These are the only points made on the instructions.

As to the rulings on the admission of evidence: Plaintiff at the time of the accident was, and for many years prior thereto had been, an insurance solicitor for the New York Life Insurance Company, receiving commissions upon all business secured by him and written by said company. Over the objection of defendant he was allowed to testify to the commissions earned by him for several years prior to the accident, which during that period varied in amounts from two thousand dollars to three thousand seven hundred dollars per annum. It is insisted that it was error to allow this proof. We think not. As elements entering into the damage which plaintiff was entitled to receive as pecuniary loss were the value of his time for the period during which he was disabled by the injuries, and if the injuries impaired his capacity for future earnings, such an amount as would compensate him for loss of such capacity. We know of no better method, and none has been suggested, whereby proof of such pecuniary loss can be presented to the jury than by the testimony of the plaintiff himself as to what his earnings as [414] insurance solicitor were for a number of years and immediately prior to the accident. Naturally, the earnings of one following a vocation such as the plaintiff was engaged in, as they varied in the past, must be uncertain as to the future, but evidence as to what they were in the past must furnish the best basis from which the jury may determine the extent of the pecuniary loss plaintiff has sustained as to either or both of the elements of damage suggested. The authorities sustain the admissibility of such evidence: Ehrgott v. City of New York, 96 N. Y. 264, 48 Am. Rep. 622; Symons v. Metropolitan St. Ry. Co., 58 N. Y. Supp. 327, 27 Misc. Rep. 502; Missouri etc. R. R. v. Vance (Tex. Civ. App.), 41 S. W. 167.

As to other points made by appellant on the rulings as to evidence, we deem them so untenable as to require neither mention nor discussion.

Lastly, it is claimed that the damages are excessive. We can only disturb a verdict in this class of cases for that reason when it appears that the damages are so excessive that the award can be sustained on no other theory than that it was the result of passion or prejudice on the part of the jury. Nothing of the kind appears here. The evidence in the case justified the jury in finding that the plaintiff had been damaged upward of two thousand dollars for expenses—medical services, nursing, etc.—incurred by him by reason of the injuries and for the loss of time while entirely disabled from pursuing his vocation as insurance solicitor. It appeared,

further, that aside from the pain and suffering he endured incident to his injuries, such injuries were of a permanent character, and materially impaired his capacity for future pursuit of his vocation as such solicitor. Under this evidence it was for the jury to exercise an intelligent discretion in the award of damages, and there is nothing in the amount awarded to indicate that it was the result of other than the exercise of such discretion.

The order appealed from is affirmed.

McFarland, J., Shaw, J., Sloss, J., and Henshaw, J., concurred.

Mr. Justice Angellotti did not participate herein, deeming himself disqualified.

Rehearing denied.

Presumptions of Negligence Against Railroad Companies from the happening of accidents resulting in injuries to passengers are discussed in the note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 1020. Some authorities take the view that there is no presumption of negligence on the part of a carrier from the fact that a passenger has been injured while on its train: Anderson v. South Carolina etc. R. R. Co., 77 S. C. 434, 122 Am. St. Rep. 591.

PUCKHABER v. HENRY.

[152 Cal. 419, 93 Pac. 114.]

PLEDGES, LIEN OF—Effect of the Statute of Limitations.—Under section 2911 of the Civil Code of California, declaring that a lien is extinguished by the lapse of time within which an action can be brought on the principal obligation, the lien of a pledge is extinguished by the lapse of time within which an action can be brought upon the debt secured thereby. (p. 78.)

PLEDGEES, Right of After the Debt has Become Barred by the Statute of Limitations.—A pledgee is in the same position as a mortgagee in possession when the statute of limitations has barred the right to maintain an action on his debt. Hence, the pledgor cannot maintain an action to recover possession of the pledged property without first paying the debt. (p. 79.)

PLEDGEE.—Right to Maintain an Action on the Pledge After the Statute of Limitations has Barred the Debt.—If a policy of insurance is assigned as security for the payment of a debt, and the statute of limitations is permitted to bar an action on such debt, the pledgee may, nevertheless, maintain an action on the policy, and thereby obtain payment of his debt, if the amount recoverable is sufficient. (p. 81.)

Mullany, Grant & Cushing and Cushing, Grant & Cushing, for the appellant.

T. Z. Blakeman, for the respondent.

[420] ANGELLOTTI, J. This is an appeal from an order granting defendant's motion for a new trial. The action was originally one against the Mutual Life Insurance Company of New York, a corporation, to recover the amount due on a policy of insurance issued by that company to John P. Henry, upon the life of said Henry, the plaintiff alleging that said policy had been assigned to him by Henry on August 22, 1896. Henry died on January 9, 1902, and the action was commenced May 8, 1902. The insurance company admitting the validity of the policy and alleging that both plaintiff and Kate Henry, administratrix of estate of Henry, claimed the proceeds of said policy, obtained an order substituting said administratrix as defendant, and discharging it from liability to either party, upon depositing in court the amount due on the policy, viz., two thousand five hundred and eleven dollars. This deposit was made. Said administratrix, having been substituted as defendant, filed her answer and so-called cross-complaint. By this pleading she denied the allegations of the complainant as to assignment of the policy. She also alleged that plaintiff's only claim to the policy or any of the proceeds thereof was that he held the policy as security for the payment of a promissory note made and delivered by Henry to Puckhaber in the year 1896 and payable one day after its date, and "that the obligation evidenced by the said promissory note and all thereof had prior to the death of the said John P. Henry become barred by the provisions of the statute of limitations of the state of California, to wit, by the provisions of section 337 of the Code of Civil Procedure of the state of California." She asked that plaintiff take nothing by his action, and that the money deposited be paid to her. Plaintiff answered this so-called cross-complaint, alleging the [421] execution and delivery by Henry to him on August 22, 1896, of a promissory note for six hundred and eighty-eight dollars and fifty cents, together with interest from that date at eight per cent per annum, and the assignment and delivery of said policy as security for such payment. He alleged that no part of this note had been paid, and denied that the obligation evidenced by the promissory note or any part thereof had prior to the death of Henry become barred by the statute of limitations, and also alleged that his rights in and to said policy were not barred. The trial court found

in accord with these allegations of plaintiff as to the assignment and delivery of the policy as security, and the nonpayment of the amount due or any part thereof. It further found that plaintiff's "cause of action herein" is not barred by any provision of the statute of limitations, but made no finding upon the issue as to the barring of such statute of the obligation evidenced by the promissory note. Judgment was given that plaintiff receive out of the sum deposited in court the amount due on said note, and that defendant receive the balance of such sum. Defendant's motion for a new trial was based upon the grounds, among others, that the evidence was insufficient to sustain the finding that the plaintiff's cause of action was not barred by the statute of limitations, and that the decision was against law, in that the court had failed to find upon the issue as to the obligation evidenced by the promissory note being barred by such statute prior to Henry's death.

The evidence showed without conflict that the obligation evidenced by the said promissory note, and all thereof, had become barred by the provisions of section 337 of the Code of Civil Procedure prior to the death of Henry. Section 2911 of the Civil Code provides: "A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." This section is contained in the article relating to extinction of liens, and by section 2877 of the Civil Code, both contracts of mortgage and pledge are expressly made subject to its provisions. In the case of Mutual Life Ins. Co. v. Pacific Fruit Co., 142 Cal. 477, 76 Pac. 67, this court held that, by reason of section 2911 of the Civil Code, the pledgee of a life insurance policy situated precisely as is the plaintiff here could not share in the proceeds of the policy. [422] The effect of that decision is that, by reason of this section, a pledgee who has allowed his remedy upon the principal obligation to become barred cannot retain possession of the pledged property. If this decision is to be followed, it necessarily requires an affirmance of the order granting a new trial. This is conceded by counsel for plaintiff, their claim being that the case cited was incorrectly decided, and should be overruled.

We are satisfied that this court in that case misconceived the effect of section 2911 of the Civil Code. There can, of course, be no question that under its terms the lien of the pledge is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action

can be brought upon the principal obligation. This is all that is said in the opinion as to the effect of this section, and it is apparently assumed from this that the lien of the pledge being extinguished, the pledgee can no longer retain possession of the pledged property, even though the debt for which it was given as security has not been paid. It is in attributing this effect to the extinguishment of the lien that we think the decision is erroneous.

Section 2911, adopted as a part of the original code in 1872, was designed simply to declare the rule previously laid down by the decisions of this court, to the effect that when an action upon the indebtedness is barred by the statute of limitations, action on any contract given by way of security for the debt is also barred. This rule was contrary to the rule existing at common law and in many of our sister states, under which an action might be maintained to foreclose a mortgage not barred by the statute, although the debt for which it was given as security was barred. It was, however, thoroughly established by a line of decisions rendered before the enactment of the codes, commencing with Lord v. Morris, 18 Cal. 482, in which the matter was exhaustively discussed in an opinion delivered by Chief Justice Field. It clearly appears from the note of the code commissioners to the original section that this was the reason for the elimination of the word "not" from the section of the New York code, when such section was otherwise taken as a part of our own Civil Code, the New York section reading, "a lien is *not* extinguished," etc., which was in accord with the rule theretofore established in that [423] state. The effect of the California rule is undoubtedly to prevent any affirmative action on the part of the mortgagee or pledgee to enforce his lien, after the debt is barred by the statute of limitations. In such a case, the lien no longer exists. It has been "extinguished." But the section was not designed to prevent the application of the equitable principle which has always been recognized as warranting courts in refusing to aid the debtor in the recovery of possession of his property from the mortgagee in possession or pledgee, or in removing any cloud upon his title created by an instrument in writing given as security, without paying his debt. This is thoroughly established in this state by the decisions in regard to mortgages, to which the section is equally applicable, and between which and pledges of personal property there is no distinction material to the question under discussion. Although the lien of a mortgage is "extinguished" by the barring of the debt by the statute

of limitations, the mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee, or maintain ejectment against his mortgagee in possession. This is firmly settled in this state by decisions rendered since the adoption of the code sections: Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; De Cazara v. Orena, 80 Cal. 132, 22 Pac. 74; Spect v. Spect, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137; Brandt v. Thompson, 91 Cal. 458, 27 Pac. 763; Hooper v. Young, 140 Cal. 274, 98 Am. St. Rep. 56, 74 Pac. 140; Burns v. Hiatt, 149 Cal. 617, 117 Am. St. Rep. 157, 87 Pac. 196. See, also, Grant v. Burr, 54 Cal. 298. This is in accord with the practically universal rule. A debt is not satisfied or extinguished by mere lapse of time. "The rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and protection of those rights, are of equitable origin, and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity. Courts look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought. Whenever a mortgagor seeks a remedy against his mortgagee, which appears to the court to be inequitable, ... the court will deny him the relief he [424] seeks, except upon the condition that he shall do that which is consonant with equity. The statute of limitations is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf, or for conferring upon him a right of action": Spect v. Spect, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137. It is impossible to reconcile these decisions as to the rights of a mortgagee whose debt has not been paid with the decision under discussion, and no attempt has ever been made to do so. Section 2911 applies alike to mortgages and pledges. The pledgee is in precisely the position occupied by the mortgagee in possession. Property has been placed in his possession by the debtor as security for the discharge of his obligation. It would be as inequitable to assist him in recovering the possession thereof without paying his debt, as to assist a mortgagor in so recovering his property. It is the general rule enunciated by courts of last resort that a pledgor cannot recover possession of the pledged property without paying his debt, although the debt be barred by the statute of

limitations, and this rule is based on the equitable doctrine already stated. This court has announced the same rule in regard to a pledge, although perhaps never in a case where it was necessary to the decision: See Spect v. Spect, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137; Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786; Commercial Sav. Bank v. Hornberger, 140 Cal. 16, 73 Pac. 625. We have no doubt that it is the correct rule in the absence of express provision to the contrary, and that section 2911 of the Civil Code should not be construed as providing to the contrary. To hold otherwise not only implies a legislative intent not shown by the language of the section, but deprives our numerous decisions as to the rights of a mortgagee of real property of the foundation upon which they are based. If Mutual Life Ins. Co. v. Pacific Fruit Co., 142 Cal. 477, 76 Pac. 67, is to be followed, either the decisions as to a mortgagee in possession must be overruled, or, accepting the doctrine of those cases as established as a rule of property which should not now be changed, we shall have two diametrically opposed constructions of section 2911, one for the mortgagee in possession and the other for the pledgee. [425] We cannot see that property rights can by any possibility be injuriously affected by our now declaring what we are satisfied is the true rule in this matter, and declining to follow the decision under discussion.

The case of Conway v. Supreme Council, 131 Cal. 437, 63 Pac. 727, is cited in the opinion in Mutual etc. Co. v. Pacific etc. Co., 142 Cal. 477, 76 Pac. 67, as sustaining the views therein enunciated. The opinion in the Conway case fails to show that the claimants had received or were in possession of the policy, or that they had anything more than a mere equitable lien. The decision goes no further than to hold that in such a case it was essential to the claimant's rights to obtain possession from the beneficiaries of proceeds of the policy, that the lien had not been extinguished by the barring of the principal indebtedness.

In this case, as in Mutual etc. Co. v. Pacific etc. Co., 142 Cal. 477, 76 Pac. 67, the position of the beneficiary is clearly that of the pledgor or his successor seeking to recover possession of the pledged property from the pledgee without paying the debt for which it was pledged. The money paid into court as proceeds of the policy has merely taken the place of the policy held in possession by the plaintiff, and for all the purposes of this action should be deemed to be in the possession of the plaintiff.

It follows from what we have said that the issue as to the debt being barred at the time of the death of Henry was an immaterial issue in this action, and the failure of the court to find on an immaterial issue would not warrant the granting of a new trial. It also follows that the evidence without conflict showed that plaintiff's "cause of action herein" is not barred.

There was no conflict in the evidence upon the proposition that Henry assigned and delivered the policy to plaintiff in pledge as security for the debt evidenced by the note. The right of the plaintiff to collect from the insurance company the amount of the policy when it fell due, followed as a matter of law: Civ. Code, sec. 3006. A new trial could not, therefore, be granted on the ground of insufficiency of evidence to support the finding as to these matters. There is no other point made in support of the order granting a new trial. It is evident that the new trial was granted by the lower [426] court solely because of the decision of this court in Mutual etc. Co. v. Pacific etc. Co., 142 Cal. 477, 76 Pac. 67.

The order granting a new trial is reversed.

Shaw, J., and Sloss, J., concurred.

BEATTY, C. J. I concur in the judgment, and also in the opinion, except that portion thereof referring to the case of Conway v. Supreme Council, 131 Cal. 437, 63 Pac. 727, which case was again before this court on a second appeal: 137 Cal. 384, 70 Pac. 223. I think the effect of the opinion in this case is to overrule—not only the decision of this court in the Mutual etc. Co. v. Pacific etc. Co., 142 Cal. 477, 76 Pac. 67, but also the Conway cases.

McFARLAND, J., HENSHAW, J., and LORIGAN, J. We dissent. In our opinion the law on the point at issue was correctly declared in the case of Mutual Life Ins. Co. v. Pacific Fruit Co., 142 Cal. 477, 76 Pac. 67, and cases cited in the opinion filed in said case.

Rehearing denied.

The Effect of the Bar of the Statute of Limitations against a debt secured by pledge is discussed in the note to Menzel v. Hinton, 95 Am. St. Rep. 662. Where a note is barred by the statute of limitations, no action can be maintained on the mortgage securing it: Bruner v. Martin, 76 Kan. 862, 123 Am. St. Rep. 172.

McKEE v. DODD.

[152 Cal. 637, 93 Pac. 854.]

LIMITATIONS OF ACTIONS upon Note Executed Without the State.—If a note executed in another state is by its terms payable therein, and the maker is a nonresident of this state when the cause of action accrues, the statute commences to run in his favor only when he comes within the state, and if afterward he leaves, the time during which he is absent is not a part of the time within which suit must be commenced. (p. 83.)

LIMITATIONS OF ACTIONS—Place Where Cause of Action is Deemed to have Arisen.—If a note is made and is payable in a state where the maker resides, and he subsequently removes to another state or country, a cause of action does not arise in the state or country where the default occurs, nor successively in each state or country into which he goes, but does arise in the state wherein the note was made and is payable. (pp. 85, 86.)

LIMITATIONS OF ACTION—Statute Respecting Cause of Action in Another State or Country, Construction of.—A statute relating to a cause of action which has arisen in another state or a foreign country, and providing that an action cannot be maintained thereon if it is barred by the laws of such state or country, does not bar an action in this state on a promissory note which might have been barred according to the laws of some foreign country wherein the debtor may have been or resided after its execution, if it is not barred by the laws of the state wherein the note was executed and was by its terms payable. (pp. 85, 86.)

ESTATES OF DECEDENTS—Ancillary Administration—Debts Due Citizens of Foreign Countries, Whether can be Recognized. If ancillary administration is had in this state of the estate of a debtor dying in another state or country, the claim of a citizen of a foreign state can be recognized, allowed and enforced, there being no provision in the statute declaring otherwise. (p. 86.)

W. M. Cannon and A. P. Black, for the appellant.

Mullany, Grant & Cushing, for the respondent.

638 HENSHAW, J. This is an action on a claim against the estate of James Dodd, deceased, based upon three promissory notes which were executed in 1891 in New York to plaintiff and payable in that state, plaintiff and the deceased at that time both being residents thereof. All of these notes by their terms became due and payable before the expiration of the year 1891. Shortly after their execution Dodd left New York and never returned. He was in Europe until May, 1892, and thence came to California, arriving here in June, 1892. He kept a liquor saloon in San Francisco until April, 1893, when he sold out his business and went to Honolulu, H. I. He entered business in Honolulu, resided, and had his domicile there until his death in January, 1900. During the time of his residence in Honolulu he made visits.

to San Francisco, but the total length of his stays in this state aggregated less than two years. He left estate, consisting of real and personal property, in Hawaii and in California. His will was duly admitted to probate in Honolulu and ancillary administration was had in the superior court of the city and county of San Francisco. Such property as he left in this state is here in [639] process of administration. McKee, the plaintiff, continued to reside in New York. He presented the notes for payment to the executrix as a claim against the estate in California, which claim was allowed by her. The court refused its allowance, whereupon this action was commenced. It was known to plaintiff that Dodd was residing in Honolulu.

The court awarded judgment to plaintiff upon his claim and defendant appeals, presenting three contentions:

1. Appellant urges that the notes are barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, by which section an action upon a contract founded upon an instrument in writing executed out of the state must be commenced in this state within two years. Section 351 of the Code of Civil Procedure in this connection declares that, "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not a part of the time limited for the commencement of the action." Appellant rules upon the case of Palmer v. Shaw, 16 Cal. 93, as supporting her contention that when Dodd came to the state the cause of action against him here arose, that the statute of limitations then began to run, and that his subsequent departure from the state did not stay this running; but in Palmer v. Shaw, not only was the court's attention not directed to this proposition, but in fact the defendant had been in the state more than two full years before the action was brought, whereas the deceased in this case had been in the state, aggregating all of his visits, less than five hundred days. The rule is to the contrary of appellant's contention and has been expressly so decided in Dougall v. Schulenberg, 101 Cal. 154, 35 Pac. 635. That case is the exact parallel of this as to the leading question involved, and it is there declared that where a note sued upon was in express terms payable out of the state, and the payers were nonresidents of the state when the cause of action accrued, the statute only commenced to run in their favor when they came to this state, and if afterward they left

the state, the time during which they were so absent would not be a part of the time within which the suit must be commenced. It follows herefrom that plaintiff's cause of action was not [640] barred by subdivision 1 of section 339 and section 351 of the Code of Civil Procedure.

2. Appellant next contends that the cause of action was barred by section 361 of the Code of Civil Procedure. This section is as follows: "When a cause of action has arisen in another state, or in a foreign country; and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued." In support of appellant's position under this section it was established in evidence that under the laws of Hawaii an action for the recovery of any debt founded upon any contract, obligation or liability, where the cause of action has arisen in any foreign country, must be commenced within four years after the cause of action accrues. Appellant's reasoning and argument is this: That a cause of action "arose" against the deceased in Hawaii upon his arrival there after the maturity of the notes; that for failure to prosecute, the right of action became barred by the statute of limitations of Hawaii; that thus is presented a case under our section 361 where by the laws of a foreign country an action cannot be maintained upon a contract by reason of lapse of time, wherefore no action is maintainable against such person or his estate in this jurisdiction. It is at once apparent, then, that the crux of this matter is to be found in the true interpretation to be given to the phrase "when a cause of action has arisen." Appellant contends that the cause of action "arose" simultaneously in New York state at the time the promissory notes became due and payable, and also in Europe where at that moment deceased chanced to be; that subsequently the cause of action arose successively in every country through which he passed and arose finally in Hawaii upon his arrival there. If this be the true construction of the statute, then admittedly plaintiff's cause of action is barred. It may at once be conceded that the courts have experienced difficulties in construing statutes of limitations similar in their terms to our section 361. Appellant cites many cases under her contention that the weight of authority is with her. It would not be profitable to analyze these authorities to show in individual instances where the ruling of

the [641] court was determined by differences between their statutes and our own, or where under other circumstances the reasoning does not appeal to us as cogent. Suffice it to say, that from a consideration of all the authorities and from the very reason of the matter itself, we are satisfied that appellant's position cannot be maintained. A cause of action, as Professor Pomeroy points out with his usual lucidity (Remedies and Remedial Rights, secs. 452 et seq.), arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. "Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term and as it is used in the codes of the several states." It was the right of plaintiff to look for payment of his debt at the time it became due and at the place of payment, New York state. It was the duty of the deceased to pay the debt, not only when it became due, but at the place of payment, New York state. His failure in this regard gave rise to the cause of action, and clearly, therefore, that cause of action arose in the state of New York. In a legal sense the cause of action cannot have two places of origin. It can arise in but one place, and that, in such a case as this, is where the note is payable and the payee resides. As between the states the same rights are reserved by the constitution to the citizens of one that are accorded to the citizens of another. But beyond this, the ability of a creditor to pursue his debtor in foreign jurisdictions rests wholly upon comity and upon the laws of such jurisdiction. This cause of action, therefore, did not arise against the deceased in Europe, where he chanced to be, and, indeed, in the particular country of his location at the time of his default, no remedy may have been open to plaintiff. Whatever subsequent remedies by way of rights of action may have accrued to plaintiff because of the deceased's presence in various states and countries, they were one and all subordinate to and dependent upon the vital and essential fact that the cause of action had arisen against him in the state of New York: Story v. Thompson, 36 Ill. App. 370; Chevrier v. Robert, 6 Mont. 319, 12 Pac. 702; Doughty v. Funk, 15 Okl. 643, 84 Pac. 484, 4 L. R. A., N. S., 1029; McCann v. Randall, 147 Mass. 81, 9 Am. St. Rep. 666, 17 N. E. 75. We conclude, [642] therefore, upon this point that section 361 has reference only to the primary and original jurisdiction in which the cause of action arises, and does not contemplate other jurisdictions in which a cause of action

may arise or accrue, depending upon the peripatetic inclinations of the defendant, and in the case at bar, unquestionably, the cause of action had its origin and primarily "arose" in the state of New York.

3. The last contention which appellant advances is that administration in this state being ancillary, no claim of a citizen of a foreign state can here be recognized at all, regardless of any question of the statute of limitations, but that such claim must be transferred to the court of primary jurisdiction. Undoubtedly, there is authority holding this view. Undoubtedly, also, this rule is ably controverted upon the ground that it is unsound in morals, as well as in law, and violates the constitutional guarantee of equal privileges and immunities to citizens. Reference herein may be made to the case of Shegogg v. Perkins, 34 Ark. 117, and to the conflicting views of the justices of that court upon the matter. In Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. Rep. 165, 43 L. ed. 432, it was declared that a state statute giving to residents of that state a priority over nonresidents in the distribution of the assets of a foreign corporation is violative of article 4 of the constitution of the United States giving equal privileges and immunities to the citizens of the several states, and as denying to every person within its jurisdiction the equal protection of the law. We find no statute of our state, which in terms denies to a creditor and resident of a sister state the right to present his claim here, whether the administration in our courts be primary or ancillary, and in view of the provision of the constitution of the United States above referred to, we should doubt the validity of such a statute if found upon our books. However, upon this matter it is necessary here to say no more than that since our statutes do not forbid, comity will dictate that such a claim should be entertained.

For these reasons the judgment appealed from is affirmed.

Lorigan, J., and McFarland, J., concurred.

Hearing in bank denied.

The Words "Where the Cause of Action has Arisen in Another State," as used in the statute of limitations, mean when the cause of action has accrued in the foreign state, or when the plaintiff has the right to sue the defendant there; they do not refer to the origin of the transaction out of which the cause of action has arisen: Bruner v. Martin, 76 Kan. 862, 123 Am. St. Rep. 172, and see the cases cited in the cross-reference note thereto.

The Statute of Limitations of the Forum usually governs, in case of a conflict of laws, unless the statute is regarded as extinguishing

the debt and not merely barring the remedy: See the note to Menzell v. Hinton, 95 Am. St. Rep. 660; Arp v. Allis-Chalmers Co., 130 Wis. 454, 118 Am. St. Rep. 1036. By the laws of Ohio a cause of action accruing in another state and barred by its laws is also barred in Ohio: Hunter v. Niagara Fire Ins. Co., 73 Ohio St. 110, 112 Am. St. Rep. 699. An action on a promissory note cannot be maintained in Kansas under section 22 of the Civil Code, if both parties were nonresidents when the cause of action accrued, and the defendant resided in a foreign state until the cause of action was barred by the law of that state: Bruner v. Martin, 76 Kan. 862, 123 Am. St. Rep. 172.

MARRIOTT v. WILLIAMS.

[152 Cal. 705, 93 Pac. 875.]

EVIDENCE—Acts and Declarations of Injured Person, When not Admissible.—In an action to recover damages for personal injuries inflicted by the defendants by beating and shooting plaintiff, the fact that he asked his wife immediately afterward to come where he lay and lock the door of that room and also the door of another room, and that she immediately did so, is not admissible as part of the res gestae. It tends to show the plaintiff's fear either that the defendants would follow and inflict further injury, or would annoy his wife, and is therefore immaterial, but not prejudicial, and its admission does not warrant a reversal. (p. 89.)

EVIDENCE in an Action for Personal Injuries Inflicted by the Defendants Tending to Show Their Acquittal in a Criminal Prosecution.—In an action to recover damages for personal injuries suffered by the plaintiff at the hands of the defendants, if the plaintiff, on cross-examination, testifies to the criminal prosecution of the defendants for the assault, and that he was the prosecuting witness, it is proper for the court to refuse to admit evidence of their acquittal, because the only legitimate purpose of proving the prosecution was to show the feelings of the plaintiff against the defendants. (p. 91.)

EVIDENCE of the Defendants' Wealth at the Time of the Trial is admissible where the plaintiff asks for exemplary damages. (p. 91.)

DAMAGES FOR ASSAULT, Mitigation of by Evidence of Defamatory Articles Published by the Plaintiff.—In an action by the publisher of a newspaper to recover damages for an assault upon and shooting of him, in which the defendants pleaded, in mitigation of damages, the publication by plaintiff of defamatory articles, it is proper for the court to instruct the jury that these articles cannot be considered in reduction of actual damages accruing from the plaintiff's pain and physical injuries, loss of time and moneys expended, or for any other element of actual damages, but only in reduction of or setoff against exemplary damages. (pp. 91, 92.)

EVIDENCE—Burden of Proof of Self-defense on the Part of Persons Committing an Assault.—When, in an action for personal injuries inflicted on the plaintiff by the defendants, they admit the assault and injury and claim to have acted in self-defense, the plaintiff is not bound to prove in the first instance that he was not the aggressor. The burden of proving self-defense rests on the defendants. (p. 92.)

may arise or accrue, depending upon the peripatetic inclinations of the defendant, and in the case at bar, unquestionably, the cause of action had its origin and primarily "arose" in the state of New York.

3. The last contention which appellant advances is that administration in this state being ancillary, no claim of a citizen of a foreign state can here be recognized at all, regardless of any question of the statute of limitations, but that such claim must be transferred to the court of primary jurisdiction. Undoubtedly, there is authority holding this view. Undoubtedly, also, this rule is ably controverted upon the ground that it is unsound in morals, as well as in law, and violates the constitutional guarantee of equal privileges and immunities to citizens. Reference herein may be made to the case of Shegogg v. Perkins, 34 Ark. 117, and to the conflicting views of the justices of that court upon the matter. In Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. Rep. 165, 43 L. ed. 432, it was declared that a state statute giving to residents of that state a priority over nonresidents in the distribution of the assets of a foreign corporation is violative of article 4 of the constitution of the United States giving equal privileges and immunities to the citizens of the several states, and as denying to every person within its jurisdiction the equal protection of the law. We find no statute of our state, which in terms denies to a creditor and resident of a sister state the right to present his claim here, whether the administration in our courts be primary or ancillary, and in view of the provision of the constitution of the United States above referred to, we should doubt the validity of such a statute if found upon our books. However, upon this matter it is necessary here to say no more than that since our statutes do not forbid, comity will dictate that such a claim should be entertained.

For these reasons the judgment appealed from is affirmed.

Lorigan, J., and McFarland, J., concurred.

Hearing in bank denied.

The Words "Where the Cause of Action has Arisen in Another State," as used in the statute of limitations, mean when the cause of action has accrued in the foreign state, or when the plaintiff has the right to sue the defendant there; they do not refer to the origin of the transaction out of which the cause of action has arisen: Bruner v. Martin, 76 Kan. 862, 123 Am. St. Rep. 172, and see the cases cited in the cross-reference note thereto.

The Statute of Limitations of the Forum usually governs, in case of a conflict of laws, unless the statute is regarded as extinguishing

the debt and not merely barring the remedy: See the note to Menzell v. Hinton, 95 Am. St. Rep. 660; Arp v. Allis-Chalmers Co., 130 Wis. 454, 118 Am. St. Rep. 1036. By the laws of Ohio a cause of action accruing in another state and barred by its laws is also barred in Ohio: Hunter v. Niagara Fire Ins. Co., 73 Ohio St. 110, 112 Am. St. Rep. 699. An action on a promissory note cannot be maintained in Kansas under section 22 of the Civil Code, if both parties were nonresidents when the cause of action accrued, and the defendant resided in a foreign state until the cause of action was barred by the law of that state: Bruner v. Martin, 76 Kan. 862, 123 Am. St. Rep. 172.

MARRIOTT v. WILLIAMS.

[152 Cal. 705, 93 Pac. 875.]

EVIDENCE—Acts and Declarations of Injured Person, When not Admissible.—In an action to recover damages for personal injuries inflicted by the defendants by beating and shooting plaintiff, the fact that he asked his wife immediately afterward to come where he lay and lock the door of that room and also the door of another room, and that she immediately did so, is not admissible as part of the res gestae. It tends to show the plaintiff's fear either that the defendants would follow and inflict further injury, or would annoy his wife, and is therefore immaterial, but not prejudicial, and its admission does not warrant a reversal. (p. 89.)

EVIDENCE in an Action for Personal Injuries Inflicted by the Defendants Tending to Show Their Acquittal in a Criminal Prosecution.—In an action to recover damages for personal injuries suffered by the plaintiff at the hands of the defendants, if the plaintiff, on cross-examination, testifies to the criminal prosecution of the defendants for the assault, and that he was the prosecuting witness, it is proper for the court to refuse to admit evidence of their acquittal, because the only legitimate purpose of proving the prosecution was to show the feelings of the plaintiff against the defendants. (p. 91.)

EVIDENCE of the Defendants' Wealth at the Time of the Trial is admissible where the plaintiff asks for exemplary damages. (p. 91.)

DAMAGES FOR ASSAULT, Mitigation of by Evidence of Defamatory Articles Published by the Plaintiff.—In an action by the publisher of a newspaper to recover damages for an assault upon and shooting of him, in which the defendants pleaded, in mitigation of damages, the publication by plaintiff of defamatory articles, it is proper for the court to instruct the jury that these articles cannot be considered in reduction of actual damages accruing from the plaintiff's pain and physical injuries, loss of time and moneys expended, or for any other element of actual damages, but only in reduction of or setoff against exemplary damages. (pp. 91, 92.)

EVIDENCE—Burden of Proof of Self-defense on the Part of Persons Committing an Assault.—When, in an action for personal injuries inflicted on the plaintiff by the defendants, they admit the assault and injury and claim to have acted in self-defense, the plaintiff is not bound to prove in the first instance that he was not the aggressor. The burden of proving self-defense rests on the defendants. (p. 92.)

may arise or accrue, depending upon the peripatetic inclinations of the defendant, and in the case at bar, unquestionably, the cause of action had its origin and primarily "arose" in the state of New York.

3. The last contention which appellant advances is that administration in this state being ancillary, no claim of a citizen of a foreign state can here be recognized at all, regardless of any question of the statute of limitations, but that such claim must be transferred to the court of primary jurisdiction. Undoubtedly, there is authority holding this view. Undoubtedly, also, this rule is ably controverted upon the ground that it is unsound in morals, as well as in law, and violates the constitutional guarantee of equal privileges and immunities to citizens. Reference herein may be made to the case of Shegogg v. Perkins, 34 Ark. 117, and to the conflicting views of the justices of that court upon the matter. In Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. Rep. 165, 43 L. ed. 432, it was declared that a state statute giving to residents of that state a priority over nonresidents in the distribution of the assets of a foreign corporation is violative of article 4 of the constitution of the United States giving equal privileges and immunities to the citizens of the several states, and as denying to every person within its jurisdiction the equal protection of the law. We find no statute of our state, which in terms denies to a creditor and resident of a sister state the right to present his claim here, whether the administration in our courts be primary or ancillary, and in view of the provision of the constitution of the United States above referred to, we should doubt the validity of such a statute if found upon our books. However, upon this matter it is necessary here to say no more than that since our statutes do not forbid, comity will dictate that such a claim should be entertained.

For these reasons the judgment appealed from is affirmed.

Lorigan, J., and McFarland, J., concurred.

Hearing in bank denied.

The Words "Where the Cause of Action has Arisen in Another State," as used in the statute of limitations, mean when the cause of action has accrued in the foreign state, or when the plaintiff has the right to sue the defendant there; they do not refer to the origin of the transaction out of which the cause of action has arisen: Bruner v. Martin, 76 Kan. 862, 123 Am. St. Rep. 172, and see the cases cited in the cross-reference note thereto.

The Statute of Limitations of the Forum usually governs, in case of a conflict of laws, unless the statute is regarded as extinguishing

the debt and not merely barring the remedy: See the note to Menzell v. Hinton, 95 Am. St. Rep. 660; Arp v. Allis-Chalmers Co., 130 Wis. 454, 118 Am. St. Rep. 1036. By the laws of Ohio a cause of action accruing in another state and barred by its laws is also barred in Ohio: Hunter v. Niagara Fire Ins. Co., 73 Ohio St. 110, 112 Am. St. Rep. 699. An action on a promissory note cannot be maintained in Kansas under section 22 of the Civil Code, if both parties were nonresidents when the cause of action accrued, and the defendant resided in a foreign state until the cause of action was barred by the law of that state: Bruner v. Martin, 76 Kan. 862, 123 Am. St. Rep. 172.

MARRIOTT v. WILLIAMS.

[152 Cal. 705, 93 Pac. 875.]

EVIDENCE—Acts and Declarations of Injured Person, When not Admissible.—In an action to recover damages for personal injuries inflicted by the defendants by beating and shooting plaintiff, the fact that he asked his wife immediately afterward to come where he lay and lock the door of that room and also the door of another room, and that she immediately did so, is not admissible as part of the res gestae. It tends to show the plaintiff's fear either that the defendants would follow and inflict further injury, or would annoy his wife, and is therefore immaterial, but not prejudicial, and its admission does not warrant a reversal. (p. 89.)

EVIDENCE in an Action for Personal Injuries Inflicted by the Defendants Tending to Show Their Acquittal in a Criminal Prosecution.—In an action to recover damages for personal injuries suffered by the plaintiff at the hands of the defendants, if the plaintiff, on cross-examination, testifies to the criminal prosecution of the defendants for the assault, and that he was the prosecuting witness, it is proper for the court to refuse to admit evidence of their acquittal, because the only legitimate purpose of proving the prosecution was to show the feelings of the plaintiff against the defendants. (p. 91.)

EVIDENCE of the Defendants' Wealth at the Time of the Trial is admissible where the plaintiff asks for exemplary damages. (p. 91.)

DAMAGES FOR ASSAULT, Mitigation of by Evidence of Defamatory Articles Published by the Plaintiff.—In an action by the publisher of a newspaper to recover damages for an assault upon and shooting of him, in which the defendants pleaded, in mitigation of damages, the publication by plaintiff of defamatory articles, it is proper for the court to instruct the jury that these articles cannot be considered in reduction of actual damages accruing from the plaintiff's pain and physical injuries, loss of time and moneys expended, or for any other element of actual damages, but only in reduction of or setoff against exemplary damages. (pp. 91, 92.)

EVIDENCE—Burden of Proof of Self-defense on the Part of Persons Committing an Assault.—When, in an action for personal injuries inflicted on the plaintiff by the defendants, they admit the assault and injury and claim to have acted in self-defense, the plaintiff is not bound to prove in the first instance that he was not the aggressor. The burden of proving self-defense rests on the defendants. (p. 92.)

TORT—Action Against Two or More, Necessity for a Single Verdict.—In an action against two or more for a single tort, there cannot be two verdicts for different sums against different defendants upon the same trial. (p. 92.)

TORTS, Joint Liability for.—All who are guilty at all are liable for the whole amount of the actual damages arising from the injury inflicted, irrespective of the degree of culpability. (p. 92.)

H. T. Creswell and P. F. Dunne, for the appellant.

Hiram W. Johnson and Albert M. Johnson, for the respondent.

[706] SHAW, J. This is an action to recover damages for personal injuries inflicted upon the plaintiff by defendants. The jury rendered a verdict against the defendant Williams, alone, and judgment was entered accordingly. The appeal is by the defendant Williams from an order denying his motion for a new trial.

The complaint alleges that the defendants entered plaintiff's home and there assaulted, beat and wounded him, shooting him twice in the leg, breaking both bones below the knee, and piercing the fleshy part of the thigh, and bruising and cutting his head and hand. The answer admits that Beale inflicted the cuts and bruises on the head and hand, and that Williams shot plaintiff in the leg, but alleges that it was all done in necessary self-defense. Upon the trial there was practically no controversy over the fact that Beale cut and bruised the plaintiff's head and hand by beating him with a pistol, and that Williams shot plaintiff in the thigh and below the knee, breaking the bones as alleged.

[707] The plaintiff was the publisher of a weekly paper called the "News Letter." The defendants went to his house for the avowed purpose of demanding and procuring from him a retraction of a statement published in the paper. Upon entering the hallway of the house, the plaintiff asked them for their hats and took Beale's hat and started toward the rear of the hall to hang it on the hat-rack. Before, or immediately after, this was done, Beale demanded of Marriott the retraction and almost immediately struck the blows on the hand and head, while the two were engaged in a scuffle. Marriott broke away and started to run up the stairway, which was on the left side of the hallway. There were twenty steps in the stairway, and about the fourteenth step from the bottom it made a quarter turn to the left to reach the floor above. When he had gone perhaps a little more than halfway up, Williams shot at him three times, hitting him twice, as alleged. Upon receiving the shot which broke his

leg, the plaintiff fell forward upon the upper steps and crawled to the upper floor and into his bedroom. Almost immediately his wife came into the room from the upper part of the stairway, where, as she testified, she witnessed a part of the shooting. The defendants did not pursue Marriott, but stood on the lower floor during the altercation and shooting and until Marriott had disappeared, and then left the house.

Over the objection of the defendant, the plaintiff and his wife were allowed to testify that immediately after the shooting and upon his arrival in the bedroom he asked her to come in where he lay and lock the door of that room, and also to lock the hall door of another room which opened into the bedroom, and that she immediately did so. The objection to this evidence was that it was immaterial and incompetent. This ruling is assigned as error.

It may be conceded that these acts and declarations were not part of the res gestae of the shooting. They occurred after the injury was done, and not in the sight or hearing of the defendants. They tended to prove no fact material to the case, except the physical condition and mental state of the plaintiff after he was shot. They would tend to show the plaintiff's fear that the defendants would follow him and inflict more injury, or annoy him or his wife in some way, and that he was himself unable to take the precautions requested. [708] We may concede that the evidence was incompetent to prove his physical condition, but its effect on that part of the case would be so trivial and inconsequential that it could not produce injury. So far as the acts and declarations tended to show that the defendant was at that time in fear, if we concede that they were not part of the res gestae on that point, they were immaterial. The ruling, then, was perhaps technically erroneous. The inquiry arises whether the proof of said acts and declarations was substantially prejudicial to the case of the defendant.

Counsel contends with much earnestness that it was very prejudicial because of its bearing upon the issue of self-defense. The defendant Williams testified that Marriott, as he was running up the stairway, turned his side around to the left, at the same time making a motion for his hip pocket, and that thereupon he, Williams, believing that Marriott intended to draw a pistol to shoot him, drew his own pistol and fired three times at Marriott as fast as he could. Beale also testified that he saw the threatening motion of Marriott. This motion of Marriott constitutes the sole basis of the claim

of self-defense on the part of Williams. He took no part in the assault on the lower floor of the hall. The argument in regard to the effect of the evidence about the locking of the doors runs thus: The motion toward the hip pocket was prompted by courage and the spirit of combat. The locking of the doors was requested because Marriott was then in fear and desired protection. Proof of the manifestation of the latter feeling, so soon after the manifestation of the former, tended to throw doubt on the existence of the former, and, to that extent, tended to disprove the making of the hip-pocket motion. This argument is not of great force, at best, and what little strength it has is much impaired when we consider that, in the meantime, Marriott had received two severe wounds, one of them dangerous, had had his leg broken by one of them, and that at the time he requested the locking of the doors he was lying on the floor of his bedroom suffering indescribable agonies from his wounds, so he testifies. Such intervening circumstances and such condition would probably unnerve the most courageous person, or at least remove all desire to attack and substitute therefor the desire for protection. There are, however, other facts which show that the [709] evidence could have had no substantial prejudicial effect. It was proven, without contradiction, that Marriott did not have a pistol or other weapon upon his person. The fact was established. Not having any pistol to draw, he could not have made the motion with the intent to draw it. There was, therefore, no real danger to Williams, no necessity for him to shoot in self-defense; nothing, at most, but a mere appearance of danger. If the suspicious motion was made, as claimed, it must have been one of those involuntary movements of the arms which many people make in running, which Williams, in his combative mood, mistook for a motion to draw a pistol, or it may have been a pretense of such motion, made by Marriott to intimidate the defendants and prevent their further pursuit or gain time to reach a place of safety. If it was the latter, it would be entirely consistent with the feeling of fear and the desire for protection manifested in the bedroom, and proof of the existence of one would not tend to disprove the other. If it was the mere accidental and unconscious motion made in running, it would have no significance at all with respect to his state of mind, and the proof of the subsequent fear and desire for protection would be proof of an immaterial fact. In either case the evidence objected to could have produced no injury to the defendants' case.

With regard to the blows, inasmuch as the verdict was in favor of Beale, who alone inflicted them, we must assume that the jury held them to be justified, and hence the effect of the evidence of locking the doors on this part of the case was not injurious.

What has been said is also applicable to the objection to the admission of similar evidence, introduced in rebuttal, in connection with proof of declarations by Mrs. Marriott, inconsistent with her testimony as a witness for plaintiff, and nothing further need be said with regard thereto.

The defendants had been acquitted upon a criminal prosecution for the assault upon Marriott. On cross-examination Marriott testified, in answer to the defendants' questions, that he was the prosecuting witness in that case. The court refused to allow proof of the fact of acquittal of the criminal charge. The evidence was pertinent only to show his feeling and bias against the defendants, and thereby to impeach his credibility as a witness. Even if we concede that natural chagrin at the 710 defeat of the criminal prosecution might have added to the intensity of his feeling, and that, in general, the proof would be admissible for that purpose solely, it would be harmless error here, where the feeling was freely admitted and was manifest throughout the case, and where the circumstances were such that it would have been inferred by the jury, even if there had been no proof or exhibition of it.

The complaint alleged malice on the part of the defendants and asked exemplary damages. It was therefore proper to allow evidence of the defendants' wealth: Sloan v. Edwards, 61 Md. 89; Webb v. Gilman, 80 Me. 177, 13 Atl. 688; Draper v. Baker, 61 Wis. 450, 50 Am. Rep. 143, 21 N. W. 527; Brown v. Evans, 8 Saw. 488, 17 Fed. 912; 3 Cyc. 1095; 2 Am. & Eng. Ency. of Law, 997; 1 Ency. of Ev. 1004. Such evidence is admitted to enable the jury to determine what amount of punishment would be inflicted upon the defendant by compelling him to pay a given sum of money. Hence, it is proper to show his wealth at the time of the trial, as was done here, instead of at the time of the injury.

In mitigation of damages the defendants pleaded the publication of the articles above referred to, which, as they allege, were defamatory and gave them just cause for great indignation. The court instructed the jury that these matters could not be considered in reduction of the actual damages accruing from his pain, physical injuries, loss of time and moneys ex-

pended, or any other element of actual damages, but only in reduction of, or setoff against, the exemplary damages. That this was a correct exposition of the law is well settled: Goldsmith's Admr. v. Joy, 61 Vt. 488, 15 Am. St. Rep. 923, 17 Atl. 1010, 4 L. R. A. 500; Badostain v. Grazide, 115 Cal. 425, 47 Pac. 118; Fenelon v. Butts, 53 Wis. 344, 10 N. W. 501; Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468; Donnelly v. Harris, 41 Ill. 126.

The assault and injury to the plaintiff were admitted. The answer that they were inflicted in self-defense as an affirmative defense, which it was necessary for the defendants to establish by a preponderance of the evidence. A person who sues for a personal injury at the hands of another is not bound to prove, in the first instance, that he was not the aggressor and that the defendant did not act in self-defense. He must prove the assault and the injury, if they are denied. In so doing, he may incidentally bring out facts tending to [711] support a plea of self-defense, and if so the defendant will be entitled to the benefit of such evidence. But the burden of proof to establish the self-defense remains with the defendant. There is no presumption that a bodily injury is justifiable, and the justification must be proven by him who asserts it. The instructions of the court embodying these propositions were properly given: Sellman v. Wheeler, 95 Md. 751, 54 Atl. 512; Gizler v. Witzel, 82 Ill. 322; Johnson v. Strong, 22 Ky. Law Rep. 577, 58 S. W. 430; Phillips v. Mann, 19 Ky. Law Rep. 1705, 44 S. W. 379; Rhinehart v. Whitehead, 64 Wis. 42, 24 N. W. 401.

In actions against two or more persons for a single tort, there cannot be two verdicts for different sums against different defendants upon the same trial. There can be but one verdict for a single sum against all who are found guilty of the tort. All who are guilty at all are liable for the whole amount of the actual damages arising from the injury inflicted, irrespective of the degree of culpability: Huddleson v. Borough of West Bellevue, 111 Pa. 110, 2 Atl. 200; McCool v. Mahoney, 54 Cal. 491; Nichols v. Dunphy, 58 Cal. 605; Everroad v. Gabbert, 83 Ind. 989; Carney v. Reed, 11 Ind. 417; Cooley on Torts, p. 136; 1 Sutherland on Damages, sec. 140. The court did not err in instructing the jury to this effect.

There are some other objections to the charge to the jury and there are other rulings in the admission of evidence which

are questioned, but they are all either covered by what we have said or they are too trivial to require notice.

The order is affirmed.

McFarland, J., Lorigan, J., Angellotti, J., and Beatty, C. J., concurred.

Rehearing denied.

The Measure of Damages as Affected by the Pecuniary Circumstances of the Parties is discussed in the note to Rowe v. Moses, 67 Am. Dec. 562. In assessing exemplary damages for an unprovoked assault, the character and standing of the parties involved should be considered by the jury: Goldsmith v. Joy, 61 Vt. 488, 15 Am. St. Rep. 923. Evidence of the financial condition of the plaintiff is admissible in an action to recover for personal injury, when the evidence will justify the jury in awarding exemplary or punitive damages: Beck v. Dowell, 111 Mo. 506, 33 Am. St. Rep. 547.

Joint Wrongdoers, However Numerous, are Jointly and Severally Liable to the injured person for the full amount of damages occasioned by the wrong: Wisconsin Central R. R. Co. v. Ross, 142 Ill. 9, 34 Am. St. Rep. 49; State v. Boyce, 72 Md. 140, 20 Am. St. Rep. 458; Grundel v. Union Iron Works, 127 Cal. 438, 78 Am. St. Rep. 75; Russell v. McCall, 141 N. Y. 437, 38 Am. St. Rep. 807.

PEOPLE v. KERBER.

[152 Cal. 731, 93 Pac. 878.]

PUBLIC LANDS—Title to Tide-lands.—Lands lying between lines of ordinary high and low tides and covered and uncovered successively by the ebb and flow thereof vest in and belong to the state by virtue of its sovereignty. (p. 95.)

LIMITATIONS OF ACTIONS—Prescriptive Title, When does not Arise as Against the State.—Tide-lands situated in a navigable bay and constituting part of the waterfront thereof are property devoted to a public use, of which private persons cannot obtain title by prescription, and the statute of limitations does not apply to an action by the state or its agents to recover such property from one using it for a private purpose not consistent with the public use. (p. 95.)

TIDE-LANDS, Public Use and Rights in, When may be Terminated.—The public use in lands covered by navigable waters may, by some lawful act of public authority, be discontinued, in which event the property may thereupon cease to be protected by the rules preventing the acquisition of prescriptive title. If an adverse possession can be maintained or the statute of limitations run against such land in regard to such proprietary property, it will begin from the date when the public use ceases and not before. (p. 96.)

LIMITATION OF ACTIONS—Conflict Between the Statutes and the Constitution.—The provisions of a state constitution are of higher force than the statute of limitations or the statute defining

the manner of acquiring title to property by adverse occupancy. If a state constitution prohibits the granting or sale of certain classes of property to private persons, such persons cannot acquire prescriptive title thereto by their occupancy under a claim of ownership. The statute of limitations, as to such property, must be regarded as inoperative after the adoption of the state constitution. (p. 97.)

NAVIGABLE WATERS—Tide-lands, Effect of Establishing the Location for a Seawall or Harbor Embankment.—The action of the board of harbor commissioners establishing a line for a seawall or harbor embankment does not, in advance of the construction of such wall or embankment, operate to withdraw from public use the lands between such line and the shore, so that a prescriptive title can arise in favor of private persons as against the state. (pp. 98, 99.)

PUEBLO LANDS.—An Alcalde Grant After the Cession to the United States has no force as against it nor as against the state of California, to which the title was subsequently transferred. (p. 99.)

PUEBLO LANDS in California—Effect of the Cession to the United States.—Whatever power any Mexican pueblo ever had before the cession of the territory in California to the United States passed to the latter on such cession, and the sole power and authority over such lands was thereupon transferred to the United States, and was by it transmitted to the state of California on its admission to the Union. (p. 100.)

Stearns & Sweet and Haines & Haines, for the appellants.

Victor E. Shaw, for the respondent.

[732] SHAW, J. This action is prosecuted under the authority of section 2578 of the Political Code, to recover possession of certain premises alleged to constitute a part of the tide-lands of the bay of San Diego. Plaintiff had judgment for part of the land sued for and the defendants appeal from that part of the judgment.

The defendants denied ownership of the lands by the state and pleaded, as a defense, the ten year statute of limitations, as set forth in section 315 of the Code of Civil Procedure. The court found that the defendants have been in adverse occupancy of the land for more than ten years next before the action was begun. The evidence shows that their occupancy began on January 1, 1887, and has continued ever since that time. The claim of the defendants is that the action is barred by the statute, and that, under the provisions [733] of section 1007 of the Civil Code, they have acquired title to the land by prescription.

The land in question lies between the lines of the ordinary high and low tides and is covered and uncovered successively by the ebb and flow thereof. It is unquestionably tide-land, in the usual meaning of that term: People v. Davidson, 30 Cal. 379; Rondell v. Fay, 32 Cal. 354; Oakland v. Oakland

Water F. Co., 118 Cal. 160, 50 Pac. 277. It is situated next to the shore line at ordinary high tide and constitutes a strip of land forty feet in width, running from the line of Atlantic street on the west to the line of California street on the east, assuming that those streets extend into the bay. The said shore line at that point is ten feet south of the south line of "H" street in the city of San Diego. The land extends forty feet into the water at ordinary high tide, and, under the existing natural conditions, it is not disputed that it fronts on the waters of San Diego bay and constitutes a portion of the waters thereof used for navigation. It either adjoins or is within the city of San Diego.

Tide-lands of this character vest in and belong to the state by virtue of its sovereignty: Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. Rep. 548, 38 L. ed. 331; Farish v. Coon, 40 Cal. 33; People v. Morrill, 26 Cal. 336; Ward v. Mulford, 32 Cal. 365. And when such tide-lands are situated in a navigable bay and constitute a part of the waterfront thereof, as in the case here, they constitute property devoted to public use, of which private persons cannot obtain title by prescription, founded upon adverse occupancy for the period prescribed by the statute of limitations. In Ward v. Mulford, 32 Cal., on page 372, the court says on this subject: "Such land is held in trust for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them, her grantee takes them upon the same terms upon which she holds them, and of course subject to the public rights above mentioned": See, also, Oakland v. Oakland W. F. Co., 118 Cal. 160, 50 Pac. 277, page 184, where the same passage is quoted with approval. Property thus held by the state in trust for public use cannot be [734] gained by adverse possession, and the statute of limitations does not apply to an action by the state or its agents to recover such property from one using it for private purposes not consistent with the public use. This is the settled rule in this state with respect to all properties so devoted to public use, and tide-lands, underlying waters forming part of the waters of a navigable bay used for navigation, are not, in this respect, to be distinguished from property used for other public purposes. Upon this point the rule is thus stated: "It is immaterial where the title—that is, the record title—is held, whether by the state at large, or by a county, or by

some municipal department or other official body. There can be no adverse holding of such land which will deprive the public of the right thereto, or give title to the adverse claimant, or create a title by virtue of the statute of limitations. The rule is universal in its application to all property set apart or reserved for public use, and the public use for which it is appropriated is immaterial. The same principles which govern the adverse holding of a street, a public square, a quay, a wharf, a common, apply to the adverse holding of a schoolhouse. The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights." This rule has been often repeated in the opinions of this court: Hoadley v. San Francisco, 50 Cal. 265; People v. Pope, 53 Cal. 437; Visalia v. Jacobs, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; Yolo Co. v. Barney, 79 Cal. 375, 12 Am. St. Rep. 152, 21 Pac. 833; Mills v. Los Angeles, 90 Cal. 522, 27 Pac. 354; Orena v. Santa Barbara, 91 Cal. 621, 28 Pac. 268; San Francisco v. Bradbury, 92 Cal. 414, 28 Pac. 803; Archer v. Salinas, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; Ames v. San Diego, 101 Cal. 390, 35 Pac. 1005; Home v. San Francisco, 119 Cal. 534, 51 Pac. 950; Holliday v. San Francisco, 124 Cal. 352, 57 Pac. 146; San Francisco v. Sharp, 125 Cal. 534, 58 Pac. 173; Southern Pacific Co. v. Hyatt, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522.

It is true that the public use may, by some lawful act of public authority, be discontinued or abandoned, and that, in that event, the property may thereupon cease to be protected [735] by this rule. If the title is at that time held by the state, it will thereafter hold it as a proprietor and not as a public agent or sovereign in charge of a public use. If an adverse possession can be maintained, or if the statute of limitations can run against the state, in regard to such proprietary property, it will begin from the date when the public use ceased and not before. If the power is left to the legislature, it may then provide for the sale of such property in order that it may become the subject of private ownership. But, as was said in Yolo County v. Barney, 79 Cal. 375, 12 Am. St. Rep. 152, 21 Pac. 833, the fact that the public authorities in charge of the property have power to discontinue or abandon the public use and sell the property for private use, does not affect the rule above cited, nor enable an occupant to gain it by adverse possession before that event occurs, or to invoke

the statute of limitations to protect his possession against the state.

This was the rule applicable to such property, so held and used, before the adoption of the constitution of 1879. To make such tide-lands more secure against unwise disposition by the legislature to the detriment or destruction of the public rights, the following provision was inserted therein: "All tide-lands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay, or inlet, used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations": Art. 15, sec. 3. Other constitutional provisions prevent the gift of any state property by the legislature: Art. 15, sec. 31. So long, therefore, as property of this character remains subject to use for the purposes of navigation, it cannot without an amendment of the constitution, be disposed of by the state in any manner, except in furtherance of the purposes of navigation to which it is dedicated. The provisions of the constitution are of higher force than the statute of limitations, or the statute defining the manner of acquiring title to property by adverse occupancy. If the state is without power to dispose of this land for private use at all, its officers and agents must be without power to make a virtual disposition of it by their neglect in permitting private persons to occupy it for a period of ten years, under claim of ownership, and thus giving such persons an opportunity to invoke for their benefit a legislative declaration [736] that such occupancy will bar the state of its title. So far as the statutes referred to may have had that effect before the adoption of the constitution, they must be considered as having ceased to exist when the constitution took effect. The constitution declares that all laws inconsistent with its provisions shall cease upon its adoption: Art. 22, sec. 1. In this view of the case, it is immaterial whether title by prescription under the code is or is not founded upon the presumption that the possession was originally taken under a grant which had been lost in the lapse of time, as was the case at common law, even if it were conceded that the rule that there can be no adverse possession of property devoted to public use did not apply to this land.

It is claimed that the land in controversy is not now devoted to public use for navigation; that, by lawful action of the harbor board, the public use has been discontinued and aban-

doned and the land made available for sale to private use, and thus has become proprietary in character; that this occurred more than ten years before the action was begun, and hence, that the statute of limitations has barred the action and the defendants have acquired title. This theory is based on the fact that on March 17, 1890, the board of harbor commissioners of San Diego, under the provisions of sections 2587 and 2588 of the Political Code, established a line for the location of a seawall or a harbor embankment to be thereafter erected, and that this land is between that line and the shore, and some one hundred and fifty feet distant from the seawall line. It may be admitted that when a seawall shall be constructed on this line and the water between it and the shore is thereby excluded from use for navigation, the land between the wall and ordinary high-tide line, not abutting on the wall, nor lying so near it as to be reasonably necessary for purposes incidental to and in furtherance of navigation, may become proprietary lands, which, like ordinary public land, may be sold by the state to private persons for private use not connected with navigation. Perhaps before such wall is constructed, land within the seawall line and so remote therefrom that its use for private purposes would not be detrimental to the public use or the public right, might be disposed of to private persons in connection with, and in aid of, the building of such wall and its adaptation to purposes [737] of navigation and commerce, as, for instance, to raise funds wherewith to build the wall. We are not called upon here to express any opinion on these questions. No such case is presented. No such disposition of the land has been made to the defendants, or to any person. No seawall has been built or projected; no barrier or obstruction to navigation has been placed on the line. For all practical purposes the bay is open to navigation to the actual shore line of high tide over the land in question as fully and freely as before the line was so located. It still remains, in fact, a part of the bay of San Diego which, by section 2579 of the Political Code, is placed in the possession and control of the harbor commissioners with all the rights, privileges, easements and appurtenances connected therewith. They may, at any time, change the location of the line: Pol. Code, secs. 2579, 2588, 2593. Before a seawall is constructed and before private rights accrue from such construction it would seem that their power to make such change is unlimited. It may therefore be changed so as to include this land within the waters of the bay set apart exclusively to navigation. In People v. Will-

iams, 64 Cal. 498, 2 Pac. 393, the court says: "The mere establishment of a harbor line does not deprive the state of the right to control and regulate the water within the line." We think the establishment of the seawall line has no effect whatever upon the character of the waters and tide-lands between it and the shore as property devoted to use for navigation, at least, until some further action is taken looking to the erection of the wall, or the abandonment of the public use of the waters between it and the shore.

On March 18, 1850, the alcalde of the pueblo of San Diego, in consideration of the building of a wharf by the grantees, executed a deed purporting to convey to Jose Aguirre and others fifteen acres of land, including the land in controversy. The defendants claim under this deed and deraign title therefrom by a regular chain of conveyances. The wharf was built, but is gone. Defendants do not claim that they ever maintained any wharf. San Diego was incorporated on March 27, 1850, nine days after the execution of this deed: Stats. 1850, p. 121. This conveyance could not have been of any force or effect to pass the title. At that time the title had accrued to the United States as sovereign. The community which afterward [738] became the city of San Diego was then a mere unincorporated village, or, at most, a Mexican pueblo, exercising some powers in that capacity. Whatever powers it may have possessed over this land as a Mexican pueblo before the cession of the territory to the United States, those powers ceased when the cession took place, and the sole power and authority to dispose of such lands was thereupon transferred to the United States, and was by it transmitted to the state of California at the time of its admission as a state on September 9, 1850. There is nothing in the incorporating act creating the city of San Diego that purports to validate the previous grants of tide lands made by the alcalde. The act of May 14, 1861, refers only to marsh and tide lands within five miles of the city of Oakland and San Francisco, or within one and a half miles of San Quentin prison. The proviso in that act declares that no sales of such land within those limits shall be confirmed by the act, "excepting alcalde grants which are hereby ratified and confirmed": Stats. 1861, p. 363. Statutes which operate to deprive the state of its property are to be construed favorably to the state, or, at all events, are not to be construed strictly against it. Under any theory of interpretation applicable thereto, this statute should not be deemed a ratification of previous alcalde grants of tide lands in or adjacent to San Diego.

We have said nothing so far upon the question whether or not the provisions of section 315 of the Code of Civil Procedure do, in fact, apply to actions by the state for the recovery of possession of these tide-lands, aside from their exemption under the constitution, or as lands devoted to public use. For the purposes of the discussion we have assumed that they would apply but for such exemption, and that their effect was similar to that of section 318 respecting private property, except as to the length of the period of limitations. The language of the two sections, however, is materially different. Section 318 declares the action barred, unless the plaintiff, or his privies, were "seised or possessed of the property in question within five years before the commencement of the action." Section 315 is as follows: "The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless: [739] 1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or, 2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years."

The title of the state to lands lying between high and low tide accrued upon the admission of the state to the Union. If all actions to recover such lands are barred under subdivision 1 of section 315, if begun more than ten years after the title of the state accrued, it would follow that the state could not, at this time, maintain any action for possession thereof against a trespasser, in any case, regardless of the time the unlawful possession had continued. In view of this absurd result it may be doubted if section 315 is applicable at all to actions to recover possession of such tide-lands. A doubt on this subject is expressed in Farish v. Coon, 40 Cal. 33, but the point was not decided. It is not necessary to decide it here. We have noticed it to this extent, merely to explain that we do not decide that the statute was intended to apply in any case.

The judgment is affirmed.

Angellotti, J., and Sloss, J., concurred.

Hearing in bank denied.

The Fee of the Shore on Tide Water Between High and Low Water Mark is in the state as trustee for the public: Allen v. Allen, 19 R. I. 114, 61 Am. St. Rep. 738; Mobile Transportation Co. v. Mobile, 128

Ala. 335, 86 Am. St. Rep. 143. The title of riparian owners in navigable waters where the tide ebbs and flows extends only to high-water mark: Grey v. Mayor and Aldermen of Paterson, 60 N. J. Eq. 385, 83 Am. St. Rep. 642.

Adverse Possession of Public Property is discussed in the notes to Northern Pacific Ry. Co. v. Ely, 87 Am. St. Rep. 775; Northern Pacific Ry. Co. v. Hasse, 92 Am. St. Rep. 844.

CASES

IN THE

SUPREME COURT

OF

CONNECTICUT.

SISTARE v. SISTARE.

[80 Conn. 1, 66 Atl. 772.]

DECREE FOR MAINTENANCE—Enforcement in Other States.—A decree for the payment of future alimony or maintenance which is inconclusive in its character by reason of the reservation to the court which made it of the unrestricted right to change or annul it at discretion, and which is not enforceable in the state of its origin otherwise than by special processes exclusive of execution, and of judgment thereon and execution, is not one creating such a debt of record as will entitle it to or justify extraterritorial enforcement. (pp. 109, 110.)

Walter C. Noyes, for the appellant.

Benjamin Slade, for the appellee.

[1] PRENTICE, J. Action to recover upon a New York decree granting periodical payments for future maintenance, brought to the superior court in New London county where a demurrer to the complaint was overruled (Shumway, J.), and the cause was afterward tried to the court, Thayer, J.; facts found and judgment rendered for the plaintiff to recover five thousand eight hundred and five dollars, and appeal by the defendant. Error, judgment set aside, and judgment for defendant ordered.

[2] In 1899 the plaintiff was by the courts of New York granted a separation from the defendant, her husband, and awarded the custody of their minor son. By the judgment it was further ordered, adjudged and decreed that the defendant, from and after the entry thereof, should pay to the plaintiff, for her maintenance and support and the maintenance and education of said son, the sum of twenty-two dollars and fifty cents per week, to be paid into the hands of

the plaintiff's attorneys of record on each and every Monday. It was further ordered, adjudged and decreed that the plaintiff have leave to apply, from time to time, for such orders at the foot of the judgment as might be necessary for its enforcement and for the protection and enforcement of her rights in the premises.

Section 1771 of the New York Code of Civil Procedure, then in force and under which this order for payments to the wife for her benefit and that of her son was made, provided that in actions for a separation the court might, either in the final judgment or by orders made from time to time before such judgment, give such directions as justice required between the parties for the custody, care, education and maintenance of any of the children of the marriage, and, where the action should be brought by the wife, for her support. It was further provided that the court might, upon the application of either party, after due notice to the other, by order, annul, vary or modify such directions. The right of the defendant to make such an application was conditioned upon leave of the court to make it having been first obtained. Section 1772 provided that the court might require the husband to give security for the payments which he might be directed to make as aforesaid, and that in case of a failure on his part to make payments, or give security, as directed, his personal property and the rents and profits of his real property might be sequestered, a receiver thereof appointed, and the property thus sequestered applied under the direction of the court to the satisfaction of the payments ordered, as justice should require. Section 1773 further provided that where [3] a husband was in default of his payments, and it appeared presumptively that the proceedings specified in section 1772 would be ineffectual, the court might, in its discretion, institute proceedings against him for his punishment for contempt.

The defendant made none of the payments required of him by said order and decree, and this suit was brought to recover the amount in arrears, which at the commencement of the action was five thousand eight hundred and five dollars. Judgment for that sum was rendered.

The complaint recited the issuance of the order and its terms in full, that it still remained in full force and effect, and that payments had not been made as ordered to the amount of eight thousand five hundred dollars, and prayed for judgment for ten thousand dollars damages. The defendant demurred, for the reasons that the so-called judgment or

decree sought to be enforced was not one for the present payment of a definite sum of money, and therefore could not be enforced in this state; that it did not create a debt or obligation which was enforceable in an action of the character of the present, but only by the court which issued it; and that it was not such a judgment as was entitled to full faith and credit in this state and enforceable by action here. This demurrer was overruled, whereupon the defendant answered over. Upon the trial the same questions which were presented upon the demurrer were again presented. The trial court, however, accepted the rulings upon the demurrer as the law of the case, and upon the facts found rendered judgment as stated.

The nature, operation and effect, within the state of New York, of orders like that in question, directing payments in futuro to a wife by a husband living in judicial separation and passed in 1899 pursuant to [4] the then provisions of statute, have been well settled by the repeated decisions of the courts of that jurisdiction. They have been declared to be tentative provisions which remain at all times within the control of the court issuing them and subject at any time to modification or annulment: Tonjes v. Tonjes, 14 App. Div. 542, 43 N. Y. Supp. 941. The right of modification or annulment which is thus reserved to the court is one which extends to overdue and unsatisfied payments as well as to those which may accrue in the future: Sibley v. Sibley, 66 App. Div. 552, 73 N. Y. Supp. 244; Goodsell v. Goodsell, 94 App. Div. 443, 88 N. Y. Supp. 161; Kiralfy v. Kiralfy, 36 Misc. Rep. 407, 73 N. Y. Supp. 708; Wetmore v. Wetmore, 34 Misc. Rep. 640, 70 N. Y. Supp. 604. The amount awarded "does not exist as a debt in favor of the wife against the husband in the sense of indebtedness as generally understood": Tonjes v. Tonjes, 14 App. Div. 542, 43 N. Y. Supp. 941. The order is not one "which simply directs the payment of a sum of money," and not such an one as can have enforcement by execution: Weber v. Weber, 93 App. Div. 149, 87 N. Y. Supp. 519. The special remedies provided in sections 1772 and 1773 for the enforcement of the orders are exclusive: Weber v. Weber, 93 App. Div. 149, 87 N. Y. Supp. 519; Branth v. Branth, 20 Civ. Pro. 33, 13 N. Y. Supp. 360. No judgment in another court can be entered upon them: Branth v. Branth, 20 Civ. Pro. 33, 13 N. Y. Supp. 360.

Such being the character of the order before us, as declared by the courts of the jurisdiction from which it comes, the conclusion would seem inevitable, not only that the courts

of this state are under no constitutional obligation to give effect to it in the manner here sought, but ought not, as an act of comity, to do so, since it would thus be given a greater effect than would be given to it in the jurisdiction of its origin: M'Elmoyle v. Cohen, 13 Pet. (U. S.) 312, 10 L. ed. 177; Mills v. Duryee, 7 Cranch (U. S.), 481, 3 L. ed. 411; Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683.

But we are not left without authoritative declarations as [5] to the extraterritorial value of this New York decree. A Mrs. Lynde was by the court of chancery of New Jersey granted a separation from her husband, and it was adjudged that she was entitled to recover seven thousand eight hundred and forty dollars as alimony then due and payable, and that her husband pay to her permanent alimony at the rate of eighty dollars a week from the date of the decree. The statutes of New Jersey contained no express reservation of power to the court to modify or annul allowances of alimony so made, but the courts had said that they exhibited the intention that the subject should be continuously dealt with according to the varying conditions and circumstances: N. J. Gen. Stats., vol. 2, p. 1269 et seq.; Lynde v. Lynde, 54 N. J. Eq. 473, 35 Atl. 641. As to the methods of enforcing such decrees the New Jersey statutes contained substantially the same provisions for security, sequestration and receivership proceedings as were embodied in the New York code when the order in the present case was made, as recited in the statement of facts. It thus appears that the provision for the payment of future alimony to Mrs. Lynde in New Jersey was affected by no condition which did not equally affect that to Mrs. Sistare in New York. There was the same reserved power of modification, only the more clearly and emphatically expressed, and the same provision of special remedies, which the New York courts had gone so far as to declare to be exclusive. Mr. Lynde having failed to make any of the payments required of him, Mrs. Lynde brought suit against him in the courts of New York for the recovery of both the seven thousand eight hundred and forty dollars and the amount of the accrued weekly payments. The appellate courts of that state, whose decisions have special interest as embodying the views prevailing in the jurisdiction from which the order before us comes, and the supreme court of the United States, to which the case was finally taken upon the federal question involved, concurred in holding that the award of seven thousand eight hundred and forty dollars

created a debt of record to which full faith and credit should be given in the courts of a sister state, and that the order for future payments did not [6] create such a debt and did not constitute such a judgment or judicial proceeding as was within the purview of section 1, article fourth, of the constitution of the United States: Lynde v. Lynde, 41 App. Div. 280, 58 N. Y. Supp. 567, 162 N. Y. 405, 76 Am. St. Rep. 332, 56 N. E. 979, 48 L. R. A. 679, 181 U. S. 183, 21 Sup. Ct. Rep. 555. The conclusion thus reached is succinctly stated, and the reasons therefor sufficiently indicated in the language of the opinion of the federal court, as follows: "The decree for the payment of seven thousand eight hundred and forty dollars was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision for the payment of alimony in the future was subject to the discretion of the court of chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum."

In respect to any claim which might be made, that although the courts of this state are under no obligation to enforce the present New York decree they should as an act of comity do so, the opinions in the cases referred to suggest a sufficient answer to it when they note the inconclusive character of a decree which remains subject to change in the discretion of the court rendering it, and further invoke the elemental principle that collateral remedies provided in one state for the enforcement of its decrees cannot be carried over into another jurisdiction and there utilized. "The provisions for bond, sequestration, receiver and injunction, being in the nature of execution, and not of judgment, could have no extraterritorial operation; but the action of the courts of New York in these respects depended on local statutes and practice of the state": Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct. Rep. 555, 45 L. ed. 810. Our courts are now asked to render a money judgment for the accrued payments as upon a debt of record, and to enforce that judgment by execution. To do so involves not only disregarding the discretionary control reserved to the New York court in respect to both past and future payments, but also giving effect by judgment and execution to a decree which could not, [7] as we have seen, be made the foundation of such a judgment in New York or enforced by execution there.

But it is said that the case of Barber v. Barber, 21 How. (U. S.) 582, 16 L. ed. 226, lays down a doctrine contrary to that expressed in Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct.

Rep. 555, 45 L. ed. 810, that this earlier case was not overruled in the later, and that therefore it is to be reckoned with before any statement of the federal doctrine can be confidently made. A careful examination of the two cases referred to will disclose that neither holds all that is frequently attributed to it, and that when rightly interpreted there is no lack of harmony between them. The Barber case (21 How. 582, 16 L. ed. 226), grew out of an allowance of future alimony made to Mrs. Barber by the courts of New York in 1844. Subsequently the husband in judicial separation moved to Wisconsin, where the wife, having found him, brought an action in equity in the United States district court for the district of Wisconsin to recover the amount of the payments in arrears, and judgment was rendered in favor of her contention. The controversy waged in the supreme court of the United States concerned the question of jurisdiction, and the somewhat extended opinion rendered deals with the various aspects of that question, which the majority opinion stated to be, "whether a wife divorced a mensa et thoro may not have a domiciliation in a state of this Union different from that of her husband in another state, to enable her to sue him there by her next friend, in equity, in a court of the United States, to carry into judgment a decree which has been made against him for alimony by a court having jurisdiction of the parties and the subject matter of divorce." As incidental to the discussion of one of the subordinate phases of this general question, the character and effect of the New York decree and its extraterritorial value were touched upon, and the statement made that such orders constituted judgments of record and created debts of record enforceable against the husband by execution or attachment against his person issuing from the court which gave it, and that actions might be brought in the courts of other [8] jurisdictions to carry them into judgment and effect. The judgment of the lower court was affirmed.

It is to be noticed that this statement of the court embodies two propositions, to wit: One as to the local character and effect of the New York decree in question, and the other as to the consequent extraterritorial value of it, and that the second of the propositions is plainly predicated upon the first. Therein lies the gist of the decision in respect to the subject now under discussion; for while the language employed is general in its terms, it manifestly was used of such orders and decrees, absolute in their adjudication, conclusive in their character, and enforceable by or-

dinary legal processes, as was that then under consideration, and as manifestly was not used of every conceivable order and decree relating to future alimony or maintenance. No question was made as to the conclusive character in New York of the decree in question, as establishing there a debt of record. No discussion upon that point appears in the opinion, and no intimation was made as to what the court would have held had the decree been one of a different character. The absence of any such question or discussion, and the unqualified assertion of the first proposition referred to, that is, that the question presented for decision arose upon a conclusive judgment of record enforceable by execution issuing from the court of its origin, is explained when the statutes and decisions of New York are examined and it is found that the assertion was well founded as respects a decree passed in 1844, and for that matter at any time during the next half century.

The courts of New York have no authority in matters of divorce, separation, alimony, etc., save that which is conferred by statute: Erkenbrach v. Erkenbrach, 96 N. Y. 456; Walker v. Walker, 155 N. Y. 77, 49 N. E. 663; Livingston v. Livingston, 173 N. Y. 377, 93 Am. St. Rep. 600, 66 N. E. 123, 61 L. R. A. 800. From 1730 to 1894 no authority was conferred upon the New York courts to modify a decree in separation proceedings directing the payment of alimony or an allowance for future maintenance. Once fixed it remained fixed, except that [9] the decree of separation could be revoked upon the joint application of the parties and the production of satisfactory proof of reconciliation: N. Y. Code Civ. Proc., sec. 1767; Goodsell v. Goodsell, 82 App. Div. 65, 81 N. Y. Supp. 806; Erkenbrach v. Erkenbrach, 96 N. Y. 456; Walker v. Walker, 155 N. Y. 77, 49 N. E. 663. Under such a decree the amount allowed became a vested property right: Livingston v. Livingston, 173 N. Y. 377, 96 Am. St. Rep. 600, 66 N. E. 123, 61 L. R. A. 300. In 1894 and 1895 the legislation which was in force when the present decree was passed, and concerning the effect of which the adjudications hereinbefore referred to have been made, supplanted that which had previously been upon the statute books. In 1900 an act was passed expressly making this new legislation with its reservations of the power of modification or annulment at any time, applicable to decrees granted prior to 1894. This act was declared unconstitutional and ineffective as impairing vested rights: Livingston v. Livingston, 173 N. Y. 377, 93 Am. St. Rep. 600, 66 N. E. 123, 61 L. R. A. 300.

Allowances of future alimony made prior to 1894 created a judicial debt of record and furnished a proper basis for recovery in another action: Wetmore v. Wetmore, 149 N. Y. 520, 52 Am. St. Rep. 752, 44 N. E. 169, 33 L. R. A. 708; Moore v. Moore, 40 Misc. Rep. 162, 81 N. Y. Supp. 729; France v. France, 79 App. Div. 291, 79 N. Y. Supp. 579.

The opinion in the Barber case (21 How. 582, 16 L. ed. 226), after observing that the New York court which granted the decree had the power to enforce it by the issuance of execution, proceeded to express its conclusion as to the extraterritorial value of the decree, by saying that when local enforcement could not be had by reason of the husband's departure from the jurisdiction, action could be brought on behalf of the wife in other jurisdictions to carry the decree into judgment there with the same effect that it had in the state in which the decree was given. The last part of the statement has been commented upon as affirming the extraterritorial operation of special collateral remedies, and as therefore antagonistic to those portions of the opinion in [10] the Lynde case, 181 U. S. 183, 21 Sup. Ct. Rep. 555, 45 L. ed. 810, which touch upon that subject. It is perfectly apparent, however, that the court was speaking of decrees which created fixed debts enforceable by the ordinary judicial processes, and that its language was used only to emphasize the fulness of the faith and credit which would be given to such a decree.

It thus appears that while the Barber case (21 How. 582, 16 L. ed. 226), is authority for the proposition that a decree directing periodical payments by a husband to a wife living in separation, by way of future alimony or maintenance, if it is conclusive in its character and creates a fixed obligation to pay a certain sum of money which will, within the home jurisdiction, be regarded as a debt of record enforceable by execution issuing from the court which granted it, is one to which extraterritorial effect will be given, it is not authority for the doctrine frequently attributed to it, that all orders or decrees for future alimony regardless of their character will be given such effect. The Lynde case, 181 U. S. 183, 21 Sup. Ct. Rep. 555, 45 L. ed. 810, on the other hand, is authority for the proposition that a decree for the payment of future alimony or maintenance which is inconclusive in its character by reason of the reservation to the court which made it of the unrestricted right to change or annul it at discretion, and which is not enforceable in the state of its origin otherwise than by special processes exclusive of execution, and

of judgment thereon and execution, is not one creating such a debt of record as will entitle it to or justify extraterritorial enforcement. It is not, as has sometimes been assumed, authority for the larger proposition that no decree for future alimony or maintenance, whatever its character, can claim or have enforcement in another state.

The two cases may therefore well stand together as declarative, as far as they go, of authoritative federal principles. It is quite conceivable that there lies between them no little debatable ground. It is quite possible that the limits to which the doctrine of the Lynde case, 181 U. S. 183, 21 Sup. Ct. Rep. 555, 45 L. ed. 810, ought to be carried are not clearly determined. But whatever questions of that kind might be suggested, we are not [11] here concerned with them, since it is apparent that the facts of the present case fill out the full measure of the conditions presented in the Lynde case and bring it within the application of the doctrine there laid down. Our conclusion must therefore be controlled by that decision and be adverse to the plaintiff's right to recover.

There is error; the judgment is reversed and the cause remanded for the rendition of judgment in favor of the defendant.

In this opinion the other judges concurred.

The Extraterritorial Effect of Decrees of Divorce is discussed in the note to Felt v. Felt, 83 Am. St. Rep. 616, and in the subsequent case of Forrest v. Fey, 218 Ill. 165, 109 Am. St. Rep. 249, and note. The power of courts to create and enforce liens to secure the payment of alimony is discussed in the note to Harding v. Harding, 102 Am. St. Rep. 700.

Judgments of Courts of Other States are discussed in the note to Montgomery v. Consolidated etc. Co., 103 Am. St. Rep. 304; and judgments of courts of foreign countries are discussed in the note to Tremblay v. Aetna Life Ins. Co., 94 Am. St. Rep. 532.

An Order Awarding Temporary Alimony and suit money, subject to modification by the court, is not enforceable by action in another state: Van Horn v. Van Horn, 48 Wash. 388, post, p. 000. See, also, Synde v. Synde, 162 N. Y. 405, 76 Am. St. Rep. 332.

PLATT BROS. & CO. v. WATERBURY.

[80 Conn. 179, 67 Atl. 508.]

NUISANCE.—Where a City Discharges Sewage into a River so that it is carried to the premises of a lower riparian proprietor, producing noxious and unhealthful gases, the wrong is a public nuisance causing legal injury to the proprietor, although he fails to prove specific damages; and every day's continuance of the acts causing such injury renders the city liable to a suit. (p. 113.)

NUISANCE—When not Authorized by City Charter.—Where a City Discharges Sewage into a Stream so that it is carried to the premises of a lower riparian owner, the fact that the city's charter authorizes it to construct the sewers in question and to acquire by eminent domain so much of the proprietor's land as may be necessary in sewering the city is no defense to his right to specific damages, when his property has not been condemned for such public use. (p. 113.)

NUISANCE—One Recovery, When does not Bar Another.—Where a City Discharges Sewage into a Stream so that it is carried undiluted and unpurified to the premises of a lower riparian proprietor, he suffers a fresh invasion of his legal rights each day that such unlawful act is repeated; therefore, the recovery of a judgment is not a bar to an action for subsequently accruing injuries. (pp. 114, 115.)

NUISANCE—Discharge of Sewage—Limitation of Actions.—An action by a riparian owner for injuries to his property occasioned by the pollution of the stream by city sewage is in the nature of an action of case rather than of trespass, and accordingly is governed by the six years' statute of limitations. (p. 115.)

Lucien F. Burpee, for the appellant.

John K. Beach, for the appellee.

[179] HAMERSLEY, J. The plaintiff now owns and for many years last past has owned, a tract of land two miles south from the city of Waterbury, with manufacturing establishments thereon, through which land flows the Naugatuck river. On said land there is a valuable water privilege from which water is conducted artificially to the manufacturing establishments for the purpose of supplying water therein. In 1884 the defendant city, in pursuance of authority granted [180] by its charter, constructed sewers according to a sewerage system by which the contents of the sewers were discharged into the river at points about two miles above plaintiff's said land. These contents consisted not only of surface drainage, but of the refuse and filth accumulated on the land of citizens. Some time subsequent to 1884 the quantity of such refuse and filth became so large in proportion to the volume of pure water in the river, that the waters of the river were inadequate to properly dilute the sewage, and at times the

filth and noxious substances concentrated by the city and discharged into the river were necessarily carried over and upon the land of the plaintiff, and there created a nuisance dangerous to health and causing pecuniary loss to the plaintiff.

In 1891 the plaintiff brought to the superior court an action to recover of the city damages for the injuries which had been so caused prior to the commencement of that action, and also asking an injunction against the continuance of said nuisance. The court assessed the damages sustained by the plaintiff up to the time of bringing the action at five hundred dollars, and on December 18, 1898, rendered judgment for that amount, and ordered that the city be enjoined against depositing sewage from its sewers into the river above the plaintiff's premises after the first day of December, 1902.

On March 19, 1902, the plaintiff brought the present action. The complaint alleges the plaintiff's ownership of the land and manufacturing establishments, as above described, and that the defendant city of Waterbury on April 24, 1891 (the day following the date of the writ in the former action), and thence until March 19, 1902 (the date of the writ in this action), has discharged from its sewers filthy and noxious substances into the Naugatuck river in such quantities that the water thereof was inadequate to dilute the same, and the same have been carried down the river over and upon the said land of the plaintiff, producing a nuisance dangerous to health, and that the plaintiff has suffered great loss and damage caused by said acts of the defendant done since April 24, [181] 1891, and since the commencement of said former action in which the plaintiff obtained judgment for damages caused by the acts of the defendant done prior to its commencement.

Upon the trial below, the defendant affirmed in its answer that it appeared in the records of the former action that the cause of action therein stated was the same as that set forth in the present complaint, and that the judgment in the former action embraced all damage suffered by the plaintiff on account of said cause of action, including future damages that might accrue because of the continuance of said cause of action; and claimed that the present action was barred by the former judgment of December 18, 1898, and the payment of that judgment by the defendant; and that the cause of action on which both suits were founded being the same, it must have accrued prior to the commencement of the first action, and so the second action was barred by the statute of

limitations. The court overruled these claims, and the appeal assigns this action as error

The defendant also claimed that in any event the statute of limitations applicable to the plaintiff's action was contained in section 1115 of the General Statutes, and was a bar to so much of the plaintiff's cause of action as rested upon acts done more than three years before the date of the complaint. The court overruled this claim, and held that the plaintiff was entitled to recover for injuries suffered within six years prior to the date of the complaint. The appeal assigns this action as error.

The discharge by the defendant from its sewers into the Naugatuck river of foul and noxious substances in such manner that the same are carried by [182] the river over the land of the plaintiff and there deposited, producing noxious and unhealthy gases, is an actionable wrong, and the nuisance thus produced is a public nuisance: Nolan v. New Britain, 69 Conn. 668, 38 Atl. 703. Such a wrong causes legal injury from which damages necessarily result, although the plaintiff fails to prove that he has suffered any specific damages: Watson v. New Milford, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167. Every day's continuance of the acts causing such injury renders the defendant liable to a suit for injuries so caused: New Milford Water Co. v. Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57; Waterbury v. Platt Bros. & Co., 76 Conn. 435, 56 Atl. 856.

The fact that the defendant's charter authorizes it to construct the sewers in question and to acquire by right of eminent domain so much of the plaintiff's property as may be necessary for the public use of sewering the city of Waterbury, is no defense to the plaintiff's right to recover specific damage caused by nuisance upon the plaintiff's land, when no property of the plaintiff has been condemned for such public use. A judgment for all damages thus caused must cover all damage from the unlawful acts done prior to the commencement of the action in which it is rendered; but additional damage caused by like subsequent unlawful acts may be recovered in another action, and the right to have the amount of such additional damage determined in an action at law cannot, without the plaintiff's consent, be taken away by instituting subsequent proceedings for the condemnation of the plaintiff's property: Waterbury v. Platt Bros. & Co., 76 Conn. 435, 56 Atl. 856; New Milford Water Co. v. Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57.

These well-settled propositions were applied by the superior court in the former action between the plaintiff and defendant, commenced April 23, 1891, and controlled the judgment therein rendered for the plaintiff on December 18, 1898. That judgment was affirmed by this court in January, 1900: 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154, 48 L. R. A. 691. It gave [183] the plaintiff five hundred dollars as damage for the defendant's unlawful acts done between 1884 and April 23, 1891, in discharging into the river noxious substances in such manner that the same were carried by the flow of the river to the premises of the plaintiff and there produced a public nuisance, and it covered all damages sustained by the plaintiff by reason of said unlawful acts and nuisance up to April 23, 1891. The present action was commenced on March 19, 1902, and was brought to recover similar damage sustained by the plaintiff between April 23, 1891, and March 19, 1902, by reason of similar unlawful acts done by the defendant between those dates, producing a similar nuisance upon the plaintiff's premises. The superior court having found the facts alleged in the complaint to be true, and that the damages suffered by the plaintiff within six years prior to the date of the complaint amounted to fifteen thousand dollars, properly rendered judgment for the plaintiff to recover that sum. It is settled by the cases above cited as well as by the decisions of this court in the prior litigation between these parties, reported in 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154, 48 L. R. A. 691, 75 Conn. 387, 96 Am. St. Rep. 229, 53 Atl. 958, 60 L. R. A. 211, and 76 Conn. 435, 56 Atl. 856, that the cause of action upon which the plaintiff recovered in the former action was not the construction of its sewers by the defendant in 1884 for the purpose of discharging sewage into the river. The construction of the sewers was lawful, and caused no damage to the plaintiff, and such construction for the purpose of discharging sewage into the river gave the plaintiff no cause of action; the sewers could be used for that purpose without invasion of the plaintiff's right and without damage to his property; but when the defendant discharged its sewage into the river in such quantities and in such manner that the same was carried undiluted and unpurified to the premises of the plaintiff two miles below, there producing a public nuisance to the plaintiff's special damage, the defendant did not make a lawful use but a misuse of its system of sewers, it did an unlawful act, and that unlawful act was a wrongful invasion of the plaintiff's legal [184] rights, and each day such unlawful act

was repeated the plaintiff suffered a fresh invasion of his legal rights. It follows, therefore, that the trial court did not err in overruling the claims made upon the trial by the defendant, viz., that the former recovery by the judgment of December 18, 1898, and the payment of that judgment by the defendant was a bar to this action, and that the plaintiff's right of action stated in the complaint did not accrue within six years before the commencement of the action. The principle leading to this conclusion was treated as one not open to question in the recently decided case of Gorham v. New Haven, 79 Conn. 670, 66 Atl. 505.

In 1734 it was enacted that "no action of trespass, or of the case for slander and defamation, shall be brought but within three years after the matter of fact was committed or transacted": 7 Col. Rec. 499. In 1821 it was enacted that "no action of trespass on the case shall be brought but within six years next after the right of action shall accrue": Rev. 1821, p. 310, sec. 4. These two provisions for testing the right to maintain an action as against the statute of limitations, by the particular form of action the pleader must use, remained substantially unchanged until the common-law forms of action were abolished by the practice act; and that act, in thus destroying this test for the application of the statute of limitations, provided that the defense of the statute of limitations "available in any form of action or suit shall be available in like manner and to the same extent against the complaint founded on the proper subject matter of such an action": Pub. Acts 1879, p. 439. The plaintiff's cause of action is one for which the form of trespass vi et armis as originally framed was not intended. It called for a new form framed to meet the circumstances of the plaintiff's case. In so far as the plaintiff's action seeks to recover damages for a nuisance, case and not trespass was the proper form; in so far as it seeks to recover for an invasion of the plaintiff's ownership in land, it is plainly distinguishable from the forcible entry upon land for which the remedy of trespass [185] was appropriate. We think the plaintiff's complaint is founded on the proper subject matter for the common-law action of case rather than of trespass; and that his action is rather one founded upon a tort unaccompanied with force and where the injury is consequential, within the meaning of section 1111 of the General Statutes, and which, by the terms of that section, may be brought within six years, than one founded upon a trespass to property, which by section 1115 must be brought within three years next after right

of action shall accrue: Newton v. New York etc. R. Co., 56 Conn. 21, 12 Atl. 644.

The trial court did not err in rendering judgment for all injuries the plaintiff had suffered within six years prior to the date of the complaint.

There is no error in the judgment of the superior court.

In this opinion the other judges concurred.

Pollution of the Waters of a Stream by one riparian proprietor to an unreasonable extent gives a cause of action to lower proprietors injured thereby: Tutwiler Coal etc. Co. v. Nichols, 146 Ala. 364, 119 Am. St. Rep. 34, and cases cited in the cross-reference note thereto. As to whether municipal corporations have any greater right than individuals to pollute waters, see the note to Winchell v. Waukesha, 84 Am. St. Rep. 908.

Negligently Allowing Water to escape from a canal lawfully constructed is not a trespass; the liability for consequential damages thus created by the wrong may be enforced in an action on the case but not in an action of trespass: Suter v. Wenatchee Water Power Co., 35 Wash. 1, 102 Am. St. Rep. 881.

DALTON v. KNIGHTS OF COLUMBUS.

[80 Conn. 212, 67 Atl. 510.]

WORDS AND PHRASES.—The Primary Meaning of the Word "Family" is the collective body of persons forming one household under one head, including parents, children, and possibly servants; and this meaning will be given the word unless the context indicates some other meaning. (p. 119.)

BENEFIT SOCIETY—Beneficiaries Belonging to "Immediate Family."—Under a clause in the charter of a benefit society limiting the persons who may be named beneficiaries to those who belong to the "immediate family" of the insured, he may name as his beneficiary an adult daughter living with him as one of his household. (p. 120.)

APPEAL—General Assignment of Error.—An assignment of error that the whole of a charge to the jury is erroneous is too general, and raises no question that the appellate court is bound to consider. (p. 121.)

John J. Phelan, for the appellant.

Charles S. Hamilton and Cornelius J. Danaher, for the appellee.

212 HAMERSLEY, J. The defendant was incorporated by a special act of the legislature, February 24, 1893. Andrew M. Dalton was an insurance member of the defendant organization, and 213 by the terms of this membership the

defendant became obligated to pay, upon the member's death (the conditions of membership having been complied with), a death benefit of one thousand dollars. In March, 1898, in the manner provided in the constitution and laws of the defendant, the said Dalton designated Mary Dalton, the plaintiff, as his beneficiary, who thereupon became entitled, in pursuance of his contract with the defendant, to demand and receive the death benefit which might become payable upon his death. Andrew W. Dalton died August 30, 1901, the plaintiff being then his designated beneficiary. This action was commenced August 14, 1902, to recover a death benefit for one thousand dollars claimed to be payable to the plaintiff upon the death of Andrew W. Dalton. Upon the trial to the jury, the plaintiff claimed to have proved that she was the daughter of Andrew W. Dalton, and at the time of her designation as beneficiary was twenty-five years of age; that at that time Andrew W. Dalton was a widower, living with his six children, all minors excepting the plaintiff; that the plaintiff lived at home as a member of her father's family, kept house for him, and managed the domestic affairs of the family; that her father remarried in 1899, and thereafter, down to the date of his death, the plaintiff continued to live in her father's house, as her home, had no other home or place of residence, and remained unmarried; that whatever earnings she made were turned in to her father, who supported and maintained the household, and that she lived as one of the household and family, the same as her minor brothers and sisters, and that they all lived with, and depended upon, their father for support.

The defendant claimed to have proved that the plaintiff lived in her father's house, acting as his housekeeper from the death of her mother, when the plaintiff was seventeen years old, until 1897; that before she was eighteen, and while living with her father, she had spent three years in learning the dressmaking trade; that in addition to her housekeeping duties she carried on in her father's house the dressmaking business during the years 1895, 1896, and
214 1897; that in 1897 she took a position as clerk in a store for three years, at a salary of six dollars a week, and during that time paid her father for her board and lodging three dollars a week, keeping the balance of her earnings for her own benefit; that in April, 1901, the plaintiff left her father's home and remained absent until August 15th, shortly before her father's death; that during this absence she worked at her trade in Springfield and Northampton, earning ten dol-

lars a week, with which money she paid her board and lodging and deposited a small sum in the savings bank in her own name, and that the plaintiff supported herself and was not dependent upon her father for several years prior to his death.

In view of this state of conflicting evidence and claims, the defendant, in writing, requested the court to charge the jury as follows: "1. To be a legal beneficiary under the 'immediate family' clause in the charter of the Knights of Columbus, the beneficiary must live in and be a part of the deceased member's household, and be under his legal control at the time of his death, must be dependent upon such member, and have a right to look to him for support and protection, and it is the corresponding duty of such member to give such support and protection to such beneficiary or beneficiaries. 2. That if you find from the evidence that the plaintiff is the daughter of Andrew Dalton, and that she, being more than twenty-one years old, had left the home of her father, intending to make a living for herself, and using her own earnings for her own benefit, and that Dalton left a wife surviving him, and minor children, who had been and were a part of his household at the time of his death, and who were dependent upon him for support and protection at the time of such death, then I charge you that in accordance with the laws of the defendant corporation the plaintiff is not the legal beneficiary, or entitled to the death benefit sued for, even if you should find that a death benefit was due."

The court did not so charge. The reasons of appeal assign error in the denial of these requests, and also error [215] "in charging the jury as follows," reciting the whole charge of the court covering more than six pages of the printed record.

The answer to the only real question properly presented by this appeal depends upon the meaning that should be given the words "immediate family," as used in the defendant's charter in describing the persons who are legally capable of taking a death benefit.

The charter forbids the payment of a death benefit to the executor or administrator of a deceased member, and defines the persons to whom alone such benefit may lawfully be paid in the following language: "A. To such person or persons of the immediate family of said member as by him designated. B. To such person or persons, in default of such family, of the blood relatives of such mem-

ber as by him designated. C. In default of any designation by said member, or out of the order named, except by the permission of the board of directors, or their successors, for cause shown, then such aid shall be rendered by said corporation to such family, or relatives who are heirs at law of such member, in the manner above arranged, upon their proof of being of such family or such heirs at law": 11 Special Laws, p. 17; 12 Special Laws, p. 690.

The primary meaning of the word "family" as used in our language to specify a definite group of persons is defined as "the collective body of persons who form one household under one head and one domestic government, including parents, children and servants": Century Dictionary. In construing a writing in which the word "family" is used, this primary meaning should be assumed in determining the expressed intention of the writer, unless there is something in the context to show that it is used [216] with some other meaning: Cheshire v. Burlington, 31 Conn. 326; Hart v. Goldsmith, 51 Conn. 479; Wood v. Wood, 63 Conn. 324, 28 Atl. 520; Crosgrove v. Crosgrove, 69 Conn. 416, 38 Atl. 219; Knights of Columbus v. Rowe, 70 Conn. 545, 40 Atl. 451. Possibly it may be questioned how far, in a modern use of the word "family," servants should be presumed to be included as among the particular persons indicated, but this query is not important in the present case.

The charter plainly indicates two groups of persons, and two only, any member of which may legally take a death benefit. One is described as the "immediate family," and the other as the "blood relatives," of the member; one person may belong to both groups. Both groups are composed of persons of the same family with the member; in the former, reference being had to the primary meaning of "family" as denoting members of one household gathered around one head, and in the latter, to a "family" as denoting individuals related through descent from one stock. "Family" is frequently used to denote those connected by the tie of a common descent, as well as that of a common household: Crosgrove v. Crosgrove, 69 Conn. 416, 38 Atl. 219; Hoadly v. Wood, 71 Conn. 452, 42 Atl. 263. The designated beneficiary must be of the former group, if such a group exists, and if not, he must be of the latter group.

We think that the charter, in limiting the persons eligible to designation as a beneficiary, uses the words "immediate family" with the meaning of a group of persons, of which the insurance member is one, connected as one family,

and from which is excluded any member who has become separated from the group as constituting one household; and that "immediate family" certainly includes all persons bound together by the ties of relationship, as parents and children living together as members of one household under one head. This construction seems to be involved in the decision of Knights of Columbus v. Rowe, 70 Conn. 545, 40 Atl. 451.

217 The vital contention of the defendant is that the words "immediate family," as used in the charter, exclude from the class of eligible designated beneficiaries every person whom the head of the family is not legally bound to support, and therefore excludes an adult child of the head. This contention is without foundation. We necessarily held, in Knights of Columbus v. Rowe, 70 Conn. 545, 40 Atl. 451, that the insurance member need not be the head of the family from which his beneficiary was selected, that the designated beneficiary need not be dependent upon the insurance member for support, but might be a self-supporting person, and either a minor or an adult. The defendant's first request asked the court to charge that, under the "immediate family" clause in the charter, it was essential to the right of a person to claim the death benefit as the designated beneficiary of an insurance member, that such person was under the legal control of, and dependent upon, that member for support, and that the member was under the duty of giving support to such person. This statement of the law is manifestly untrue, and therefore the trial court correctly refused the defendant's first request to charge.

The court did not err in refusing to charge as requested in the defendant's second request. A charge so framed—if it were intended as a statement of the law (which was admitted and undisputed) that the plaintiff was not her father's legally designated beneficiary, if, at the time of his death, she had separated herself from the family and ceased to be a member of his household—would have been an incorrect statement of that law; and if it were intended as a statement of the facts which, if found by the jury, would require them to find the fact that the plaintiff at her father's death had ceased to be a member of his household, it plainly would have been an insufficient and improper statement. The court, however, in its charge did state fairly the conflicting claims as to the facts proved, upon which the jury must find the fact whether or not at her father's death the plaintiff remained a member of his household.

218 The only other assignment of error, namely, that the whole charge as given is erroneous, is too general, and raises no question we are bound to consider: Gen. Stats. 802.

There is no error in the judgment of the superior court.

In this opinion the other judges concurred.

As to Who is a "Member of the Family" of an insured person, who may be designated as his beneficiary, see the note to Bankers' etc. Assn. v. Stapp, 19 Am. St. Rep. 787. A stepfather, not a member of his stepdaughter's household at the time of her death, though previous thereto he had boarded with her for a time, is not a member of her "family" within the meaning of a benefit certificate of insurance issued to her and permitting the payment of her death benefit to a member of her family: Supreme Lodge etc. v. Dewey, 142 Mich. 666, 113 Am. St. Rep. 596.

STATE v. ROSENBAUM.

[80 Conn. 327, 68 Atl. 250.]

WORDS AND PHRASES.—A "Trader" is One Who Makes It His Business to buy merchandise, goods or chattels, to sell at a private sale. (p. 122.)

LICENSE—Whether Employé must Obtain.—A statute providing that dealers and traders in junk shall obtain a license therefor does not require bona fide employés of such dealers to take out license. (p. 123.)

Dennis J. Slavin and James M. Lynch, for the appellant.

Ulysses G. Church, prosecuting attorney, for the appellee.

328 THAYER, J. The accused, who is a minor, was prosecuted and convicted in the trial court of being a dealer in junk without having a license therefor. His defense was that the acts of buying and selling which were proved against him, which he admitted, and which the state claimed constituted him a dealer within the meaning of the law, were done by him as the agent of his brother, who was a licensed junk dealer in the city of Waterbury. His counsel requested the court to charge the jury that if they found as a fact that the accused was so acting in a bona fide capacity, their verdict should be not guilty. The court refused to so charge.

Section 4654 of the General Statutes, under which this prosecution was instituted, provides, among other things, that "every person who engages in the business of buying

or selling second-hand bicycles, junk, old metals, or other second-hand articles, or is a dealer therein, unless licensed therefor, according to law, ... shall be fined," etc. Section 4653 of the General .Statutes, as amended by chapter 43 of the Public Acts of 1903 and chapter 88 of the Public Acts of 1905, provides that "the selectmen of any town, and the chief of police in any city, may grant licenses to suitable persons, to be dealers and traders in second-hand bicycles, junk, old metals, and other second-hand articles"; that such license shall designate the place where such business is to be carried on; that every such dealer shall keep a book in which shall be written "a description of such article, the name, residence and general description of the person from whom, and the time and hour when, such property was received"; that "such book, and the place where such business is carried on, and all articles of property mentioned therein, may be examined at all times" [329] by the authorities of the town or city; and that "every junk dealer doing business in this state shall display on every wagon or vehicle used by him in such business the name of the person conducting said business, the number of the license under which said business is being conducted, and the name of the town where such license was granted."

It is not the purpose of the law to prevent or curtail the business of dealing in junk or other second-hand articles, but to regulate the business by causing the dealers or traders therein to become registered, as licensees, and to submit to public inspection all articles of this class received by them. The junk-shop, when conducted by a dishonest dealer, is likely to become a "fence" or place where burglars and thieves can dispose of their plunder without inquiry and conceal their identity; and the shop of an honest dealer may be made use of by such criminals as a place to dispose of their stolen goods. The legislature has considered it to be in the public interest to have the business so regulated that the authorities of the town or city where the business is conducted shall have open to them a record of the articles received by any such dealer or trader, with the name and a description of the person from whom received, and shall also have an opportunity to inspect the articles received by such dealer. The statute in terms requires only dealers or traders, the persons conducting the business, to be licensed. It punishes licensed dealers for failure to keep the book, make the return, and permit the inspection required by the statute, and punishes every person who is a dealer without a license.

It does not require a license from every person who, not being a dealer or trader therein, buys or sells junk and second-hand articles, nor impose a penalty upon every such person who buys or sells without a license. Many persons who are not dealers or traders therein occasionally buy or sell such articles. A dealer is one whose business it is to buy and sell, as a merchant, shopkeeper, or broker—a trader: Century Dictionary. A trader is one who makes it his business to buy merchandise, goods or chattels, to sell the same at a profit: [330] Bouvier's Law Dictionary. The statute in question contemplates that the licensed dealer will or may act through agents in the conduct of his business, and it provides that he shall display upon every wagon or other vehicle used by him in such business the number of the license under which said business is being conducted, and the name of the town where such license was granted. It does not intend that such employé in his shop or upon his wagons along the highways who may make a purchase or sale of junk shall take out a license before so doing. They are not dealers or traders within the intent of the law. If, therefore, the accused was merely an employé of a licensed dealer, acting in good faith as such in the purchase and sale of junk for his employer, he was not amenable under the statute. He was, therefore, entitled to the instruction requested, and the trial court erred in refusing it.

There is error.

In this opinion the other judges concurred.

The Imposition of License Tax on Traders is discussed in the note to New Orleans v. Telephone etc. Co., 8 Am. St. Rep. 510; People v. Wemple, 27 Am. St. Rep. 562.

PALMER v. MAYO.

[80 Conn. 353, 68 Atl. 369.]

BAILEE—Unauthorized Use of Property.—One who hires a horse to drive to a certain place is liable for an injury to the animal while being driven by him or by others with his consent to a different place, although the injury is due to accident and not negligence; and a third person who so uses the horse with knowledge of the purpose for which it was hired is under a similar liability. (pp. 125, 126.)

Charles S. Hamilton, for the appellant.

Matthew A. Reynolds and Jeremiah F. Donovan, for the appellee.

[354] HALL, J. Upon the trial to the jury in the court of common pleas, the plaintiff, who conducts a livery business in New Haven, offered evidence to prove these facts: Between 6 and 7 o'clock on the evening of May 11, 1906, the defendant Mayo hired a horse and carriage of the plaintiff for the stated purpose of driving to East Haven on business. He did not go to East Haven, but, after driving part way there, drove to the house of one Scott, a son in law of the defendant Cook, and there, at about 8 o'clock, permitted Cook to take the horse and carriage to drive with Scott to his, Cook's home, a few blocks away, Mayo stating to Cook that they must be immediately driven back by Scott, in order that they might be returned to the plaintiff's stables. Instead of going to his home, Cook and Scott drove to West Haven and Savin Rock, visiting several saloons and purchasing a bottle of whisky, and becoming intoxicated, and at about half-past 10 drove against a trolley-pole and trolley-car, by which collision the carriage was destroyed and the horse killed.

The defendant Cook claimed to have proved that he had no knowledge that the horse and carriage belonged to the plaintiff, or that they had been hired to be driven to any particular place, but that he believed, and was informed by Mayo, that they were owned by him; that Mayo invited Scott to take the horse and carriage and give Cook a ride; that Scott thereupon took Cook for a drive in said carriage, Scott at all times driving the horse and Cook having no control over it; that they were not intoxicated, but that the horse became frightened and uncontrollable, and ran into a trolley-pole and in front of a trolley-car, and caused said injuries to the horse and carriage and also serious injuries to said Cook.

The defendant Cook requested the court to charge the jury, in substance, that he would not be liable to the plaintiff for the injury to the horse and carriage, (1) if he had no knowledge of the particular purpose for which they were hired, but supposed from Mayo's representations that they belonged to him; nor (2) if he had no control or [355] management of the horse and carriage, but was merely riding with Scott; nor (3) if the collision with the telegraph or trolley pole and car was an "inevitable accident," caused by the horse becoming frightened and uncontrollable from the noise of a passing train, and without any negligence upon his part.

The charge was favorable to the defendant Cook upon the first and second of these requests, excepting, as the court very properly charged, that Cook would be liable in any event, if it was proved that he negligently drove the horse and carriage into a telegraph or trolley pole as alleged in the complaint, and so caused the injury. As to the third request, the court instructed the jury, in substance, that if Mayo loaned the horse and carriage to Cook, and he knew the purpose for which they had been hired by Mayo, he would be liable, even if the collision with the telegraph or trolley pole and car was accidental and without any negligence on Cook's part.

The third request was rightly refused, nor should a new trial be granted upon the instruction given by the court upon the subject of that request. In the case of Frost v. Plumb, 40 Conn. 111, 16 Am. Rep. 18, which was an action of trover and trespass on the case, the plaintiff sought to recover the value of a horse which the defendant had hired to drive to a stated place, and which had died from having been driven by him and others with his permission, beyond said specified place, and from having been driven immoderately. In granting a new trial, upon the ground that the trial court had erroneously charged the jury that the plaintiff could not recover if he had knowingly let his horse on Sunday for other purposes than those of necessity or charity, this court said (page 113): "It was only necessary for the plaintiff to prove his own title to the property, and a conversion by the defendant. The destruction of the horse was a conversion; and proof that the injury which caused his death occurred while being driven without the consent of the owner shows a complete cause of action without any reference to an illegal contract."

356 A bailee is liable in an action of tort for an injury to property bailed, occurring during a use of it by him, or by others with his consent, which was neither expressly nor impliedly authorized by the contract of bailment, even though such injury was the result of accident and not of negligence in the manner in which the property was used: Ross v. Southern Cotton-Oil Co., 41 Fed. 152; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Buchanan v. Smith, 10 Hun, 474; Lane v. Cameron, 38 Wis. 603; DeVoin v. Michigan Lumber Co., 64 Wis. 616, 54 Am. Rep. 649, 25 N. W. 552; Farkas v. Powell, 86 Ga. 800, 13 S. E. 200; Kellar v. Garth, 45 Mo. App. 332.

Whether one who receives property from a bailee, without knowledge of the purpose for which it is to be used under the contract of bailment, is liable for an injury to it arising from a use not authorized by such contract, without proof of negligence, we have no occasion to decide, since the trial court charged in the defendant Cook's favor upon that question. Nor is the question whether it was proper for the plaintiff to allege in the same paragraph of his complaint, both that Cook unlawfully drove the team to West Haven, and that he negligently drove the horse against the telegraph pole, before us, since it does not appear to have been properly raised in the lower court.

There is no error in the rulings upon evidence complained of. They require no discussion.

The motion to set aside the verdict as against the evidence was properly denied. A perusal of the defendant Cook's testimony is sufficient to satisfy us that the verdict rendered was a just one.

There is no error.

In this opinion the other judges concurred.

Where a Horse is Hired for one purpose or to drive to a certain place, and the bailee uses him for a different purpose or drives him to some other place, he is liable for injuries suffered by the horse although they are the result of accident rather than of negligence: See the note to De Tollenere v. Fuller, 12 Am. Dec. 621. As to whether he is guilty of a conversion in such a case, see Doolittle v. Shaw, 92 Iowa, 348, 54 Am. St. Rep. 562; Malaney v. Taft, 60 Vt. 571, 6 Am. St. Rep. 135.

One Who Borrows a Horse is entitled to bring an action for its value against one whose negligence has caused the death of the animal, the recovery being in trust for the owner: Baggett v. McCormack, 73 Miss. 552, 55 Am. St. Rep. 554; American District Tel. Co. v. Walker, 72 Md. 454, 20 Am. St. Rep. 479.

BITELLO v. LIPSON.

[80 Conn. 497, 69 Atl. 21.]

PRIVATE WAY—Implied Easement in Light.—An express grant of a private way carries no implied grant of a right to have light and air pass over the way to any greater extent than is necessary for the reasonable enjoyment of the right of passage. (p. 129.)

PRIVATE WAY—Projection of Bay Window.—The owner of the fee to a private driveway will not be enjoined from projecting a bay window therein which does not obstruct the passageway nor affect the supply of light and air therein, so as to prevent persons

entitled thereto from passing along it in vehicles and otherwise with comfort and convenience. (pp. 129, 130.)

PRIVATE WAY—Projection of Bay Window.—In determining whether the owner of the fee should be enjoined from projecting a bay window over a private driveway, on the ground that the window may directly interfere with the complainant's use of the way, the proper question is not what use the complainant might possibly attempt to make of the way, but what uses can he reasonably be expected to have occasion to make of it. (p. 130.)

TRIAL—Visit of Judge to the Premises.—An appellate court will not assume that a visit by the trial judge to the premises after the facts had been agreed upon by the parties was made without the consent of counsel, in the absence of a finding to that effect. (p. 130.)

TRIAL.—A Motion to Expunge is an exclusive remedy, which will be granted only when the defect is plain. (p. 131.)

Richard H. Tyner and Louis M. Rosenbluth, for the appellant.

George E. Beers and Carl A. Mears, for the appellee.

[498] HALL, J. Anson Brown owned a tract of land on the northerly side of Washington avenue in New Haven, about eighty-nine feet wide and two hundred and thirty feet deep. In October, 1901, Brown conveyed the northerly end of said tract, a lot some seventy feet on the east and west, and eighty-nine feet on the north and south, to the plaintiff, and also, by the same deed, granted the plaintiff a right of way over the east side of the remainder of the grantor's tract, in the following language: "And the use of a right of way in common with myself, heirs and assigns forever, over a strip of land ten (10) feet wide and one hundred and sixty (160) feet, more or less, deep, from Washington avenue to the above-described land." At the time of said conveyance there was a dwelling-house on the lot conveyed, and there is now also a small barn and sheds upon it.

In August, 1902, Brown conveyed to one De Crosta a tract immediately south of that conveyed to the plaintiff, [499] bounding him northerly on the plaintiff seventy-nine feet and easterly fifty-six feet on "a driveway." There was then a dwelling-house on the tract conveyed to De Crosta.

In June, 1904, the remainder of said original tract, being the land immediately south of De Crosta and fronting on Washington avenue, together with the fee to the driveway on the east side of the same, was conveyed to the defendant. This deed described two parcels of land, the easterly boundary of one being the "driveway eighty-seven (87) feet," and the other being described as follows: "Also another piece or parcel of land fronting ten (10) feet southerly on

said Washington avenue; northerly ten (10) feet on land formerly of Roscoe Brown; easterly and westerly lines running parallel with the above-described property eighty-seven (87) feet, and known as the driveway leading to and from Washington place, subject to the conditions and stipulations of said right of way."

The said strip of land ten feet wide and one hundred and sixty feet long has for about twenty years been used by said Brown and his successors in title to said rear premises, for all purposes of ingress and egress, to and from said lot and buildings now owned by the plaintiff, and it is the plaintiff's only means of access to his said property. It has for a long time been known as Washington place.

In December, 1906, the defendant commenced constructing, on the east side of his dwelling-house, which fronts on Washington avenue and adjoins said driveway, a bay window, eleven feet and six inches above the ground, extending about sixteen feet north from the southeast corner of the house, and projecting over said driveway two feet and six inches.

Upon the question of the possible interference of this bay window with the plaintiff's use of the driveway, these facts are found: The plaintiff is engaged in the ice business, and keeps his ice wagon, which is five feet and four inches high, upon his said premises. A two-horse covered ice wagon is eight feet and six inches high, and six feet two inches wide. The highest furniture van used in New [500] Haven is ten feet six inches high, and seven feet four inches wide. The highest two-horse canvas covered truck is ten feet eleven inches high. The ordinary two-horse truck, loaded with furniture, is not higher than eleven feet. If a high furniture van were to be driven through the driveway into the plaintiff's premises, it could not be turned around on account of the buildings. A two-horse load of loose hay is from eight to ten feet wide and from ten to twelve feet high. The plaintiff purchases his hay by the bale, and has never carted anything over said driveway with which said bay window would interfere.

The finding states that in addition to the above facts found, as stipulated by the parties, the court personally viewed the premises, and that, "in the light of all the surrounding circumstances, and from a view of the premises," reached the conclusion that "the plaintiff is not only entitled to an unrestricted right of way over the strip of land described in the grant to him, for the purpose of passage, but is also entitled to the right of uninterrupted access of

light and air over and across the same, and that the erection of the structure in question is an improper and material interference with and obstruction of such rights, thus rendering the right of way less beneficial and useful."

Among the claims of law made by the defendant was the following: "The owner of the fee in a strip of land over which a right of way is granted by deed, with no reservation of light and air, has a right to construct a bay window over said right of way, provided it is so constructed at so great a height that it does not interfere with the reasonable and ordinary use of said right of way."

The only ruling of the trial court upon the defendant's claims of law was that they were overruled, in so far as they were inconsistent with the judgment rendered and the conclusion stated.

The defendant's said claim was inconsistent with the conclusion of the trial court above set forth, and with the judgment based upon that conclusion. The defendant's
[501] claim was that there being no express grant of an easement of light and air over the strip in question, the owner of the fee might construct a bay window over it at such a height as not to interfere with the reasonable and ordinary use of the right of way. The court said in its conclusion that the plaintiff was entitled not only to unrestricted right of way over the strip, for the purpose of passage, but also "to the right of an uninterrupted access of light and air over and across the same." By this language, as well as from the judgment rendered upon the facts found, it seems clear that the court intended to hold that any material interference, by the defendant, with the "access of light and air over and across" the strip of land was an obstruction of the plaintiff's rights, even though it did not interfere with the reasonable and ordinary use of the right of way.

This ruling was erroneous. By his deed from Brown the defendant acquired the fee to land over which he was building the bay window, encumbered by a right of way previously granted by Brown to the plaintiff, which was a right of passage over the ten-foot strip: Hart v. Chalker, 5 Conn. 311. The deed from Brown to the plaintiff contained no express grant of an easement of light and air. Implied grants of such easements not reasonably necessary for the enjoyment of the rights expressly granted are not favored in this state: Gen. Stats., sec. 4046. There was no implied grant to the plaintiff of a right to have light and air pass over the drive-

way to any greater extent than was necessary for the reasonable enjoyment of the right of passage granted: Puorto v. Chieppa, 78 Conn. 401, 62 Atl. 664; Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582; Atkins v. Boardman, 2 Met. (Mass.) 457, 37 Am. Dec. 100; Gerrish v. Shattuck, 132 Mass. 235. We are unable to see how the projection two feet and a half over the driveway, of a bay window eleven feet and a half from the ground, could so diminish or affect the supply of light and air in the driveway as to prevent those persons who have the right to use it, or those vehicles which are permitted to be [502] driven over it, from passing along it with comfort, safety and convenience, and the trial court has not found that it would. The driveway is not to be kept supplied with light and air for the benefit of the public. The way granted to the plaintiff is appurtenant to his land, and is a private one. That this lane is known as "Washington place" does not make it a public court or highway or thoroughfare. The deed to the defendant describes it as "leading to and from Washington place." The grant to the plaintiff gives no right to any person to use it for any other purpose than in passing to and from the plaintiff's premises.

It follows from what we have said that the judgment was erroneous unless it appears that the bay window itself would constitute a physical obstruction to the proper use of the driveway, such use being the measure of the plaintiff's right under this deed. The court has not found that it would, and the facts found show that it would not. The top of the highest loaded vehicle described in the finding, a two-horse load of loose hay, which never has passed, and probably never will pass, through the driveway, might extend six inches above the bottom of the bay window. If there should ever be any occasion to drive such a loaded vehicle by the bay window, it evidently could be done without any inconvenience. In inquiring whether an injunction ought to be granted upon the ground that the bay window may directly interfere with the plaintiff's use of the driveway, the proper question is not what use the plaintiff might possibly attempt to make of it, but what uses can he reasonably be expected to have occasion to make of it. Such uses would seem to be covered by those the measurements required for which are given in the finding.

The defendant complains of the action of the court in visiting the premises after the facts of the case had been agreed upon by the parties. In the absence of a finding that it was

done without the consent of counsel, we cannot assume that it was.

The motion of the defendant to expunge the allegation [503] of the complaint that the right of way had existed for a long time prior to the conveyance to the plaintiff, for the purpose of furnishing access to Washington avenue for all purposes, including those of light and air, and as the only way from the plaintiff's lot to any public highway, was properly denied. Although not strictly necessary to the complaint, this allegation was not entirely irrelevant, since it tended to more fully state the plaintiff's claim: Dawson v. Orange, 78 Conn. 96, 61 Atl. 101. The motion to expunge is an exclusive remedy, and will be granted only when the defect is plain: Practice Book, 1908, p. 255, sec. 185.

There was error, and the judgment is set aside and the case remanded, with directions to render judgment for the defendant.

In this opinion the other judges concurred.

The Rights and Obligations of Parties to Private Ways are discussed in the notes to Dudgeon v. Bronson, 95 Am. St. Rep. 318-330; Bakeman v. Talbot, 88 Am. Dec. 279-282. The rights and remedies of the parties to ways are further discussed in the monographic note to Welch v. Wilcox, 100 Am. Dec. 114-119. If the owners of lots abutting on an alley have a right to use it for a passageway and watercourse, the owner of one of such lots, who also owns a theater located on the opposite side of the alley, has no right, against the objection of a lot owner having such easement in the alley, to erect a fire-escape on the wall of his theater overhanging the alley, and such erection may be enjoined: Schmoele v. Betz, 212 Pa. 32, 108 Am. St. Rep. 84, 61 Atl. 525. But one of the owners in common of a right of way in an alley who erects an obstruction on his part, beneficial to himself alone, but not incommoding his abutting owner, cannot be compelled to remove such obstruction: Moon v. Mills, 119 Mich. 298, 75 Am. St. Rep. 390.

Easements by Implication are discussed in the note to Powers v. Heffernan, 122 Am. St. Rep. 206.

SHELTON v. WOLTHAUSEN.

[80 Conn. 599, 69 Atl. 1030.]

INTERPLEADER—Funds in Custody of Law.—Where parties to an action of interpleader pay into court the fund involved, the money passes into the custody of the law. The court alone has authority over it, which authority can be exercised only through proceedings in, or relating to, the pending cause. (p. 134.)

INTERPLEADER—Funds in Custody of Law.—Where funds have been deposited in court in an action of interpleader, a stranger to the proceedings who claims a right concerning the fund should apply to intervene in the action and present his claim. (p. 134.)

INTERPLEADER—Funds in Custody of Law.—Where a fund has been paid into court in an action of interpleader, and the court has ordered the clerk to hold the same to await the result of the pending suit, and directs the manner of its payment upon the conclusion of the suit, an action of interpleader by the clerk against persons claiming an interest in the fund is misconceived and irregular. His duty is to comply with the order. (pp. 134, 135.)

ATTACHMENT—Funds in Custody of Law.—Money deposited in court in an action of interpleader and directed by the court to be paid to a third person is not subject to foreign attachment, with the usual consequence that judgment may be followed by scire facias proceedings to appropriate the fund. (p. 136.)

GARNISHMENT.—A Creditor can Acquire No Greater Right to the Effects of the Defendant in the Hands of the Garnishee, or to any debt owing from the garnishee to the defendant or against the garnishee, than the defendant himself had at the time of the garnishment, unless it may be in cases of voluntary or fraudulent conveyances. He can only succeed in putting himself into the position with respect to the effects of debts attached that the defendant occupied. (p. 136.)

FOREIGN ATTACHMENT.—Equitable Interests are not the Subjects of foreign attachment, save as special statutes may have made them so. (p. 137.)

James T. Hubbell, for the appellant.

J. Belden Hurlbutt, for the appellees.

600 PRENTICE, J. August 11, 1902, the defendants Wolthausen and Bouton made and delivered their non-negotiable note for $2,500 to one Settle. This note became due October 31, 1902. October 9, 1902, the Espencheid Hat Company brought an action against Settle, and therein factorized Wolthausen and Bouton. October 11, 1902, Settle assigned the note to the Essex County Trust Company as collateral security for certain sums then and thereafter to be advanced to Settle. November 20, 1902, the trust company brought suit upon the note against the makers in the superior court in Fairfield county, and on February 18, 1903, judgment therein was rendered in favor of the trust company for the recovery of $2,574.16. Settle's indebtedness to the trust company amounted to $718.65. Whatever sum in excess of this amount it should receive from said judgment it was bound to account for to Settle or those who claimed under him. January 31, 601 1903, Settle assigned his interest in the note to John C. Wilson, doing business as John C. Wilson & Company, as security for credits given and to be extended by said firm to Settle, and notice thereof was on February 11, 1903, given to the trust company.

After the recovery of judgment by the trust company, the action on behalf of the Espencheid Hat Company being

still pending, Wolthausen and Bouton, the judgment debtors in one case and garnishees in the other, brought to the superior court in Fairfield county an action in the nature of an interpleader, setting out the facts above recited, and asking that, after the payment to the trust company of said sum of $718.65 due it from Settle, the balance due from them upon the judgment, to wit, $1,855.51, be deposited by them in the hands of the clerk of the court to await the disposition of the action of the hat company against Settle, and be distributed as the court should determine and direct. April 2, 1903, an order was passed in said action directing the deposit with the clerk, who was this plaintiff, by said Wolthausen and Bouton of said sum of $1,855.51, together with the accrued interest thereon. This order was complied with, said sum of $718.65 having been first paid to the trust company. The order of April 2, 1903, besides directing said payment to the clerk, directed him to hold the fund paid to him until the action of the hat company against Settle should be terminated, that he pay to such officer as had in his hands an execution issued against Settle in that case, upon demand, such sum as was required to satisfy it, and that he pay the balance, if any, then remaining in his hands to the trust company. It was further ordered that, upon production to said clerk of a copy of final judgment in said action in favor of Settle, he should pay the entire amount in his hands to the trust company.

July 6, 1903, said hat company began another action for another cause of action, and garnisheed the trust company and the present plaintiff, who had continued to be, and still is, the clerk of said superior court. The two actions [602] instituted by the hat company against Settle remained in the court of common pleas in Fairfield county, to which they were brought, until January, 1905, when they were tried, and judgment was rendered in favor of the plaintiff in each case on April 3, 1905. The amount of the judgment in the first action as afterward, pursuant to the order of April 2, 1903, paid by this plaintiff out of the funds held by him, and the judgment thereby satisfied. The balance then remaining in the plaintiff's hands was $1,029.87. The amount of damages and costs recovered in the second action was $931.15. Demand upon execution was refused by the plaintiff. January 29, 1905, Wilson filed with the plaintiff a copy of the assignment to him from Settle, and then and thereafter claimed the balance in the plaintiff's hands now in controversy. The credits which Wilson had extended to Settle, relying upon

said assignment, amounted to $1,101.01. In this situation the present action was instituted December 22, 1905. April 30, 1907, when judgment was rendered awarding the balance on hand, less certain taxable costs, to the hat company, the amount due upon the Settle judgment exceeded such balance. The right of action in each of the actions brought by the hat company against Settle existed prior to October 1, 1902. Other facts found, having no bearing upon the questions discussed, are omitted.

Wolthausen and Bouton, the Essex County Trust Company, the Espencheid Hat Company, John C. Wilson and Settle are the parties defendant.

The plaintiff is, and during the whole period covered by the events which have culminated in the [603] present controversy has been, the clerk of the superior court in Fairfield county. The fund here involved is the balance of a larger one which was by order of said court, passed in an action therein pending, paid into court and into the plaintiff's hands as its depositary. That action was one in the nature of an interpleader brought by parties who were obligated to pay the amount so ordered to be paid into court and against two defendants who made conflicting claims upon the plaintiffs therefor, and the court was asked, in the exercise of its equitable powers, to adjudicate the rights of the claimants, and to award the fund to the person or persons found entitled to it. The money thus deposited with this plaintiff passed into the custody of the law. It was the res which was the subject matter of the action brought to determine its ownership and disposition. Such being its status, the court alone had authority over it, and that authority was one which could be properly exercised only through the medium of proceedings had in or relating to the pending cause. The jurisdiction which the court had over it could not be invaded by scire facias proceedings in the court of common pleas, or, for that matter, any other court. Its disposition could not be controlled from without or through any other channels than those which the law provides as incidental to a pending action. Methods are provided whereby persons asserting claims, new or old, to funds thus in court awaiting judicial disposition may present such claims to the consideration of the court, being admitted as parties for that purpose, if strangers to the cause. It became the privilege of the hat company, already a party, if it conceived that it had acquired a new status in relation to the money remaining in court, or a new right to share in it, to interpose

that claim. It was likewise the privilege of Wilson, as assignee of Settle, to apply to intervene in the action, and assert any claim which he thought that his situation justified. By no other course could either reach the fund and release it, or any part of it, from the judicial grasp which was upon it. This plaintiff, as the officer and depositary [604] of the court, could recognize no other authority than that which placed the money in his hands pending adjudication and judgment of distribution: Tuck v. Manning 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666.

But that is not all. We have thus far considered the situation presented upon the assumption that no order of distribution of the balance now in contention had been made in the original action. Such, however, is not the fact. The balance, which the hat company and Wilson now claim, and which in the present action has been ordered paid to the hat company, was by the terms of the order passed in that action April 2, 1903, directed to be paid to the Essex County Trust Company, one of the then parties claimant, and the present plaintiff was ordered to so pay it. Such was the situation when the present proceeding was begun, and such it is to-day. The authority alone having jurisdiction to adjudicate as to the disposition of this res had adjudicated. The authority alone competent to command this plaintiff as to his conduct with it had commanded. The present resort to an independent action was therefore misconceived and irregular, as being in disregard of the plaintiff's relation to the money in his hands, of the authority of the court over it in the pending action, and of the order of the court passed therein, or, if it be that the authority of the court in that action had been finally exercised and final judgment rendered, then of the terms of that final judgment, and the present judgment awarding the fund to the hat company must, for that reason, be set aside.

The hat company's claim to the fund rests solely upon its institution of an action against Settle in which the plaintiff was named as garnishee, the service of the writ and complaint upon the latter, as required in garnishment proceedings, the rendition of final judgment in said action in favor of the hat company, the issuance of an execution thereon, and a demand thereunder upon the plaintiff. In answer to this claim it is urged that the money in the plaintiff's hands, being in the custody of the law, could [605] not be made the subject of foreign attachment. The hat company asserts the contrary proposition. The facts before

us disclose a decree of the court directing that the money in controversy be paid to a third party. We have no occasion, therefore, to determine the broad general question, to which the arguments of counsel were for the most part addressed, as to whether or not a fund deposited in court, as this was, can, under our statutes, be made the subject of foreign attachment with any effect. It is of course plain from what has already been said that it cannot, with the usual consequence that judgment may be followed by scire facias proceedings to appropriate the fund. The field of inquiry in this direction is, however, not exhausted in this statement. But we have no occasion to traverse it: See Conover v. Ruckman, 33 N. J. Eq. 303; Trotter v. Lehigh Z. etc. Co., 41 N. J. Eq. 229, 3 Atl. 95; Dunlop v. Patterson Fire Ins. Co., 74 N. Y. 145, 30 Am. Rep. 283; Wehle v. Conner, 83 N. Y. 231; Tuck v. Manning, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666; Colby v. Coates, 6 Cush. (Mass.) 558; Allen v. Gerard, 21 R. I. 467, 79 Am. St. Rep. 816, 44 Atl. 592, 49 L. R. A. 351; Winchell v. Allen, 1 Conn. 385; Stillman v. Isham, 11 Conn. 124. Neither have we occasion to decide the narrower question, sometimes distinguished from the former, as to the effect of garnishment proceedings upon a fund so placed in the hands of a depositary by order of court after the ownership of it has been adjudicated and an order paying it to the defendant in the attachment action has been passed: See Wilbur v. Flannery, 60 Vt. 581, 15 Atl. 203; Williams v. Jones, 38 Md. 555. The situation before us presents other controlling features.

A factorizing creditor can acquire no greater right to the effects of the defendant in the hands of the garnishee, or to any debt owing from the garnishee to the defendant or against the garnishee, than the defendant himself had at the time of the garnishment, unless it may be in cases of voluntary or fraudulent conveyances. He can only succeed in putting himself into the position with respect to the effects or debts attached that the defendant occupied: Fitch v. Waite, 5 Conn. 117; Harris v. Phoenix Ins. [606] Co., 35 Conn. 310; Parsons v. Root, 41 Conn. 161. Settle was the defendant in the action of the hat company. It was, therefore, his debt due from the present plaintiff that was sought to be attached. It was his position with respect to this plaintiff and the fund in his custody into which, giving the attempted garnishment all the effect that such proceedings ever have, the hat company could claim to have been admitted. Settle, however, when the attachment was served upon Shelton, had no claim

to any of the money in the latter's hands. All of that now in controversy had been awarded to the trust company, and Shelton was under the orders of the court to pay it to that company. Until that judicial award and order should be revoked, as it never has been, Settle was powerless to assert any claim against Shelton or to the fund in his keeping.

Furthermore, the money in court was the proceeds of a payment by Wolthausen and Bouton in satisfaction of a judgment in favor of the trust company. The order of April 2, 1903, which made disposition of this fund, recognized the force of this judgment and the rights it gave, save as they were affected by the equities of the situation created by the hat company's garnishment of Wolthausen and Bouton prior to the assignment of the note to the trust company. Settle's position and rights when the second garnishment was made must be determined in the light not only of the order of April 2, 1903, but also of the judgment which lay back of that order, which, together, made the legal right of the trust company to collect and receive the money complete and denied to Settle any right to receive it, save by force of the trust company's duty to account to him for it after it should have received it. Whatever interest Settle may have had to the money in the plaintiff's hands had none other than an equitable foundation, and equitable interests are not the subjects of foreign attachment, save as special statutes may have made them so: Judah v. Judd, 1 Conn. 309; Candee v. Penniman, 32 Conn. 228; Armstrong v. Cowles, 44 Conn. 44; Chase v. 907 Thompson, 153 Mass. 14, 26 N. E. 137; Burnham v. Hopkinson, 17 N. H. 259. The trial court, therefore, erred in giving to the garnishment of the plaintiff the effect it did in awarding the fund to the Espencheid Hat Company.

There is error and the judgment is reversed.

In this opinion the other judges concurred.

The Right of Interpleader is the subject of a note to Connecticut Mutual Life Ins. Co. v. Tucker, 91 Am. St. Rep. 593.

A Balance of the Proceeds of a Sale of attached, perishable personal property, remaining in the custody of the clerk of the court after an execution in favor of the plaintiff has been satisfied, is not subject to garnishment or attachment by trustee process, by one of the defendant's creditors, as such balance, being still in the registry of the court, is in the custody of the law: Allen v. Gerard, 21 R. I. 467, 79 Am. St. Rep. 816.

LITHUANIAN BROTHERHELP SOCIETY v. TUNILA.

[80 Conn. 642, 70 Atl. 25.]

JUDGMENT—Relief Against in Equity.—In a suit for equitable relief against a default judgment, on the ground that the defendant was misled by the statements of the plaintiff's attorney, an averment that the attorney gave the defendant to understand that no action had been, or would be, commenced, is sufficient without stating the precise language which misled. (p. 139.)

JUDGMENT—Relief Against in Equity.—Where, in an action against a benefit society, service is made on its secretary, a foreigner ignorant of our language, who, supposing the summons and complaint to be a notice to call at the office of the plaintiff's attorney, does so, and the attorney, though with no intent to mislead, gives him to understand that no action has been or will be commenced, a default judgment thereafter taken against the society, which has no knowledge of the proceedings, will be relieved against in equity upon the showing of a meritorious defense. (p. 140.)

NEW TRIAL.—The Court of Common Pleas has no jurisdiction to grant a new trial of an action brought before a justice of the peace, except under the provisions of section 816 of the General Statutes. (p. 140.)

Thomas J. Wall, for the appellant.

Samuel A. Herman, for the appellees.

643 HALL, J. The plaintiff is a voluntary association, of which the defendant is a member.

The complaint alleges substantially these facts: The defendant brought an action against this plaintiff to recover alleged "sick benefits," returnable before a justice of the peace on the 12th of June, 1907, the complaint in which was not otherwise served than by leaving, on the 7th of said June, an attested copy thereof at the place of abode of one Petrofski, the secretary of the society, and obtained judgment therein by default, on said return day, for fifty dollars damages and five dollars and seventy-six cents, costs, which he threatens to enforce.

The said secretary of the plaintiff society was a foreigner, and did not well understand and could not read English. He understood from his wife, and from what she informed him the officer leaving the copy had told her, that the copy was a notice to call at the office of the attorney for the defendant Tunila, which he did. The attorney informed him that he had the claim in question against the society for collection, but did not inform him that any suit had been brought upon it, but led Petrofski to believe that the society had better consider the matter, and settle the claim without litigation. At the same time Petrofski informed the attorney that Tunila

had no legal claim against the society, for the reason that, under the constitution and by-laws of the society, it was necessary for Tunila to procure the certificate of one or more reputable physicians [644] that he had been unable to perform manual labor, and was therefore entitled to benefits, and that the physicians would not so certify, but had stated that Tunila was not entitled to benefits.

The plaintiff had no knowledge of the pendency of said action before the justice of the peace, nor that said judgment had been rendered, until after June 12th, when he asked said attorney to permit the default to be opened, and to allow the society to present its defense, which the attorney refused to do.

The plaintiff society has a good defense against the claim of Tunila, and it would be inequitable to enforce said judgment against it.

The complaint asks that the judgment be annulled and set aside, and that the defendant be enjoined from enforcing it.

The trial court properly denied the defendant's motion to expunge the allegations that Petrofski understood, and was informed by his wife, that the copy of the complaint left in service was a notice to call at the attorney's office, and that he called and had the conversation with said attorney as alleged. The facts so alleged were proper evidence that the plaintiff's failure to defend the justice suit was due either to a mistake, or to the wrongful conduct of the defendant's attorney.

The averment, in effect, that defendant's attorney at the described interview gave Petrofski to understand that no action had been, or would be, commenced was sufficient, without stating the precise language by which he was misled. The motion to make the averment more specific, by setting forth the statements which led Petrofski to so believe, was rightly denied.

The defendant's demurrer to the complaint and prayer for relief was properly overruled.

If the plaintiff or Petrofski had failed to appear before the justice of the peace, having knowledge of the pendency of the justice suit, the mere fact that the service of the copy upon Petrofski was defective in point of time would [645] not have given the plaintiff any claim for equitable relief: Gallup v. Manning, 48 Conn. 25.

But the complaint alleges, and the demurrer admits, that the plaintiff had no knowledge, and its secretary did not understand, that an action had been commenced. The aver-

ments are sufficient to admit of proof that the plaintiff's secretary, upon whom alone service of the complaint was made, from a misunderstanding which was contributed to, if not caused, by the conduct of the defendant's attorney, without negligence on his own part, or on the part of the society, failed to appear, or to have anyone appear, before the justice of the peace in behalf of the society. It was not necessary for the plaintiff to allege that the defendant's attorney fraudulently or intentionally misled Petrofski. Proof that he did so innocently might entitle the plaintiff to equitable relief: Wells v. Bridgeport Hydraulic Co., 30 Conn. 316, 79 Am. Dec. 250.

The allegation that the defendant had a good defense to the justice suit, with the averment of what Petrofski told the defendant's attorney as the reason why Tunila had no legal claim against the society, was an averment of a sufficient defense to the justice suit, and of the nature of it.

Fraud, accident, mistake and surprise are recognized grounds for equitable interference, when one, without his own negligence, has lost an opportunity to present a meritorious defense to an action, and the enforcement of the judgment so obtained against him would be against equity and good conscience, and there is no adequate remedy at law: Allis v. Hall, 76 Conn. 322, 56 Atl. 637.

The plaintiff should not, as claimed by the defendant, have asked for a new trial. The court of common pleas had no jurisdiction to grant a new trial of an action brought before a justice of the peace, excepting under the provisions of section 816 of the General Statutes, which do not apply to this case.

There is no error.

In this opinion the other judges concurred.

Relief in Equity Against Judgments is discussed in the notes to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 218; Reiger v. Mullins, 124 Am. St. Rep. 755.

STATE v. HOWELL.

[80 Conn. 668, 69 Atl. 1057.]

CONTEMPT.—An Actual Criminal Intent is not Essential to constitute the publication of articles a contempt of court. (p. 143.)

CONTEMPT.—A Proceeding for Contempt is not a Criminal Prosecution, although it is of a criminal nature. (p. 143.)

CONTEMPT—Absence of Wrongful Intent.—The publication of articles in a newspaper may constitute a contempt of court for which the editor and manager may be punished, although he may have no actual knowledge of the contents of the articles nor any actual intent to interfere with justice or bring disrespect upon the court. Absence of wrongful intent may be considered in mitigation of the offense but not as an excuse therefor. (p. 143.)

CONTEMPT—Publication not Reaching Court or Jury.—The publication of articles referring to a pending trial and circulated in the neighborhood may constitute a contempt of court, though they do not actually reach the eyes of the court or jury. (pp. 143, 144.)

CONTEMPT—Publication of Court Proceedings.—A newspaper article printed two days before a trial has begun but after the case has been assigned for trial, which assumes to state the evidence to be produced by witnesses upon the trial, with improper comment thereon and reflections upon the parties to the action, and improperly expresses an opinion as to the right of the controversy, the purpose of the article being the disparagement of the defense and the intimidation of the witnesses who might support it, constitutes a contempt of court. (p. 144.)

CONTEMPT—Publication of Court Proceedings.—An article published in a newspaper pending a trial, purporting to be an account of what occurred at the trial, which takes sides, improperly comments on the evidence, expresses opinions upon the merits of the case and the effect that should be produced by the witnesses, which contains statements calculated to intimidate possible witnesses and also states, as facts and evidence as to what occurred upon the trial, matters not given in evidence and not occurring upon the trial, constitutes a contempt of court. (p. 144.)

Robert E. De Forest, for the appellant.

William B. Boardman, special state's attorney, for the appellee.

669 THAYER, J. Counsel for the defendant, in his brief, summarizes the various questions stated in the reasons of appeal as (1) questions relating to the admissibility of evidence; (2) the question of the liability of the defendant to criminal punishment for contempt, in the absence of any criminal intent; (3) the question of the liability of anyone for criminal contempt, when it does not appear that the alleged contemptuous publication in fact interfered in any way with the course of justice, or was known to the court, jury, witnesses, or anyone concerned in the case or its trial, until called to the court's attention after the trial; (4) the ques-

tion whether the publications in themselves could, under the circumstances of the case as found, be [670] legally regarded as in contempt of court, so as to subject anyone to punishment upon that ground. We shall adopt this summary of the questions presented.

The defendant was charged, in the application, with having published, in the "Bridgeport Herald" and the "Waterbury Herald," two articles relating to a cause then pending in the superior court at Danbury, where said papers circulated, which tended to unduly interfere with the administration of justice, to obstruct the court in the discharge of its duties, and to prejudice the public and the jury as to the merits of said cause. After demurrers to the application had been overruled, he offered himself as a witness, for the purpose of purging himself of the contempt. He testified that, although he was the editor and manager of the newspapers mentioned, he did not read the articles before publication, and had no actual knowledge of their contents, or that they contained matter disrespectful to the court, or tending to interfere with the course of justice in the trial of the case to which they related, and that in their publication he had no intent to be disrespectful to the court, or to interfere with the course of justice. He admitted the publication of the articles in the newspapers. One of them was published two days before the trial of the case referred to began in the superior court, but after it had been assigned for trial; the other was published after the trial began and before it was completed. Upon his cross-examination the defendant was asked to identify several other articles relating to the same case and similar in their nature to those complained of, published in the same newspapers during his management and editorship of the same but prior to the assignment of the case for trial, and the articles were offered and received in evidence as tending to contradict his statement that he had no knowledge of the publication of the articles complained of. We think the evidence was admissible for the purpose for which it was received. But as the court has found that the defendant had no actual knowledge of the contents of the articles complained of, and no actual intent, by the publication of [671] the articles, to obstruct or interfere with the due course of justice in the trial or disposition of the case, it is apparent that the admission of the evidence could have done him no harm, and therefore, if improperly received, its admission would afford the defendant no ground for a new trial.

The defendant insists that as this proceeding is of a criminal nature, an actual criminal intent is essential to warrant his punishment, and that, as the court has found that there was no such actual intent, his punishment was unwarranted. But an actual criminal intent was not essential to constitute the publication of the articles a contempt of court. Such an intent is not an essential of many statutory crimes: State v. Nussenholtz, 76 Conn. 92, 55 Atl. 589. But a proceeding for contempt, while it is of a criminal nature, is not a criminal prosecution. Courts having no criminal jurisdiction may publish for contempts: Middlebrook v. State, 43 Conn. 257, 21 Am. Rep. 650. And when the contempt consists of an act punishable under the criminal law, as an assault perpetrated in open court, the adjudication of contempt will be no bar to a criminal prosecution for the assault or breach of the peace. The proceeding in contempt is for an offense against the court as an organ of public justice and not for a violation of the criminal law. The power to punish such offenses is inherent in courts of record, to enable them to preserve their own dignity and to duly administer justice in the causes pending before them. It makes no difference, in its effect upon the public, whether an article reflecting upon the court in a cause on trial, and improperly commenting upon the evidence, and disparaging the cause of one or the other of the parties, and calculated to prevent a fair trial, is published with criminal intent or with good intent. It brings contempt upon the court in the public mind, and is a contempt of court in either case, just as an assault or breach of the peace, committed in open court, is a contempt, although committed without actual intent to bring disrespect or disgrace upon the court. The absence of improper intent is to be considered in mitigation of the offense, but not as an excuse [672] for it: Sturoc Case, 48 N. H. 428, 97 Am. Dec. 626; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; Cartwright's Case, 114 Mass. 230; Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 70 Am. St. Rep. 280, 52 N. E. 445, 44 L. R. A. 159; Globe Newspaper Co. v. Commonwealth, 188 Mass. 449, 74 N. E. 682; State v. Frew, 24 W. Va. 416, 49 Am. Rep. 257.

It appears from the record that no evidence was offered tending to show that the offensive articles ever came to the attention of the court or jury, and the defendant argues that they, therefore, could not have obstructed or interfered with the course of justice, and consequently were not a contempt of court. But articles circulated through the neighborhood

when a trial is in progress may influence the trial without being read by the court or jurors. Witnesses may be intimidated or otherwise influenced by them. A sentiment favorable or unfavorable to one of the parties to the case may be made to so pervade the community as to reach the courtroom and the triers and interfere with the fair and impartial performance by the latter of their duties. When, therefore, articles calculated to interfere with the fair trial of a cause, and thus to obstruct justice, are so published and circulated, it is not necessary, in order to constitute them contempts, that they actually reach the eyes of the court or jury: Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 70 Am. St. Rep. 280, 52 N. E. 445, 44 L. R. A. 159; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528. The court, until the trial has ended, is bound to see that justice is duly administered, without obstruction or delay.

The fourth and last question raised by the defendant's brief is whether the publications, in themselves, could, under the circumstances of the case found, be legally regarded as in contempt of court. The court has found that the first article, printed two days before the trial began but after it had been assigned for trial, assumes to state the evidence to be produced by witnesses upon the trial, with improper comment thereon, and reflected upon the parties to the action, and improperly expressed an opinion as to the right of the controversy, and that the purpose of [673] the article was the disparagement of the defendant's defense, and to intimidate witnesses who might support it. It is found that the second article, which was a full-page illustrated article published after the trial began but before its close, and purporting to be an account of what occurred at the trial, took sides, improperly commented upon the evidence, expressed opinions upon the merits of the case and the effect that should be produced by the witnesses, contained statements calculated to intimidate possible witnesses, and also stated, as facts and as evidence, and as what occurred upon the trial, matters not given in evidence and not occurring upon the trial. The publications, under the circumstances thus found, were properly held to be a contempt of court.

There is no error.

In this opinion the other judges concurred.

Contempt of Court by Libelous Newspaper Publications is discussed in the monographic note to Percival v. State, 50 Am. St. Rep. 572-585. Such contempts are also classified, and the manner of their punishment prescribed, at great length in the case of State v. Shep-

herd, 177 Mo. 205, 99 Am. St. Rep. 624. Any citizen has a right to comment upon the proceedings and decisions of a court, to discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important trusts reposed in them, but he has no right to attempt, by libelous publications, to degrade the tribunal, for such publications are an abuse of the liberty of the press, for which he is answerable. The fact that a publisher erroneously thought that court had adjourned at the time of his publication of an insulting libel of the judge, or that such judge had in fact adjourned court at the time of such publication, is no defense for contempt of court in making the publication: Burdett v. Commonwealth, 103 Va. 838, 106 Am. St. Rep. 916, 48 S. E. 879.

CASES

IN THE

SUPREME COURT

OF

IDAHO.

UNION STOCK YARDS NATIONAL BANK v. BOLAN.

[14 Idaho, 87, 93 Pac. 508.]

FOREIGN CORPORATION—Error in Striking Out Plea of Failure to Appoint an Agent and File Copy of Articles.—Where the indorsee of a promissory note sues the maker thereof, and the defendant sets up as one of his defenses that the payee was a foreign corporation doing business in this state, and that it failed to comply with the constitution and statutes of the state in designating an agent upon whom service of process could be made, and in filing copies of its articles of incorporation, it is error for the court to strike such defense from defendant's answer. (p. 148.)

PLEADING—Amendment of Answer, Error in Refusing to Permit.—If a court has erroneously stricken out a part of an answer stating a good defense to the action, it is an abuse of its discretion to refuse to permit the amendment of the answer by reinstating such defense. (p. 148.)

NEGOTIABILITY OF INSTRUMENT, Destruction of by Making Time of Payment Uncertain.—A promissory note containing a stipulation whereby the sureties, guarantors, indorsers and makers waive notice of the granting of any extension of time for payment and waive the right of defense on the ground that extension has been made without notice to them or either of them, is not a "negotiable promissory note" within the meaning and intent of the negotiable instrument law of this state. (p. 149.)

BILLS AND NOTES.—If a Note is Non-negotiable, the Indorser Holds It Subject to all equities, counterclaims and defenses that existed between the maker and the payee. (p. 150.)

Rhea & Son, for the appellant.

Harris & Smith, for the respondent.

90 AILSHIE, C. J. This action was commenced by the respondent as the indorsee of a promissory note made and executed by the appellant in the following form:

"$900.00 No. 0187. Cambridge, Idaho, May 8, 1903.

"Six months after date, for value received, I, we, or either of us jointly and severally promise to pay to the order of Uinta Hereford Cattle Company the sum of nine hundred dollars, with interest at the rate of ten per centum per annum from date until paid.

"Payable at the office of the People's Bank, Salubria, Idaho.

"Should this note be collected by suit, ten per cent shall be allowed holder as attorney fee. The sureties, guarantors, and endorsers of this note severally waive presentation for payment, protest and notice of protest. No extension of time of payment with or without our knowledge by the receipt of interest or otherwise shall release us or either of us from the obligation of payment. J. H. BOLAN."

The plaintiff alleged that it was a bona fide purchaser of this note for value before maturity and received it in the due and ordinary course of business. Defendant answered, admitting the execution and delivery of the note, but denied that the plaintiff was a bona fide purchaser of the note for value and in the due course of business. He alleged, as a defense to the action, that the note was executed in payment for certain livestock purchased by him from the payee of the note, the Uinta Hereford Cattle Company, and that the stock purchased were not up to the guaranty furnished him by the company at the time of the sale; and he thereupon claimed [91] damages in the sum of one thousand dollars. He also alleged that the Uinta Hereford Cattle Company was a foreign corporation organized and existing under the laws of the state of Nebraska, and that it was on the date of the execution of the note, and had been for a long time previous thereto, doing business in the state of Idaho, and that it had failed and neglected to comply with the laws of this state in filing certified copies of its articles of incorporation and the designation of an agent upon whom process could be served, and that it never at any time made any designation of an agent in any county of this state upon whom process might be served. Other matters were pleaded in defense and as counterclaims to plaintiff's cause of action.

On motion of the plaintiff, the court struck from defendant's answer all the allegations with reference to the Uinta Hereford Cattle Company being a foreign corporation and failing and neglecting to comply with the laws of this state in

designating an agent upon whom service of process might be made and filing a certified copy of its articles of incorporation. Defendant took an exception to the ruling of the court and assigns the same as error.

After the plaintiff had submitted its proofs at the trial, the defendant moved for a nonsuit upon the grounds, among other things, that it appeared from the evidence introduced by the plaintiff that the Uinta Hereford Cattle Company was a foreign corporation organized under the laws of the state of Nebraska, and that the plaintiff had failed to prove that such corporation had complied with section 10 of article 11 of the constitution of the state of Idaho, and the act of the legislature in reference to foreign corporations doing business in this state. The motion was denied by the court, whereupon the defendant asked leave to file an amended answer again setting up the facts as to the Uinta Hereford Cattle Company being a foreign corporation doing business within this state, and having failed and neglected to comply with the constitution and statutes in reference to foreign corporations doing business within the state. Thereupon defendant offered to pay the actual costs that had been incurred in the case, in the event it became necessary for a continuance over 92 the term on account of such amendment. The motion and application was denied by the court, and the defendant excepted and assigns the action of the court as error on this appeal.

It was clearly error on the part of the court to sustain plaintiff's motion and strike from defendant's answer that part of his defense setting up the failure of the Uinta Hereford Cattle Company to comply with the constitution and statutes of this state in the designation of an agent on whom process could be served and filing its articles of incorporation. He had an undoubted right to interpose such a defense: Katz v. Herrick, 12 Idaho, 1, 86 Pac. 873; Valley Lumber Co. v. Driessel, 13 Idaho, 662, 93 Pac. 765, 15 L. R. A., N. S., 299; Valley Lumber Co. v. Nickerson, 13 Idaho, 682, 93 Pac. 24. It was also an abuse of discretion on the part of the court, after it had erroneously granted the motion to strike this defense from defendant's answer, to deny the defendant's motion and application to amend his answer setting up this defense.

On the trial of this case, the most important and decisive question that arose was that as to whether the plaintiff, Union Stock Yards National Bank of South Omaha, was a bona fide purchaser for value in due course of business, within the

meaning of the law so as to preclude the defendant from setting up equities that existed between him and the Uinta Hereford Cattle Company, the payee named in the note. The test to be applied, therefore, in this case is, Was the note sued on a negotiable instrument within the meaning of the statute of this state defining and governing such instruments? Sess. Laws 1903, p. 380. We may note in passing that the uniform negotiable instrument law is in substance merely a codification of the law-merchant on the subject. Appellant contends that since the note sued on contained an express waiver on the part of the sureties, guarantors, indorsers and maker of any and all rights of defense on account of extensions of time of payment of the note, it thereby rendered the note non-negotiable. Subdivision 3 of section 1 of the negotiable instrument law requires that an instrument in order to be negotiable "must be payable on demand or at a fixed or determinable future time." Section 4 of the act provides as follows: "An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable: First, at a fixed rate period after date or sight; or, second, on or before a fixed or determinable future time specified therein, or third, on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

Section 184 of the act defines a negotiable promissory note, and, among other requisites, provides that it must engage "to pay on demand or at a fixed or determinable future time a sum certain in money, to order or to bearer." The note sued on in this case cannot be said to comply with these provisions of the statute. Its closing sentence provides that "No extension of time of payment, with or without our knowledge, by the receipt of interest or otherwise, shall release us or either of us from the obligation of payment." This is an express contract to the effect that the time of payment may be extended to any one or all of the sureties, guarantors, indorsers or makers of the note without notice to all or any one of them. This undoubtedly renders the note non-negotiable under all the authorities that have been brought to our attention on the subject. By section 52 of the act (Sess. Laws 1903, 389), in order to establish that one is "a holder in due course" of commercial paper, the instrument must be "complete and regular upon its face."

In Matchett v. Anderson Foundry & Machine Works, 29 Ind. App. 207, 94 Am. St. Rep. 272, 64 N. E. 229, the note provided that "The drawers and indorsers severally waive presentment for payment, protest, and notice of protest, and on payment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them or either of them." In that case, the Indiana court of appeals held that the note was non-negotiable, and was subject to defense on all the equities that the maker held against the payee. It will be noticed by comparison that the stipulation contained in that note is almost [94] identical with the stipulation in the note at bar, and was to the same effect as the one here.

For other cases in point, see Smith v. Van Blarcom, 45 Mich. 371, 8 N. W. 90; Citizens' Nat. Bank v. Piollet, 126 Pa. 194, 12 Am. St. Rep. 860, 7 Atl. 603, 4 L. R. A. 190; Miller v. Poage, 56 Iowa, 96, 41 Am. Rep. 82, 8 N. W. 799; Woodbury v. Roberts, 59 Iowa, 348, 44 Am. Rep. 685, 13 N. W. 312; Glidden v. Henry, 104 Ind. 278, 54 Am. Rep. 316, 1 N. E. 369; Mitchell v. St. Mary, 148 Ind. 111, 47 N. E. 224; Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963.

The note is non-negotiable and the indorsee holds it subject to all the equities, counterclaims and defenses that existed between the maker, Bolan, and the payee, Uinta Hereford Cattle Company: Eaton & Gilbert on Commercial Paper, sec. 71, p. 354, and cases cited; 2 Am. & Eng. Ency. of Law, 2d ed., 253. As to the sufficiency or merit of the defense set up on the alleged guaranty of the livestock and damages claimed, we express no opinion, as that question is not properly before us.

The conclusion we have reached on the foregoing questions renders it unnecessary for us to consider or pass upon any of the other assignments of error presented on this appeal. The judgment must be reversed, and it is so ordered, and the cause is remanded to the district court, with direction to permit the parties to amend their pleadings if they so desire, and to grant them a new trial. Costs awarded in favor of appellant.

Sullivan, J., and Stewart, J., concur.

The Service of Process on foreign corporations where they have failed to designate an agent upon whom service can be made is discussed in the note to Abbeville etc. Co. v. Western etc. Co., 85 Am. St. Rep. 905.

Conditions and Agreements which destroy the negotiability of a writing otherwise negotiable are discussed in the note to Kimpton v. Studebaker Bros. Co., post, p. 185.

TARR v. OREGON SHORT LINE RAILROAD COMPANY.

[14 Idaho, 192, 93 Pac. 957.]

RAILWAYS—Statute Requiring the Affixing of Checks to Baggage.—Under the provisions of section 2674, Revised Statutes, a railroad corporation doing business in this state is required to affix a check to every parcel of baggage received by it, and to deliver a duplicate thereof to the passenger or person delivering the same, and if such check is refused on demand therefor, the railroad company is liable in the sum of twenty dollars to such person, and, in addition thereto, cannot collect any fare or toll from such passenger. (p. 154.)

RAILWAYS—Failure to Give Checks for Baggage Entitles the Passenger to Refuse Payment of Fare.—Where a railroad company has no night agent at a station to receive and check baggage, but stops its train at such station and takes on a passenger and his baggage, and after the passenger boards the train and demands a check for his baggage, and declines to pay his fare or deliver up his ticket until he receives such check, and the employés of the company in charge of the train neglect and refuse to deliver a baggage check, and, on the contrary, eject the passenger from the train, the railroad company will be held liable in damages for the tort so committed. (p. 155.)

RAILWAYS—Passenger, Right of to Insist upon Baggage Checks Before Surrendering His Ticket.—Where a passenger purchases a ticket, and on the arrival of the train at the station points out to the conductor and brakeman his baggage, and they receive the same and take it on board the train, and the passenger boards the same train for the purpose of transportation to another station on the line of the company's road, and demands of the conductor on the train a baggage check, he is entitled to receive such check before delivering up his ticket or paying his fare, and on failure to receive such baggage check and refusal to pay his fare until he does receive it, he does not thereby become a trespasser on such train, and the employés of the company have no right to eject him from the train until they have either delivered to him his baggage check or until he has reached the station to which he notified the employés receiving the baggage that he desired the same checked. (p. 156.)

RAILWAYS—Penalty Requiring Free Transportation of Passenger Because of the Failure to Check His Baggage.—Under the provisions of section 2674, the liability to furnish the passenger free transportation to the point of his destination in case of refusal to deliver him a check for his baggage is as much a part of the penalty for refusal to check the baggage as is the twenty dollars' cash penalty named therein. (p. 156.)

RAILWAYS—Fourteenth Amendment, Penalties, When not Forbidden by.—The requirement of section 2674, Revised Statutes, that a railroad company shall not collect toll or fare from a passenger when it fails, neglects or refuses to deliver the passenger a check for his baggage, is valid and binding upon such company as a part of the penalty for its failure and neglect to comply with the statute, and is in no sense a taking of property without due process of law within the inhibition of the fourteenth amendment to the constitution of the United States. (p. 157.)

JURY TRIAL—Instructions Concerning Matter not in Evidence.—The instruction, "That every particular phase of the injury may enter into the consideration of the jury in estimating compensation, loss of time with reference to the injured party's con-

dition and ability to earn money, his loss from permanent impairment of faculties, mental and physical pain, suffering and disfigurement, are all elements to be considered by the jury in estimating plaintiff's damages," while correct as a general principle of law, is erroneous in a case where there is no allegation of loss of time and no evidence has been introduced showing the loss of any particular or specified time, or the value thereof or amount of damage sustained by reason of loss of time. (pp. 158, 159.)

DAMAGES—Evidence of Mental and Physical Pain, When not Required.—As to mental and physical pain and suffering and humiliation, evidence need not be offered as to its value. This is a question entirely for the jury. (p. 159.)

DAMAGES—Evidence of Loss of Time.—Where a party claims special damages for loss of time, he must prove both the amount of time lost and its value. The jury must be governed by the evidence. (p. 159.)

JURY TRIAL—Instructions Erroneous but not Prejudicial.—Where the court has instructed the jury that they must be governed by the evidence in assessing damages, and that they must find the data therefor within the evidence, and the entire record in the case discloses that no claim has been made for damages on account of loss of time, and no evidence has been introduced thereon, and it is reasonably clear from the record that the jury did not consider such element in assessing damages, an erroneous instruction to the effect that loss of time is a proper element to be considered in such cases is not within itself such error as will cause a reversal of the judgment. (p. 160.)

APPEAL AND ERROR—Jury Trial—Duty to Consider All the Instructions.—All the instructions given in a case must be read and considered together as a whole, and where they are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the instructions as a whole rather than to an isolated portion thereof. (p. 160.)

P. L. Williams and D. Worth Clark, for the appellant.

G. F. Hansbrough, for the respondent.

[197] AILSHIE, C. J. This is an appeal from the judgment and order denying a motion for a new trial. The appellant recovered judgment in the lower court against the defendant for the sum of one thousand dollars damages on account of the agents and employés of the defendant company wrongfully and unlawfully ejecting him from one of its railway trains. The respondent, Jacob E. Tarr, was, on the twenty-third day of December, 1905, residing with his family, at Shelley, Idaho, and on the evening of that day purchased from the ticket agent at that place three tickets to Pocatello. It seems that the railway company had no night agent at Shelley, and that it was the practice of the company to take on baggage without the same being checked, on the passenger's pointing out his baggage to the conductor or brakeman or other employé of the company. [198] About 2 o'clock on the morning of the 24th, the south-bound pas-

senger arrived at the station where respondent, together with his wife and daughter, was waiting to board the train. When the train stopped, the respondent pointed out to the conductor and brakeman a trunk and roll of bedding he had on the platform, and told them that he wanted to take that baggage with him to Pocatello. When the respondent asked them to put the baggage on board, they made some profane remarks concerning it, but put the trunk on the baggage-car and left the roll of bedding. No question is raised here concerning the roll of bedding that was left on the platform. Respondent helped his wife and daughter on the train. After the train pulled out, the conductor came through taking up tickets and collecting fare, and when he came to respondent, the respondent gave him one ticket and told him that he had a trunk on board for which he wanted a baggage check. He also told the conductor that when he got his check for his trunk, he would give him the other two tickets. The conductor insisted on his surrendering up the tickets, but the respondent declined to do so. This demand for the tickets was made two or three times, the conductor telling him that if he did not surrender them he would put him off the train. Finally, when the train was about a mile out of the station of Blackfoot, the conductor came to respondent and told him if he did not surrender the tickets, he was going to put him off. Respondent replied that he would not do so unless the conductor gave him a check for his trunk. Thereupon the conductor called the brakeman and the two of them proceeded to eject the respondent from the train. Before they had completely ejected him, he told the conductor that he would not give up the tickets, but that if he would let him ride to Pocatello, he would pay the fare in cash. They disregarded this offer, however, and put him off the train. It seems to be generally agreed by all the witnesses that the train did not fully stop but "slowed up," as the witnesses put it. As the last coach passed, respondent swung onto the platform, and as he did so, he encountered the brakeman, who kicked him off, and in his endeavor to do [199] so, injured and bruised respondent's hands and dislocated a thumb. When he was kicked off the train he was either struck by the brakeman one blow on the back over the lungs and another over the kidneys, which made bad bruises, or else he received those injuries when he fell from the moving train. Respondent was under the care of a physician for a couple of weeks, and the physician testified that he had a bad bruise over his lung and also over his kidneys, and that he had in-

cipient pneumonia, which might have been caused by the blow over the lungs.

The respondent contends that under the provisions of section 2674, he was entitled to demand and receive a check for his baggage before surrendering his transportation, and that he was entitled to remain on appellant's train until such time as he received a check for his baggage, or until he reached his destination. Appellant, on the other hand, contends that while the company would have been liable for the penalty prescribed in section 2674 for failing and neglecting to furnish the baggage check, notwithstanding that, respondent was not entitled to ride on the train without paying his fare or surrendering up his ticket. Section 2674 provides as follows:

"A check must be affixed to every package or parcel of baggage when taken for transportation by any agent or employee of a railroad corporation, and a duplicate thereof given to the passenger or person delivering the same in his behalf; and if such check is refused on demand, the railroad corporation must pay to such passenger the sum of twenty dollars to be recovered in an action for damages; and no fare or toll must be collected or received from such passenger, and if such passenger has paid his fare, the same must be returned by the conductor in charge of the train; and on producing the check, if his baggage is not delivered to him by the agent or employee of the railroad corporation, he may recover the value thereof from the corporation."

It will be seen from the foregoing provision of the statute that it is made the duty of the railway corporation to affix a check to every parcel of baggage and deliver a duplicate thereof to the owner. In this case, the company, having no 200 night agent at the station, received baggage on its being pointed out by the passenger, and was in the habit of attaching a check on the train and delivering the duplicate to the passenger. Our decision on this point turns upon the question as to whether the railway company had a right to demand the fare from respondent as a condition precedent to furnishing him with a check for his baggage. Was defendant justified in ejecting him from the train upon his refusal to surrender up his ticket or pay his fare? There can be no question but that he rightfully boarded the train. He had bought his ticket, had caused his baggage to be placed upon the train, and he had a lawful right to board appellant's railway train. The question is, then, Did he, after entering the car, do any act that converted him into a trespasser? The primary duty devolving upon the passenger is to pay his

fare, and on the railway company, to carry the passenger. In addition to carrying the passenger, the company agrees to carry a certain amount of baggage with each passenger. In this case, the company received the respondent's baggage, and, under the provisions of the statute above quoted, was clearly liable to check the same and furnish a duplicate to the passenger. A failure to do so subjected the company to a certain penalty; first, to pay the sum of twenty dollars as damages for the neglect and failure, and in addition thereto, defendant was prohibited from collecting or receiving any "fare or toll" from the passenger. Clearly, then, the passenger's transportation is made as much a part of the penalty as is the twenty dollars. Upon failure to furnish the passenger with his baggage check, it was not only liable to pay a twenty dollar penalty, but it was also liable to carry the passenger free of "fare or toll" until such a time as it should furnish such check or until he reached his destination, the point to which he had requested a check for his baggage. We do not think this statute is capable of any other reasonable construction. We therefore conclude that the respondent was rightfully upon the appellant's railway train, and his ejectment by the company's agents and employés was wrongful and unlawful and in violation of his rights. If it was unlawful for them to eject him, it was unlawful [201] for them to keep him off the train. If he was rightfully on the train and they put him off, he had a clear right to return to the train, and their using force and violence in keeping him off was as much of a wrong and trespass upon his rights as it would have been for them to have used that violence on him in the first instance. This case, it must be remembered, involves transportation exclusively within the confines of this state, and is purely a domestic transaction.

Counsel for appellant have argued that the company in the discharge of its duty has a right to establish certain rules and regulations to facilitate business, and that, among other things, it was the duty of the passenger to pay his fare or surrender his ticket before demanding his baggage checked. The law does not say which act shall be performed first, but they are clearly concurrent duties, one resting upon the passenger and the other upon the transportation company. The passenger had an undoubted right to demand his baggage check. The company's agent in this case did not give him any assurance that they would ever furnish him a check for his baggage. The only assurance he ever had was that the conductor said to him: "You give me your tickets and if your

baggage is lost, I think we can locate it for you later." This was far from an assurance that the conductor would discharge his duty under the statute and secure the passenger a check for his baggage before reaching his destination. We think the doctrine is correct as stated by Hutchinson on Carriers, volume 2, section 1036 (third edition), cited by appellant, to the effect that passengers are required to show their tickets to the conductor at reasonable times and be subject to the reasonable requirements of the company. In this case, the company had already received the passenger's baggage on its train, and had complete charge and control thereof, and the conductor had received from the passenger one ticket and knew that he had two other tickets in his possession on the same train. A somewhat different rule would apply, we apprehend, where a prospective passenger takes his baggage to the depot and demands that it be checked. In such case, he would have to [202] produce a ticket, and if required, deliver it to the agent for the purpose of being punched.

Counsel for appellant insist that the statute, section 2674, supra, should not receive the construction we are placing on it, for the reason that such a construction would be in violation of the fourteenth amendment to the constitution of the United States, in that it would deprive the railroad company of property without due process of law. Counsel admit that the company would be liable for the twenty dollar penalty under the statute on a failure to furnish the passenger with a baggage check, but say it would be taking its property without due process of law to allow a passenger to ride without paying his fare. Such an argument is unsound, for the reason that free transportation under the condition named in the statute is no more a taking of property without due process of law than the collection of the twenty dollar penalty. Indeed, we think one is as much a part of the penalty as the other. In the matter of transportation, the statute says the company shall not collect fare unless the check is furnished. As to the payment of the twenty dollar penalty, the company might do that without action, or if it fails to do so, it is liable to an action for the recovery of the same. In this case, however, the company refused to carry the passenger as required to do by section 2674, and proceeded to eject him from the train. In doing so it committed a tort for which it is liable in this action.

This, it should be observed, is not an action for breach of the contract, but an action in tort to recover for the wrongs committed. The passenger is not endeavoring to col-

lect the twenty dollar penalty prescribed by the statute, but insists that he was rightfully on the appellant's train, and that he had a right to remain there until he reached his destination, and that under such circumstances the employé of the railroad company committed a tort for which this action has been prosecuted. This case is not parallel with, or subject to, the same rule that governs cases where a passenger goes upon a railway train and refuses to pay fare or surrender his ticket until he is furnished a seat. In those cases it is held that if he remains on the train, he must pay his fare, but that [203] on the other hand, he may leave the train at the first opportunity and sue for a breach of the contract and recover his damages: Memphis etc. R. R. Co. v. Benson, 85 Tenn. 627, 4 Am. St. Rep. 776, 4 S. W. 5; Pittsburg R. R. Co. v. Van Houten, 48 Ind. 90; St. Louis etc. R. R. Co. v. Leigh, 45 Ark. 368, 55 Am. Rep. 558; Davis v. Kansas City etc. R. R. Co., 53 Mo. 317, 14 Am. Rep. 457.

On the trial of this case, defendant's counsel objected to the introduction of evidence showing that the passenger when being ejected from the train offered to pay his fare if the employés of the company would permit him to continue on his journey. If it be conceded that it is a correct principle of law that a passenger after refusing to surrender his ticket or pay fare, and the employés of the company have commenced to eject him, cannot then offer to pay fare and reinstate himself in the right to continue on the train, then, of course, such evidence as was offered in this case would be immaterial and was improperly admitted. When it came to giving the instructions, however, to the jury, the court adopted the appellant's theory of the law and gave an instruction on its request to the effect that a "passenger who refuses to pay his fare or furnish and deliver up a ticket good for such transportation, and on account of such refusal the train is stopped for the purpose of ejecting him, he cannot then, by a tender of his fare or an offer to deliver up his ticket, reimpose upon the carrier the duty of carrying him." In the case at bar, this question became entirely immaterial, and evidently did not enter into the consideration of the jury in making up their verdict, for the reason that the passenger was rightfully on the train, and the company had no right to eject him in the first instance.

The next and most serious question that arises on this appeal is directed against the instructions given by the court to the jury. The objectionable instruction is plaintiff's request No. 3, which is as follows: "The jury is instructed that

every particular phase of the injury may enter into the consideration of the jury in estimating compensation, loss of time with reference to the injured party's condition and ability [204] to earn money in business or calling; his loss from permanent impairment of faculties, mental and physical pain, suffering and disfigurement, are all elements to be considered by the jury in estimating plaintiff's damage, if you find from the evidence that plaintiff is entitled to recover." The causes and injuries for which plaintiff demanded damages in his complaint are in substances as follows: "A bad bruise on the back over the left lung; a bad bruise over the left kidney; his right hand badly bruised and sprained and two bruises on both legs and hands, and by reason of the insult, humiliation and the bodily and mental suffering of the plaintiff, caused by the said unlawful acts of the defendant in forcibly, violently and unlawfully assaulting, bruising and ejecting the plaintiff from its said train of cars." Damages were claimed for these injuries in the sum of nineteen hundred and seventy-five dollars. On the trial, no evidence whatever was introduced showing any particular or specific loss of time nor the value of any time lost, nor was there any evidence introduced showing the amount paid out for medical attention or for any other item of loss, damage or injury, and no evidence whatever was given placing an estimate as to a just compensation for the injuries sustained. The court also instructed the jury that for mental and physical injury and suffering, and for humiliation and wounding a man's feelings, the measure of damages was a question entirely for the jury to determine as nearly as possible from the evidence in the case. The court also instructed the jury that they must be governed by the evidence, and that if they should find for the plaintiff, they could only assess such damages as they found him entitled to from the evidence.

Defendant's requested instruction No. 11 was given by the court, and that instruction also advised the jury that if they found in favor of the plaintiff, the only damage they could assess was such as was within the evidence and justified thereby, and that they must secure their data from the evidence itself upon which they calculated and assessed the damages.

It must be conceded in the outset that the plaintiff's requested instruction No. 3 as given by the court, while entirely [205] correct as a general principle of law, was improper and erroneous in this particular case, for the reason that no claim appears to have been made on account of loss of time,

and that no evidence was given showing the loss of any particular or specific amount of time or the value thereof.

It is well settled that as to mental and physical pain and suffering and humiliation, it is unnecessary to submit any evidence as to the value thereof and the amount of damages to compensate therefor, but that the same is a question entirely and exclusively for the jury: North Chicago St. Ry. Co. v. Fitzgibbons, 180 Ill. 466, 54 N. E. 483; Springfield Consol. Ry. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884; Sutherland on Damages, 3d ed., sec. 1243; Hughes' Instructions to Juries, secs. 652, 653. On the other hand, it is equally well settled that where the party claims special damages for loss of time he must prove both the amount of time lost and the value thereof, and that the jury must be governed by the evidence in relation thereto: Western Union Tel. Co. v. Morris, 83 Fed. 992, 28 C. C. A. 56; Pratt v. City of Ottumwa, 136 Iowa 221, 113 N. W. 831; Barron v. Northern Pac. Ry. Co., 16 N. D. 277, 113 N. W. 102; Gardner v. Burlington C. R. & N. R. Co., 68 Iowa, 588, 27 N. W. 768; Southern Ry. Co. v. Hawkins, 28 Ky. Law Rep. 364, 89 S. W. 258.

It will be seen, however, on an examination of the authorities, that where a case has been reversed on account of such an instruction, it has been where there was either evidence of loss of time and no evidence of its value, or where the court had told the jury that they might assess the damages for loss of time without any evidence as to its value or without reference to such evidence if any had been given. The latter condition is peculiarly noticeable and prominent in Pratt v. City of Ottumwa, 136 Iowa, 221, 113 N. W. 831. In the case at bar, there is no evidence of any particular or specific loss of time, and the most that could be said in that regard would be that it contained a mere inference of the loss of some period of time less than two weeks while respondent was receiving medical treatment, and no evidence whatever as to the value of any time lost. The record is convincing from the complaint to the last word [206] of evidence and instruction in the case that the real cause for which the plaintiff was seeking to recover damages, and against which the defendant was waging its defense, was the physical and mental suffering, pain and humiliation as the direct and immediate result of the wrongful acts of the railway company in ejecting plaintiff from its train. The record nowhere contains any suggestion or intimation that the jury was asked to give the plaintiff any special damages on account of loss of time. The question then arises whether the error committed in giv-

ing plaintiff's instruction No. 3 was, under the facts and circumstances of this case, and in view of the evidence produced, and of the other instructions given, such an error as prejudiced any substantial right of the defendant for which this court would be justified in reversing the judgment under the purview of section 4231, Revised Statutes. In the first place, we must assume that the jury were reasonable and fair-minded men, and limited their finding as to the plaintiff's damages to that shown by the evidence in the case as they were instructed by the court. In the second place, there is nothing in the record that indicates that the jury were acting under any sense of passion, prejudice or bias. The evidence is abundant to justify the verdict without taking into consideration any loss of time whatever or any other element of damages except that of physical and mental pain and suffering and humiliation consequent upon plaintiff's unlawful ejection from the train. Indeed, we think the appellant company were, under the facts and circumstances of this case, exceedingly fortunate in reducing the plaintiff's demand to the sum allowed by the jury. In the third place, there is nothing in the record that suggests or intimates that the jury took into consideration loss of time in estimating damages, or any other matter than that entirely proper for their consideration.

Lastly, instruction No. 3 is a correct general principle of law, and although there was no allegation in the complaint, and no evidence in the case claiming damage for the one element, namely, loss of time, mentioned in this instruction, we think it would be far-fetched and illogical for an appellate court to hold that under such facts and circumstances the [207] judgment should be reversed, and thereby assume that the jury went outside of the pleadings and proofs under such an instruction as this in order to render an unjust verdict against the defendant. There is no doubt but that the court should not give an instruction on a question of law that is not involved in the pleadings or proofs, but we are equally satisfied in this case that the appellant has not been prejudiced or injured or damaged on account of the instruction, and we are unwilling to reverse the judgment for that reason.

Again, we have repeatedly held that all the instructions given in a case must be read and considered together as a whole, and that where they are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole instruction rather than to an isolated portion thereof: Lufkins v. Col-

lins, 2 Idaho, 256, 10 Pac. 300; State v. Corcoran, 7 Idaho, 220, 61 Pac. 1034; Hansen v. Haley, 11 Idaho, 278, 81 Pac. 935; State v. Bond, 12 Idaho, 424, 86 Pac. 43; State v. Niel, 13 Idaho, 539, 90 Pac. 960, 91 Pac. 318.

The other instructions given by the court we think correctly stated the law, and the assignments of error in reference thereto are without merit. All of the defendant's requested instructions that correctly stated the law were given, either literally or in substance by the court. Those rejected were clearly erroneous and properly refused by the court. We think the judgment in this case is a just one, and that no sufficient grounds have been shown why it should be reversed. Judgment is affirmed, with costs in favor of respondent.

Sullivan, J., and Stewart, J., concur.

The Liability of Common Carriers for the baggage of passengers is the subject of a note to Wood v. Maine Cent. R. R. Co., 99 Am. St. Rep. 343.

The Liability of Railroad Companies for the negligence, mistakes and misrepresentations of ticket agents is discussed in the note to St. Louis etc. Ry. Co. v. White, 122 Am. St. Rep. 638.

PILMER v. BOISE TRACTION COMPANY, LIMITED.

[14 Idaho, 327, 94 Pac. 432.]

NONSUIT, When Should be Granted and When Refused.—A motion for a nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and on such motion the evidence must be interpreted most strongly against the defendant. (pp. 166, 167.)

NONSUIT in an Action to Recover for Death.—In an action to recover damages for the injury or death of a person, by reason of being run against and over by a street-car, a motion for a nonsuit at the close of the plaintiff's evidence should not be granted unless the facts presented by the evidence are such that but one conclusion could reasonably be drawn from them, and that conclusion is, that no recovery can be had under the evidence. (p. 167.)

NONSUIT—Province of the Court and Jury.—It is the province of the court to determine that conclusion and grant a nonsuit; but if different minds might reasonably reach different conclusions from such evidence, the motion for a nonsuit should be denied and the case submitted to the jury. (p. 167.)

NEGLIGENCE, CONTRIBUTORY—Burden of Proof.—In an action to recover for the death of a human being alleged to have resulted from the negligence of the defendant, the burden of proving contributory negligence must be assumed by him. (p. 167.)

STREET RAILWAYS—Rights of Pedestrians.—In a city a pedestrian has the right to rely on the motorman's using due care in managing his car, and due care means having it under such control as the occasion demands at a street intersection where people and vehicles are crossing. (p. 167.)

STREET RAILWAYS—Negligence—Failure to Look and Listen.—It is not negligence as a matter of law to omit to look and listen before crossing a street-car track. (pp. 167, 168, 170.)

NEGLIGENCE Which is not the Proximate Cause of an Injury.—Negligence on the part of a person which was not the proximate cause of his injury or death will not be a bar to his recovery. (p. 168.)

NEGLIGENCE—Proximate Cause, Definition of.—The proximate cause of an event is that which in a natural and continuous sequence, unbroken by a new cause, produces that event, and without which that event would not have occurred. (p. 169.)

NEGLIGENCE—Proximate Cause, When a Question for the Jury.—What is the proximate cause of the death of a person must, in an action to recover therefor, be submitted to a jury, if two fair minds might reasonably differ on the subject. (pp. 169, 170.)

STREET RAILWAYS, Right to Recover Against Notwithstanding the Negligence of the Person Injured.—In an action against a street railway company to recover for the death of a person claimed to be due to the defendant's negligence, and where it appears that the deceased was also negligent, his negligence will not prevent a recovery, if, after he was perceived by the motorman, the latter might have avoided the result of the negligence of the deceased. (p. 170.)

NEGLIGENCE, CONTRIBUTORY, When Precludes Recovery.—In an action against a street railway company to recover for the death of a person due to the defendant's negligence, the contributory negligence which may exist to bar a recovery must concur with the negligence of the defendant in such a way that the latter is not alone the immediate and proximate cause of the accident. If the negligence of the decedent only placed him in a dangerous situation, out of which he would have come with safety had it not been for the subsequent negligence of the defendant, then there is no such concurring negligence as will exonerate the defendant. (p. 170.)

STREET RAILWAYS.—It is the Duty of Motormen to have their cars under control when crossing streets over which people travel. (p. 170.)

STREET RAILWAYS, Care Which Persons in the Streets may Presume will be Exercised by.—Persons with vehicles passing over a street railway track and crossing may assume that care will be used to reduce the speed of cars when at a sufficient distance from a passing team or person, so as to enable such team or person to get out of the way. (p. 170.)

NEGLIGENCE—Last Clear Chance Doctrine.—A person who has the last clear chance or opportunity of avoiding an accident, notwithstanding the negligence of his opponent, is considered in law solely responsible for such accident. (pp. 170-174.)

NEGLIGENCE, Recovery Notwithstanding.—Although the act of the one injured may have been the primary cause of the injury, yet an action for such injury may be maintained if it be shown that the defendant might, by the exercise of reasonable care and diligence, have avoided the consequences of the injured party's negligence. (p. 174.)

Hawley, Puckett & Hawley, for the appellant.

Borah, Cavanah & Blake, for the respondent.

[333] SULLIVAN, J. This action was brought by the plaintiff as administratrix of the estate of John Pilmer, deceased, to recover damages against the respondent for the death of said Pilmer, alleging that his death was caused by the fault, negligence and carelessness of the defendant, and without any fault or negligence of the deceased. The answer puts in issue the material allegations of the complaint and pleads affirmatively facts tending to show that the respondent was without fault, and that the negligence of the deceased was the cause [334] of his death. The cause was tried by the court and a jury and at the close of the testimony on the part of the plaintiff a motion for a nonsuit was sustained and judgment of dismissal entered, from which judgment this appeal was taken. The following quotation from the judgment clearly shows the grounds of the motion and the points on which the judgment of nonsuit was granted, to wit: "Upon the close of the testimony upon the part of the plaintiff, the defense through its counsel moved for nonsuit upon the ground that there was no evidence for the consideration of the jury; that the evidence in the case affirmatively disclosed that the deceased was guilty of contributory negligence, and further that the evidence failed to show that the deceased was without fault and without contributory negligence at the time of receiving the injury complained of." The granting of said motion is assigned as error.

Counsel for appellant contend for the rule that the respondent company was bound to prevent injury to deceased at a street intersection by keeping its car under control and by using every reasonable opportunity for preventing the injury after the peril of the deceased was discovered regardless of the negligence of the deceased. Counsel for appellant admit contributory negligence on the part of the intestate, if the proximate cause of the accident would relieve the respondent from liability, but contend that the question of whether or not there was such contributory negligence was a matter for determination by the jury under proper instructions, and that even if contributory negligence were shown, yet if the defendant had a clear chance to save intestate's life and did not make the most of his opportunity, then the defendant is responsible for the injuries which followed. And whether such a clear chance existed is a matter solely for the

jury to determine. That, we think, is a clear statement of the contentions on behalf of the appellant.

It appears from the evidence that the deceased was about fifty-eight years of age, that he was quite deaf, and blind in the left eye. These facts were known to the motorman, McEvoy, who had charge of the car in that capacity on the morning [335] of July 8, 1905, when the accident occurred. McEvoy testified for the plaintiff on the trial and testified that just before the accident he saw Mr. Pilmer and recognized him. He also testified that he was acquainted with the car and familiar with its brakes, machinery, etc., and that there was neither sand-box nor any air-brakes on the car; that there was a light trip-fender that can be handled by the motorman with his foot; that when you trip the fender, it falls right on the rails, and that such fender is usually carried about six inches above the rails. He also testified that he saw the deceased on the day the accident occurred, about a quarter of a block away, and recognized him at that time, and that at the rate the car was going that morning, just before the accident, he could stop the car in about fifty or sixty feet; that when he first saw the deceased, he was out in the street a quarter of a block away from the track, going down Brumback street; that he did not think the car was running over four miles an hour at that time.

Another witness testified that on the morning of the accident he was standing about seventy-five feet southwest of the street crossing, and could clearly see the crossing and the ground just north of it; that he saw the deceased when he was just stepping on the track. He was about thirty-five or forty feet from the car at that time; that witness was looking toward the car and heard the bell ring; that when he first saw the car, the motorman was trying to apply the brakes and the car was going at the usual rate of speed; that he noticed the fender on the car; that it was eight or nine inches above the track before or just as it struck the deceased. Witness did not observe any cessation or marked stoppage of the car from the time he first saw it until it struck the deceased. When witness looked up, deceased was just stepping upon the track. When the car hit him, he had one foot inside the track and one foot outside the track on the opposite side from where he started to cross it. The deceased was looking straight ahead, with his head inclined a little to the ground. On cross-examination, the witness testified that the deceased was just stepping on the track when he first saw him, and the car was [336] thirty or forty feet away from him; that he stepped

on the track just in front of the car; that the deceased was leading a horse and had gotten across the track when the accident occurred, so that he had one foot on the inside of the track and the horse was just about to step on the west side of the track. The deceased was leading the horse by a rope or strap; did not know whether the car struck the horse, but when the horse jerked back, he threw the deceased down with his face to the east, and when he pulled him around, his face was to the east; that the horse jerked the deceased down before the car struck him. This all happened in about a moment. The fender hit the deceased when he was lying crosswise of the track and hit the body about eight or nine inches high. The deceased was looking straight ahead, with his head slightly inclined to the ground. He did not have his face turned toward the car until he was thrown upon the ground.

Another witness testified that on the morning of July 8, 1905, he was on a street-car of the defendant company; the car was going south on Eighteenth street; that he could see out of the front of the car and observed the deceased; his attention was called by the loud ringing of the gong, and looking up he saw the deceased leading a horse going east on Brumback street, about two or three rods away; he was at that time about eight feet from the track; he was looking down, apparently not knowing that there was any danger near or any car around. He was walking toward the track from the west with the horse slightly behind him. It was just a few seconds after the gong rang before the witness looked up and the car was then about three rods from the deceased and he was a few feet from the track; that the car was going at a speed faster than an ordinary horse trots; that the view of the street was practically unobstructed and clear; that he could see deceased plainly from the rear of the car and there was no obstruction to prevent the motorman from seeing him; that he did not observe any slacking of the speed of the car until just before it struck deceased, then witness could feel there was a trifle slacking of the speed. Witness went to get off the car, but on account of the speed could [337] not do so until the car struck deceased. When deceased passed out of witness' vision in front of the car, he was about the length of the car, perhaps sixteen or eighteen feet, from the deceased; that the rope with which the deceased was leading the horse was in his left hand. Did not remember at any time of hearing any grinding noise similar to iron upon iron; that as soon as witness dared after the collision, he stepped off the car and ran to see if he could be of any assistance to

the deceased; that the effect of witness stepping off the car was that he had to brace himself—catch himself to keep from falling; that the car was going lively, and that it was not quite stopped when he reached its front; that the deceased was carried at least fifty or sixty feet after he was struck; that the front of the car, when it stopped, was down past the south side of Brumback street from thirty to forty feet. The deceased was struck just a little south of the middle of Brumback street at the crossing. The deceased was carried by the car from the time it struck him. On cross-examination this witness testified that the deceased was coming directly facing the track, the car being off to his left, and as the car approached within a few feet of Brumback street, it would practically be within the line of deceased's vision; that the deceased could have seen the car had he looked up; that this accident occurred between half-past 8 and 9 o'clock in the morning on a bright, sunshiny day.

Another witness testified that he did not know what occurred from the time the car struck deceased until he fell in front of the fender; that the fender of the car was shoving deceased along the track, rolling him over and over, possibly twenty or twenty-five feet, before the fender came up, then the deceased passed back against the guard-rail in front of the wheel, and then shoved him possibly fifteen or twenty feet, when the car stopped.

The record contains other evidence tending, at least, to show that the motorman did not have his car under proper control just before and at the time the accident occurred, and that the negligence of the deceased (if there was any) was not the proximate cause of the accident.

[338] A nonsuit was granted at the close of the plaintiff's testimony, on motion of the defendant, and as held by this court in Later v. Haywood, 12 Idaho, 78, 85 Pac. 494, the defendant must be deemed to have admitted all the facts of which there is any evidence, with the facts which the evidence tends to prove: See, also, Kramm v. Stockton Electric R. Co., 3 Cal. App. 606, 86 Pac. 738, 903.

The trial court did not err in granting the nonsuit if the facts presented by the evidence are such that but one conclusion could reasonably be drawn from them, and that conclusion is that no recovery can be had under the evidence. Then, in that case, it was the province of the court to determine that conclusion. But if different minds might reasonably reach different conclusions from the evidence, the motion for a nonsuit should have been denied and the case submitted

to the jury. We are satisfied that different minds might reasonably reach different conclusions from the evidence as to whether the negligence of the deceased was the proximate cause of the accident, or whether the carelessness or negligence of the motorman was such cause. That being true, the court erred in granting the nonsuit.

But it is contended by counsel for respondent that as the plaintiff under her pleadings failed to show that the defendant was without fault or negligence, the motion for a nonsuit was properly sustained, and it is further contended that the facts disclosed by the evidence show affirmatively contributory negligence on the part of the deceased. This court held in Adams v. Bunker Hill & S. M. Co., 12 Idaho, 637, 89 Pac. 624, 11 L. R. A., N. S., 844, that a nonsuit should only be granted when the evidence wholly fails to support the demand of plaintiff, and that in an action against the master for damages caused by the death of the servant, as a result of the master's negligence, the presumption which arises in favor of the instincts of self-preservation and the known disposition of men to avoid injury and personal harm to themselves, constitute a prima facie inference that the servant was at the time in the exercise of ordinary care and was himself free from contributory negligence, and that in such case the [339] burden of proving contributory negligence rested on the defendant. This is the correct rule, and is fully sustained by the decided weight of the adjudicated cases: Dearden v. San Pedro etc. R. Co., 33 Utah, 147, 93 Pac. 271. This rule of law prevailed in this state prior to the act approved March 13, 1907: Sess. Laws 1907, 323.

It is contended by counsel for respondent that the intestate's death occurred by reason of his own negligence, and that for that reason the court did not err in granting a nonsuit, and that the real question presented is whether the failure to stop, look and listen for an approaching street-car was negligence per se on the part of the deceased. In a city, a pedestrian has a right to rely on the motorman using due care in managing his car, and due care means having it under such control as occasion demands at a street intersection where people and vehicles are crossing. In the case of Richmond P. & P. Co. v. Gordon, 102 Va. 498, 46 S. E. 772, the following instruction was held to be a correct statement of the law: "While, generally speaking, one who is about to cross a street railway should both look and listen for cars, this is not an inflexible rule, nor is it to be enforced with any such strictness as in case of an ordinary steam railway; it is not

negligence as a matter of law to omit to do so. The question is whether men of ordinary prudence, exercising ordinary care and prudence, would have thought it unnecessary to do so": Shea v. St. Paul City R. Co., 50 Minn. 395, 52 N. W. 902; Chauvin v. Detroit R. Co., 135 Mich. 85, 97 N. W. 160; Marden v. Portsmouth etc. Ry. Co., 100 Me. 41, 109 Am. St. Rep. 476, 60 Atl. 530, 69 L. R. A. 300. In the last-cited case, the court said: "While it may be found, as a matter of fact, in any action involving an accident by crossing in front of an electric car, that it was the duty of the person undertaking to so cross to look and listen, it cannot be laid down as a rule of law that a failure to do this does, per se, constitute negligence." And on page 304 of 69 L. R. A. of that decision, the court said: [340] "The duty imposed upon street-cars when approaching public street crossings also clearly shows that the same rule with respect to such crossings cannot be invoked for both steam and electric cars. The very fact that the law, as far as we have been able to discover, almost universally holds that, upon the approach of public street crossings, the rights of street-cars and vehicles are equal, and that neither has a paramount right over the other, necessarily modifies the rule applicable to the approach of steam-car crossings. And it is proper here to observe that the decisions impose a special duty upon cars operated in the streets when approaching street crossings, a duty which, instead of clothing them with the paramount rights conceded between crossings, places them upon an equal footing with other vehicles rightfully occupying the streets."

In Nellis on Street Railroad Accident Law, page 252, it is said: "At the intersection of two streets, a pedestrian has the right to cross the tracks of a street surface railroad, notwithstanding a car is within sight, provided there is a reasonable opportunity to do so without obstructing the passage of the car unnecessarily; and if, for that purpose, it is necessary for the person having charge of the motive power of the car to check the speed, or even to entirely stop the car for a short period, it is his duty to do so, and the person crossing the track has the right, without being necessarily chargeable with contributory negligence, to assume that that duty will be performed; the rights of the pedestrian and of the person in charge of the motive power of such car under these circumstances, are reciprocal, and each is bound to use equal diligence to avoid a collision."

We think it is well settled that any negligence on the part of the intestate which was not the proximate cause of his

death will not be a bar to the plaintiff's recovery. In Smithwick v. Hall, 59 Conn. 269, 21 Am. St. Rep. 104, 21 Atl. 924, 12 L. R. A. 279, it is held that the negligent act or omission, to constitute contributory negligence, must appear as a proximate cause of the injury, or one of the proximate causes, and [241] not merely as a condition. In volume 6, page 5760, of Words and Phrases, it is stated: "The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by a new cause, produces that event and without which that event would not have occurred."

The term "proximate cause" is defined in Milwaukee etc. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256, and the court said: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury." Measuring the facts as disclosed by the record in this case by the rules of law above referred to, we find the intestate approaching a street-car track, negligent, perhaps, in that he goes upon the track without listening or looking for an approaching car. The question then arises whether such negligence is the proximate cause of his death by collision with the car, when the evidence at least indicates that the motorman did not have his car under control when he approached the street crossing and did not, to any perceptible degree, check its speed, when it was going faster than an ordinary horse trots, as testified by one of the witnesses; when the motorman saw the deceased a quarter of a block away, who he knew was hard of hearing and blind in his left eye, which was the eye next to the approaching car, and deceased, traveling toward the track in such a manner as to indicate clearly his intention to cross it, and so near the track that in case he walked thereon the car would strike him, without getting his car under control, and failed, after perceiving that the collision was inevitable, to lower the fender upon his car, which was placed there for taking up objects on the track, and which might, if lowered, have picked up the body of the deceased and prevented it from going under the car, and thus prevented his serious injury.

Under those facts, what was the proximate cause of intestate's death? That was a question for the jury to answer. That is not a question of science or legal knowledge, and it was one to be determined by the jury from the evidence. From the evidence contained in the record, we think that two [242] fair minds might reasonably arrive at different conclusions as to the proximate cause of the accident. One might conclude that the negligence of the motorman in failing to

have his car under control at said street crossing, and his failure to lower the fender after it appeared that the intestate was going on the track was the proximate cause of the accident, and the other, that it was not. It is true, the deceased was on the track, and if he had not been there, he would not have been injured; but that was a condition and not the direct cause of the injury, as in any case of an accident such accident would not have occurred if the one injured had not been present. We think the correct view of this case is that if the negligence of the intestate could have been avoided, after it was perceived by the motorman, then his negligence was not the direct or proximate cause of the accident, but such direct or proximate cause was the neglect or failure of the motorman to avoid it, if it were reasonably possible for him to do so. The motorman knew the physical infirmities of the deceased. The evidence shows his ability to stop the car in fifty feet, and the evidence shows that the car ran about that distance after it struck the deceased. The motorman also failed to operate the fender, which perhaps would have prevented any serious accident had he done so. The contributory negligence which must exist to bar a recovery in this class of cases must concur with the negligence of the defendant in such a way that the latter is not alone the immediate or proximate cause of the accident. If, however, the deceased's negligence only placed him in a dangerous situation, out of which he would have come with safety and without injury had it not been for the subsequent negligence of the defendant, then there is no such concurring negligence as will exonerate the defendant. The rule of making it negligence per se to fail to stop and listen at a steam railway crossing, is not the prevailing rule in regard to street railway crossings: Philbin v. Denver Tramway Co., 36 Colo. 331, 85 Pac. 630; Finnick v. Boston etc. Ry., 190 Mass. 382, 77 N. E. 500; Indianapolis etc. Co. v. Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; Brozek [3-13] v. Steinway Ry. Co., 10 App. Div. 360, 41 N. Y. Supp. 1017; Smith v. Minneapolis St. Ry. Co., 95 Minn. 254, 104 N. W. 16; Kramm v. Stockton etc. Co., 3 Cal. App. 606, 86 Pac. 738, 903.

It is the duty of motormen on street railways to have their cars under control when crossing streets over which people travel. The motorman should not expect to run his car at the same rate of speed across streets as he may along other places where there are no streets crossing his line of road. A trolley-car should be under the reasonable control of the motorman, and persons with vehicles passing over the rail-

road track and street crossings may assume that care will be used to reduce the speed of cars, when at a sufficient distance from a passing team or person, so as to enable such team or person to get out of the way.

Counsel for appellant insists that this court adopt the doctrine of the "Last Clear Chance" as laid down in Indianapolis St. Ry. Co. v. Bolin, 39 Ind. App. 169, 78 N. E. 210, and in many other cases cited by him. In the Indianapolis St. Ry. Co. case, the court referred to it as: "The 'last clear chance,' a doctrine firmly established on both principle and authority," and said: "Except for it, the greater the original negligence of a defendant and the more gross its delinquency, the less likelihood of a recovery against it on account of injury thereby caused. It serves the broadest principles of public policy. The state is interested, not alone that justice be done in a given instance, but that the law be so declared as that it will tend to the security of life and limb. The government is dependent upon its citizenship, not only politically, but economically, and high as the duty which devolves upon the courts of protecting acquired rights of property is, it is subordinate to the one which has as its object the uninterrupted enjoyment of that personal security which is incident to human existence, and in which every individual is entitled to the fullest protection which society can give. And therefore the language of the supreme court of Indiana, which follows: 'It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own [344] negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is longer disputed': Southern Ind. R. Co. v. Fine, 163 Ind. 617, 72 N. E. 589."

The origin of the doctrine of the "Last Clear Chance" is generally attributed to the case of Davies v. Mann, 10 Mees. & W. (Eng.) 546, in which the owner of a donkey, who negligently turned it out on the highway with its feet hobbled, was allowed, notwithstanding his own negligence, to recover from a person driving along the highway who carelessly ran into and killed it. It is stated in the note to the case of Bogan v. Carolina C. R. Co., 129 N. C. 154, 39 S. E. 808, 55 L. R. A. 418, that the doctrine of the donkey case and the ground of its decision have been accurately stated by a writer in the Quarterly Law Review, volume 2, 507, as follows: "The

party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it."

The United States supreme court in Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. Rep. 679, 36 L. ed. 485, thus lays down the doctrine of contributory negligence as modified by that of the "Last Clear Chance": "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years (having been first enunciated in Davies v. Mann, 10 Mees. & W. (Eng.) 546), that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

345 This court is in full accord with the doctrine of the "Last Clear Chance" as above defined. The deceased had a right to travel on said street. He had a right to rely on the defendant's controlling its car. We refer to the following cases on the point that failure to look and listen is not negligence per se: Philbin v. Denver Tramway Co., 36 Colo. 331, 85 Pac. 630; Finnick v. Boston etc. Co., 190 Mass. 382, 77 N. E. 500; Brozek v. Steinway Ry. Co., 10 App. Div. 360, 41 N. Y. Supp. 1017. In the last-cited case it is held: That "negligence and contributory negligence are questions for the jury where a person, in the daytime, attempted to drive a vehicle across a track, forty or fifty feet in front of an electric car which was approaching at the rate of eight to ten miles an hour and was injured by the car": Walls v. Rochester Ry. Co., 92 Hun. 581, 36 N. Y. Supp. 1102; Read v. Brooklyn Heights Co., 32 App. Div. 503, 53 N. Y. Supp. 209; Newark Passenger R. Co. v. Bloch, 55 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374; Fairbanks v. Bangor etc. Co., 95 Me. 78, 49 Atl. 421.

In the last above cited case, the court said: "There is no absolute rule of law requiring a traveler to look and listen before crossing the track of an electric railway in a public highway. Whether a failure of a traveler about to cross a railway track to look or listen amounts to negligence, must be determined from all the facts and circumstances proved": Bullman v. Metropolitan St. Ry. Co., 85 N. Y. Supp. 325;

Consolidated Traction Co. v. Haight, 59 N. J. L. 577, 37 Atl. 135.

The last above cited case contains this statement: "It is not, under all circumstances, negligence per se not to look and listen before crossing a trolley track": Dennis v. North Jersey R. Co., 64 N. J. L. 439, 45 Atl. 807.

The syllabus in the above case is as follows: "The principle of law is now well established, and must be applied, that it is not negligence per se, or negligence in law, for a person driving a vehicle, in approaching a street crossing over which he intends to cross, to fail to look for an approaching street-car, in order to avoid danger from it. The [346] question whether he was negligent or not must be submitted": Garrity v. Detroit etc. Co., 112 Mich. 369, 70 N. W. 1018, 37 L. R. A. 529; Smith v. Minneapolis St. Ry. Co., 95 Minn. 254, 104 N. W. 16.

In the last-cited case, the court says: "Indeed, a traveler at a crossing may obtain the right of way over the street crossing where, in the reasonable exercise of his rights, he reaches the point of crossing in time to go safely upon the track in advance of an approaching car; the latter being sufficiently distant to be checked or stopped, if need be, in the exercise of due care": Chisholm v. Seattle Co., 27 Wash. 237, 67 Pac. 601. The syllabus in that case says: "One about to cross a street-car track is not bound to look and listen, in order to be free from negligence."

Kramm v. Stockton E. R. Co., 3 Cal. App. 606, 86 Pac. 738, 903, is a late California case that is similar in some respects to the case at bar. On page 741 of that case it is said: "There was evidence, whether true or untrue it is not our province to judge, that the motorman saw deceased in his perilous position when far enough away from him to have stopped the car before reaching him, or at least to have so reduced its speed as to have caused less injury; and there is evidence, which we must receive, that the motorman did not attempt to check the momentum of his car until the very instant—one witness testified simultaneously—the car struck the deceased. Without further noticing the evidence or further comment, in our judgment, the case should have gone to the jury, because, among other reasons, the jury as presumably 'sensible and impartial' men might have decided that the deceased exercised ordinary care (Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651), or that the motorman 'had the last clear opportunity to avoid the injury,' in which case it was his duty to have done so."

In Thompson v. Salt Lake R. T. Co., 16 Utah, 281, 67 Am. St. Rep. 621, 52 Pac. 92, 40 L. R. A. 172, among other things the court said: [347] "Both parties being negligent, the true rule is held to be that the party who last had a clear opportunity to avoid the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it": See, also, 1 Shearman & Redfield on Negligence, sec. 99. There are many other authorities to the same effect, and it is useless for us to make further citations.

Where a street railroad company is authorized to operate its cars in a city, both the company and those traveling on the streets, on foot or in vehicles, are required to use the streets at all times with just regard to the rights of others. And a traveler on the streets has a right to assume that the car company will exercise ordinary care and diligence to prevent a collision: Indianapolis St. Ry. Co. v. Bolin, 39 Ind. App. 169, 78 N. E. 210.

The negligence of the deceased, if the jury should find that there was such negligence, becomes remote if it should be found that the motorman could have prevented the accident by having his car under proper control at said street crossing, or by lowering the fender on the car he could have prevented the serious consequences of the accident. The street-car company owes a duty to the pedestrian, and must run its cars with due care in order to avoid doing him injury. While we regard rapid transit as indispensable in this rushing age, we do not esteem it of greater value than life and limb, and it must be conducted with due care for the rights of others. Justice and humanity will not countenance the doctrine that a street railway company may, without liability, run down and maim or kill a human being who may have carelessly placed himself, unconsciously or otherwise, in a position to be injured or killed, simply because he was careless or negligent in placing himself in such position.

The question whether the negligence or want of due care on the part of the respondent was the proximate cause of the accident ought to have been submitted to the jury with all other questions of fact arising in the case, under proper instructions. The court therefore erred in granting a nonsuit. The judgment is reversed, a new trial granted, and the cause [348] remanded for further proceedings in accordance with the views herein expressed. Costs are awarded to appellant.

Ailshie, C. J., and Stewart, J., concur.

It is the Duty of a Street Railway to persons upon or approaching its tracks, in view of apparent dangers and of those which may reasonably be expected, so to regulate the speed of its cars as to have them under control, and so to be on the lookout for persons about to cross the track that such persons, if themselves in the exercise of due care, shall not be put in jeopardy: Butler v. Rockland etc. St. Ry. Co., 99 Me. 149, 105 Am. St. Rep. 267; Marden v. Portsmouth etc. St. Ry., 100 Me. 41, 109 Am. St. Rep. 476; Gilmore v. Federal Street etc. Ry. Co., 153 Pa. 31, 34 Am. St. Rep. 682.

A Person About to Cross the Track of an electric street railway is not under duty to observe the same degree of care and watchfulness as when attempting to cross a steam railroad, and hence cannot, as a matter of right, be adjudged guilty of contributory negligence because he does not stop, look and listen: Marden v. Portsmouth etc. St. Ry., 100 Me. 41, 109 Am. St. Rep. 476; Drown v. Northern Ohio Traction Co., 76 Ohio St. 234, 118 Am. St. Rep. 844. Some courts, however, have held that the duty to stop, look and listen applies to street as well as steam railways: Hornstein v. United Rys. Co., 195 Mo. 440, 113 Am. St. Rep. 693.

Presumptions of Negligence from the happening of accidents are discussed in the note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 986; and presumptions of the exercise of due care are discussed in the note to Chicago etc. Ry. Co. v. Wilson, 116 Am. St. Rep. 108.

RIDENBAUGH v. SANDLIN.

[14 Idaho, 472, 94 Pac. 827.]

ATTACHMENT, at What Time may Issue.—Under the provisions of section 4302, Revised Statutes, a writ of attachment may issue at the time of issuing the summons or at any time thereafter. (p. 177.)

ATTACHMENT, Premature Issuing of, What is.—A writ of attachment issued prior to the issuance of any summons or to the appearance of the defendant in the case would be subject to discharge on motion on the ground that the same was improperly issued. (p. 177.)

ATTACHMENT—Irregularity in the Issuing of the Summons, Effect of.—Where the plaintiff has commenced his action by filing his complaint, and demands of the clerk the issuance of a summons, and the clerk, in compliance therewith, issues what purports to be a summons, and thereafter issues a writ of attachment, the latter writ will not be quashed merely because the summons was irregular or in some respects failed to comply with the provisions of section 4140, Revised Statutes, or is in some respect vulnerable to the assault of a motion to quash. (pp. 177, 178.)

ATTACHMENT Supported by Summons Which Might be Quashed on Motion.—The vitality and efficiency of a writ of attachment cannot in all cases and at all hazards be tested by the strength of the summons to withstand a motion to quash. (p. 177.)

ATTACHMENT, Mistake of the Clerk Which will not Destroy.—The fact that the clerk makes a mistake in drawing a summons, and in some respect fails to comply with the statutory requirements, will not alone and of itself render the process as though

no summons whatever had been issued, so as to subject the writ of attachment to dissolution on the grounds that no summons had been issued at the time of the issuance of the writ. (p. 178.)

SUMMONS, Power to Amend.—Under the provisions of section 3862, Revised Statutes, the court has control of its process, and may order a defective summons so amended as to conform to the requirements of the statute, and after amendment may order it withdrawn from the files and served. (p. 178.)

SUMMONS, Right to Withdraw and Make Further Service of. A summons once returned and filed with the papers in the case becomes a file of the court which cannot be withdrawn without permission of the court, but the court may order it withdrawn and served upon any defendant in the case. (p. 179.)

Karl Paine, for the appellants.

John F. MacLane and Perky & Blaine, for the respondent.

[474] AILSHIE, C. J. This is an appeal from an order dissolving an attachment. On November 20, 1907, the plaintiffs commenced their action by filing their complaint with the clerk of the district court. They thereupon caused a summons to [475] be issued. This summons is conceded to be in regular form and in compliance with the statute, with the exception of the time in which the defendant was required to appear and answer. The summons was evidently a form that had been used prior to the amendment of section 4140, Revised Statutes, and required the defendant to appear and answer within ten days if served within the county in which it was issued. Section 4140, as amended at the ninth session (Sess. Laws, 1907, p. 530), requires the summons to contain, among other things, "the direction that the defendant appear and answer the complaint within twenty days if the summons is served within the district within which the action is brought and within forty days if elsewhere." Immediately after the issuance of this summons, the plaintiff procured a writ of attachment to be issued against the property of defendant, which writ was thereafter served by levying upon certain of the defendant's property. After the service of the summons and writ of attachment, the defendant made a motion to quash the summons, and also a motion to dissolve the writ of attachment, and the plaintiffs made a counter-motion for leave to amend the summons previously issued so as to make it conform to the requirement of section 4140 as amended. These motions all came on for hearing on January 6, 1908, before the district judge at chambers, and he thereafter sustained the motion to quash the summons and also the motion to dissolve the attachment and denied the plaintiffs' motion to amend the summons. This appeal is from that part of the

order of the district judge which dissolved the attachment. The only question which presents itself for our consideration here is the meaning and intent of section 4302 of the Revised Statutes, in reference to the conditions under which a writ of attachment may issue. The statute says: "The plaintiff at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached," etc. Section 4303 provided that, "The clerk of the court must issue the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff," etc. This motion was made under section 4321, which provides that the defendant may at any time after the issuance of a writ of attachment, [476] apply to the court on motion for a discharge of the writ of attachment "on the ground that the same was improperly or irregularly issued." The contention here made is, that since the summons was not regular and in due form in its requirement as to the time within which the defendant should appear and answer, it must be treated as if no summons has been issued at all. If no summons had been issued, and no appearance had been made by the defendant, then, of course, the attachment was improperly issued. We apprehend that the only purpose the legislature had in providing that the writ of attachment should not issue until the issuance of a summons was to guard against the attachment and seizure of a defendant's property without requiring the plaintiff to, at the same time or previously, invoke the process of the court to bring the defendant into court and litigate the question of indebtedness if any issue is to arise over that question. In other words, the legislature did not intend to allow a plaintiff to commence an action and let his complaint lie in the files of the court for one year, as he may do under section 4139, Revised Statutes, and at the same time have the defendant's property attached and held under process for the payment of a debt that he has taken no steps to reduce to a final judgment. When a plaintiff comes to the point where he is in the notion of prosecuting his action to judgment and invoking a judicial determination as to the question of indebtedness and amount due him, then and in that case it was the evident purpose of the legislature to allow him a writ of attachment under the statutory conditions to secure the indebtedness which might be found due. The issuance of a summons is a ministerial duty imposed upon the clerk. The statute prescribes the form of the summons and certain things that it shall contain, and this is done for the aid and direction of

the clerk in the issuance thereof. The fact that a plaintiff demands of the clerk the issuance of a summons indicates clearly and unequivocally his intention to prosecute his action to judgment, and, in our opinion, such demand made on the part of the plaintiff, and an attempted compliance therewith on the part of the clerk, constitutes a compliance with the requirements of section [477] 4302, and entitles the plaintiffs to further demand and receive a writ of attachment by which process he may have the defendant's property seized. The fact that the clerk makes such a mistake in the summons as to avoid the process entirely, or to merely render it so defective as to subject it to a motion to quash, is not sufficient, in our opinion, to avoid the writ of attachment or justify its dissolution. Of course, a total failure to issue a summons would be grounds for the dissolution of the attachment. But the validity and efficiency of the writ cannot in all cases and at all hazards be tested by the strength of the summons to withstand the assault of a motion to quash it. On the contrary, if the defendant should appear in the case without the issuance of any summons at all, and thereby render a summons unnecessary, that fact could certainly not deprive the plaintiff of the benefit of a writ of attachment in a case where he would otherwise be entitled to such writ.

There is no doubt but that the summons in this case was open to the motion to quash, for the reason that under the statute the defendant is entitled to twenty days in which to answer. If a judgment had been entered against him by default at the expiration of the ten day period, the judgment would have doubtless been void. A different question would probably have arisen, however, had the defendant not appeared and the plaintiff had waited until after the expiration of the twenty day period prescribed by the statute, and had then applied to the court for a default judgment; or had the defendant appeared and moved to quash the summons after the expiration of the full period of twenty days allowed him by statute in which to answer. That contention does not arise here, and, of course, we are not called upon to express any opinion as to the validity of a summons attacked under such circumstances. We merely suppose such a case as an illustration of the objects and purposes of the statute. Under section 3862, Revised Statutes, we have no doubt of the power and right of the trial court to order the amendment of a summons such as this to make it conform to the requirements of the statute. That section provides as follows: "Every court has power 8. To amend and control its process and

orders, so as [478] to make them comformable to law and justice." The contention that a summons once returned and filed is functus officio, and cannot be given life and effect by an order of the court, is not well founded. As soon as it becomes a file of the court, it is beyond the power of any party to the action to withdraw it without an order of court to that effect; but the court itself has control over the records and files in a case as well as over its own process, and it might order a summons already issued and on file to be withdrawn for service, or order an entirely new summons, as justice and the exigencies of the case may demand: Hancock v. Preuss, 40 Cal. 572; Coffin v. Bell, 22 Nev. 169, 58 Am. St. Rep. 738, 37 Pac. 240.

The trial court erred in dissolving the writ of attachment. The order is reversed and cause remanded. Costs in favor of appellant.

Sullivan, J., and Stewart, J., concur.

A Writ of Attachment Issued Before the Summons is not merely voidable, but void, under a statute providing that "the plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached": Sharman v. Huot, 20 Mont. 555, 63 Am. St. Rep. 645; White v. Johnson, 27 Or. 282, 50 Am. St. Rep. 726.

Proceedings to Dissolve Attachments are discussed in the note to Collins v. Stanley, 123 Am. St. Rep. 1028.

Courts Have Inherent Power Over Their Process, and may direct the amendment thereof in case of errors or irregularities: Passumpsic Savings Bank v. Maulick, 60 Neb. 469, 83 Am. St. Rep. 539; Miller v. Zeigler, 44 W. Va. 484, 67 Am. St. Rep. 777; Simmons v. Norfolk etc. Steamboat Co., 113 N. C. 147, 37 Am. St. Rep. 614; Richmond etc. R. R. Co. v. Benson, 86 Ga. 203, 22 Am. St. Rep. 446. But a void jurisdictional writ of process cannot be amended: Sharman v. Huot, 20 Mont. 555, 63 Am. St. Rep. 645.

CITY OF BELLEVUE v. DALY.

[14 Idaho, 545, 94 Pac. 1036.]

EASEMENT Over Lands of Another, Duty of Maintaining, Who must Assume.—As a general principle of law, it is the duty of an individual or the public entitled to an easement or right of way over the lands of another to keep up, maintain and protect such easement or right of way, and the presumption as to such duty and obligation arises as one of law, and where it is sought to maintain an action on the theory that such duty rests upon the owner of the fee, it is necessary for the plaintiff to plead and prove the facts from which the duty or obligation arises. (p. 182.)

EASEMENT to Maintain Water Ditch, Effect of on Right of the Land Owner to Pasture Cattle.—The fact that a municipality

uses water that it conveys to the place of use through a ditch that runs across the field of another does not of itself entitle the municipality to maintain an action against the owner of the land for a perpetual injunction restraining him from allowing his cattle to feed and graze in the field along the banks of the ditch and to cross over the same or wade through the waters thereof. (p. 182.)

EASEMENT to Maintain Water Ditch, Duty of Maintaining Fence Along.—Though one has the right to maintain a water ditch through the lands of another, the latter is under no duty of fencing in such ditch before permitting his cattle or other stock having the right to range at large, to graze on his land or upon the public common or domain. (p. 182.)

NUISANCE, Lawful Exercise on One's Property Rights, When does not Constitute a.—The principle that every person shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal and like right to the enjoyment of their property, nor injurious to the equal rights of the public, must always be considered and applied in the light of that other principle that every man has a right to the natural use and enjoyment of his own property, and that if, while lawfully in the enjoyment of such use without negligence or malice on his part, an unavoidable loss occurs to his neighbors, the same is damnum absque injuria. The rightful use of one's own land may, in some instances, cause damage to another and yet constitute no legal wrong, and afford the damaged person no remedy. (pp. 183, 184.)

Ensign & Ensign and R. F. Buller, for the appellant.

McFadden & Brodhead, for the respondent.

547 AILSHIE, C. J. This action was commenced by the plaintiff praying for a perpetual injunction against the defendant, restraining him from the commission of certain acts alleged in the complaint. The allegations of the complaint are as follows:

"1. That plaintiff is a municipal corporation organized and existing under the laws of the state of Idaho.

"2. That said city has a population of about one thousand inhabitants, who are supplied with water for drinking, culinary and other domestic purposes, from Seaman's creek, a small stream, flowing in a westerly direction toward the said city; that said water is diverted from said stream by means of a ditch and conveyed to a reservoir and from thence to said city by means of pipes.

"3. That said defendant is the owner of certain land through a portion of which said ditch is constructed, and said defendant is also the owner of a large number of cattle which are allowed by the defendant to range on that portion of his said land through which that said ditch runs; that said cattle are accustomed to wade in the water of said ditch and feed along its banks, the excretion from said cattle finding its way into said ditch and thereby polluting the water carried therein

to such an extent that the same is unfit for drinking and culinary purposes, and thereby endangering the health of the inhabitants of said city.

[548] "4. That the ranging of said cattle as aforesaid is a menace to the health of the inhabitants of the city of Bellevue, and is thereby a public nuisance.

"5. That said defendant has been notified to discontinue the practice of allowing his cattle to range along and through said ditch as aforesaid, but he totally disregards said notification, and will, unless restrained by an order of this court, continue to allow his cattle to so range as aforesaid.

"That plaintiff has no plain, speedy, and adequate remedy at law in the premises."

On this complaint a temporary injunction was issued. The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court, and defendant thereupon answered, admitting the ownership of the land and the cattle mentioned in the complaint, and denying that the ranging and grazing of his cattle on the lands belonging to him and through which the ditch runs is or was a nuisance or menace to the health of the inhabitants of the plaintiff municipality, and denied that he had committed or permitted any act that constituted a nuisance or injured the health of the inhabitants of the plaintiff corporation. He also denied that he was the owner of the ditch or had any interest therein whatever, and denied that it was his duty to fence or in any way protect the ditch in question. The case went to trial before the court without a jury, and the court made findings of fact to the same effect as contained in the allegations of the complaint, and thereupon ordered a perpetual injunction against the defendant, restraining and enjoining him from permitting or allowing his cattle to range along the banks of the ditch mentioned in the complaint, or to in any way interfere with or trespass upon the same. This appeal is from the judgment, and was taken on the same date judgment was entered. The judgment-roll contains a statement and bill of exceptions which sets out the substance of the evidence that was introduced in the case. The only question necessary for us to determine on this appeal is the sufficiency of the complaint and the action of the court in overruling the demurrer thereto. [549] We have been unable to discover from the allegations of the complaint upon what theory the plaintiff could expect to obtain an injunction perpetually restraining the defendant from using his own lands in the usual and ordinary

manner and for necessary purposes of grazing, farming and agriculture. In the first place, it does not appear from the complaint what interest or right the municipality has in and to the ditch, easement or right of way that it is seeking to protect. The most that can be gathered from it is that the plaintiff and its inhabitants are using the waters carried through the ditch, but by what right does not appear. Ordinarily, it is the duty of an individual or the public owning an easement or right of way over lands of another to keep up, maintain and protect such easement or right of way, and that presumption would necessarily arise as a matter of law in the absence of allegations showing a contrary condition or obligation. Whether the city of Bellevue owns the ditch and water right and right of way over plaintiff's lands or merely has an easement to receive waters across that land and through the ditch, it would still have a clear and undisputed right to enter the premises for the purposes of cleaning out, repairing, protecting and taking care of the ditch and waters flowing in the ditch, and would be vested with the necessary right and authority to fence the ditch or perform such other acts as are necessary to protect the water from pollution and the ditch from impairment or destruction, and to keep injurious and deleterious matter and substances therefrom. On the contrary, if, by reason of contract or otherwise, the obligation to do these things has devolved upon the defendant, it would be necessary for the plaintiff to allege and prove the facts necessary to establish such duty or obligation. But to say that because this ditch runs through defendant's field he cannot use the field in the ordinary course of husbandry, and graze his cattle therein, is contrary to all law and every principle of justice. In the first place, under the laws of this state, defendant would be entitled to let his cattle run at large, and if this ditch crossed the uninclosed public domain or the public common, defendant's cattle would have a right to run at large and [550] graze thereon, and if in doing so they grazed along this ditch or waded into it, defendant would not be liable therefor (Swanson v. Groat, 12 Idaho, 148, 85 Pac. 384), nor would it be defendant's duty to fence or inclose the ditch so as to protect the waters before permitting his cattle to graze at large on the common or public domain. Certainly he cannot have any less right on his own lands and in his own field than he would have upon the public common or public domain. If for any reason he has parted with such rights upon his own lands as he would have

upon the public domain, those facts should be alleged and proven. Of course, the foregoing observations apply to such livestock as have the right under the laws of this state to run at large, and would not apply to such stock as are required to be kept within inclosures—as, for example, hogs. It may be that if the defendant should pasture his hogs in the field through which this ditch runs, he would be required to keep them off the plaintiff's easement on the theory that he must keep his hogs up or within his inclosure, and that he cannot permit them to trespass upon either the premises or easements of others.

Under the charter of the city of Bellevue, by section 19 thereof (Sess. Laws 1883, p. 93), the municipality has authority to exercise its corporate jurisdiction and authority over any territory outside the city limits used for waterworks, reservoirs, or streams, trenches, ditches or drains necessary to the construction, maintenance and operation of a waterworks system. Under such authority the municipality has jurisdiction over its ditches, reservoirs and pipe-lines, and may do any and all things necessary for the maintenance and protection thereof, and for keeping the water pure and free from pollution and contamination.

Respondent relies upon sections 3620 and 3621, defining nuisance, and insists that the fact that appellant's cattle are permitted to graze along this ditch and to wade through the waters constitutes a public nuisance, and insists that the courts have the power and authority to restrain nuisance. The latter proposition is true, and it has been so held by this [551] court: Redway v. Moore, 3 Idaho, 312, 29 Pac. 104; Village of Sand Point v. Doyle, 11 Idaho, 642, 83 Pac. 498, 4 L. R. A., N. S., 810; Shreck v. Village of Coeur d'Alene, 12 Idaho, 708, 87 Pac. 1001. The statutes above cited mean something more than the usual, ordinary and lawful use of one's own property in order to constitute such act or acts a nuisance within the definitions they contain.

The principle announced in People v. Truckee Lumber Co., 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581, cited by respondent, which holds that, "Every person shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the public," must be considered and applied in the light of that other principle announced in Beach on Injunctions, section 1112, note 1, wherein he says: "It may be stated as a general

proposition that every man has a right to the natural use and enjoyment of his own property, and if, while lawfully in such use and enjoyment without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is damnum absque injuria, for the rightful use of one's own land may cause damage to another without any legal wrong." To the same effect, see Barnard v. Sherley, 135 Ind. 547, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453.

The whole proposition resolves itself to the question: Upon whom rests the duty and obligation of fencing or otherwise protecting this ditch? We answer that primarily that duty rests upon the owner of the easement or right of way. If for any reason, contractual or otherwise, that duty has shifted to the respondent, the owner of the fee, the plaintiff must show such fact.

The judgment of the trial court is reversed and the cause remanded, with directions to sustain the demurrer and allow [552] the defendant a reasonable time in which to amend. Costs awarded in favor of appellant.

Stewart, J., concurs.

Sullivan, J., took no part in the decision.

The Owner of Property may Make Any Use Thereof, as a rule, which he chooses, and any damages that may result therefrom to others is ordinarily damnum absque injuria: Koblegard v. Hale, 60 W. Va. 37, 116 Am. St. Rep. 868; note to Weitzmann v. Barber Asphalt Co., 123 Am. St. Rep. 566.

One Riparian Owner is not Entitled to an Injunction Restricting the other to the use of so much of the waters of a stream as may be necessary for his household and domestic purposes and water for his stock. And the cutting of trees by a riparian owner on his own land is a legal act, which cannot be enjoined because it lets in the sun, causes greater evaporation, and thereby lessens the amount of water which would otherwise flow upon the lands of the lower proprietor: Fisher v. Feige, 137 Cal. 39, 92 Am. St. Rep. 77.

As to What are Public Nuisances, see the note to Acme Fertilizer Co. v. State, 107 Am. St. Rep. 195.

KIMPTON v. STUDEBAKER BROS. CO.

[14 Idaho, 552, 94 Pac. 1039.]

NEGOTIABILITY OF NOTE, When Destroyed by Provision Respecting the Title to Property.—A recital in a title-retaining note that the title to the property for which it is given shall remain in the payee, and that he shall have the right to take possession of it when he may deem himself insecure, even before maturity of the note, renders such instrument non-negotiable under the provisions of sections 1 and 5 of an act relating to negotiable instruments, approved March 30, 1903 (Sess. Laws 1903, p. 380). (pp. 189, 190.)

PAYMENT VOLUNTARILY MADE, When cannot be Recovered.—Where money is voluntarily paid in satisfaction of an unjust or illegal claim, with full knowledge of the facts and without any fraud, duress or extortion, it cannot be recovered back by the payor. (p. 191.)

A NON-NEGOTIABLE NOTE, Although Assigned or Transferred Before Maturity and for Full Value, is subject to all legal defenses which might have been interposed against it in the hands of the original payee. (p. 191.)

A. B. Redford and Gray & Boyd, for the appellant.

Hawley, Puckett & Hawley, for the respondent.

553 SULLIVAN, J. This action was brought to recover the value of a surrey and set of harness, which it is alleged that plaintiff delivered to the defendant to be sold by it, and that defendant agreed to sell the same for the plaintiff for one hundred and thirty-five dollars or return the same to the plaintiff in case no sale was made; that the defendant sold said property but failed and neglected to pay the plaintiff for the same. The answer denies that the defendant received said personal property as alleged in the complaint, and denies that it agreed to sell the same for plaintiff for one hundred and thirty-five dollars or for any sum whatever, or that it agreed to return the same to the plaintiff on demand; denies that the defendant did sell said personal property, and denies that it had failed and neglected to pay plaintiff for the same; and further answering the defendant avers that on the fifth day of February, 1904, the plaintiff made and delivered to the defendant its certain promissory note, which is set forth in the answer, which note was a renewal of a similar note dated about two years prior to the date of the copy of the note set forth in the answer. Said note is as follows:

554 "$277.00. Salt Lake City, Utah, Feb. 5, 1904.

"On or before the 1st day of December, 1904, for value received in No. 3 harness No. 130 Std., 4 spring 2-3 gear truck wheels, 1 No. 759 surrey and set No. 129 Har. hereafter

called 'said property,' bought of Studebaker Bros. Co. of Utah, I or either of us promise to pay to the order of said company at its office in Salt Lake City, two hundred seventy-seven and no 100 dollars with 12 per cent interest per annum from date until after maturity, and if not paid after maturity the rate of interest shall thereafter be one per cent per month until paid, and reasonable attorney's fees if placed in the hands of an attorney for collection.

"The express condition of this transaction is that the title or ownership of 'said property' does not pass from said company until this note and interest shall have been paid in full, and the said company has full power to declare this note due and take possession of said property when it deems itself insecure, even before the maturity of this note; and it is further agreed by the makers hereof, that they will not sell or dispose of the said property except on the written order of said company. In case said company shall take possession of said property, it may at its pleasure sell the same at public or private sale without notice, and apply the proceeds on this note, or it may without sale indorse the true value of the 'said property' on this note and I or either of us, agree to pay on this note any balance due thereon after such endorsement, as damages and rental for 'said property,' as to this note we waive the right to exempt or claim as exempt, any property, real or personal we now own or may hereafter acquire, by virtue of any homestead or exemption law, now in force or that may hereafter be enacted. I agree to pay $20.00 on the 15th of each month until paid.

"Signed: GEORGE KIMPTON.
"JOHN HENRIE."

It is also averred in the answer that the property so purchased was for the use and benefit of the plaintiff Kimpton, and that John Henrie was only an accommodation indorser; that the plaintiff failed and neglected to pay said note or any
555 part thereof, and on June 6, 1904, the defendant, deeming itself insecure and no payment having been made on said note, repossessed itself of the harness mentioned in said note, and on June 13, 1904, said defendant, deeming itself insecure and not having received any payments on said note, repossessed itself of the surrey mentioned in said note; that the true value of said surrey at the time it was repossessed by defendant was $75, and the true value of the harness was $13, and that thereafter, on November 23, 1904, defendant demanded payment in full on said note, but plaintiff failed

and neglected to pay any part thereof, and that said note was by the defendant declared due and payable according to its terms; that on or about November 23, 1904, the defendant sold said note by indorsing the same "without recourse" to one S. M. Nixon for $160.30, by and with the consent and knowledge of the plaintiff.

Upon the issues thus made, the cause was tried by the court without a jury, and in its findings of fact the court found execution of said note as alleged, and further found that on April 1, 1904, the plaintiff voluntarily delivered to the defendant said surrey and harness, and that the defendant then and there agreed to sell the same for the plaintiff for the sum of $135, said sum to be indorsed upon said promissory note; that on or about June 1, 1904, the defendant sold said surrey and harness, and indorsed upon said note the sum of $13 and neglected to indorse thereon the balance of $122; that on November 16, 1904, and before the maturity of said obligation, the defendant sold the same to said Nixon; that on August 24, 1905, the plaintiff paid to said Nixon the full amount of said obligation, including interest thereon at the rate of twelve per cent per annum, aggregating a sum of $341.06.

As a conclusion of law from the facts found, the court found that the plaintiff was entitled to judgment as prayed for in his complaint, and judgment was entered accordingly. A motion for a new trial was denied and this appeal is from said order and judgment.

The main questions involved in this case are the negotiability of said title-retaining contract or note, and whether the respondent was justified under the facts of this case in paying [556] the full amount that appeared to be due on said contract upon its face to said Nixon, a purchaser thereof, and whether the evidence is sufficient to sustain the findings of fact. The following facts appear from the record: That in 1902, the respondent entered into a contract like the one above set forth, for the purchase of said personal property. The former contract not having been complied with, the one above set forth was taken in its place as a renewal thereof. About two years after said transaction, the respondent not having been paid anything on said contract, he delivered to the agent of the appellant said surrey and set of double harness, the value of which was to be applied on said contract. There is a conflict in the evidence as to the terms on which this property was returned to the appellant, but, under the contract the property belonged to the appellant, and under its provisions it might repossess itself of said property whenever it

deemed itself insecure. But the effect of all the evidence clearly is that the value of said property was to have been indorsed on said contract. According to the evidence of the appellant, the value was agreed upon as follows: $13 for the set of double harness; $75 for the surrey, making a total of $88, while the evidence of the respondent is to the effect that the appellant was to sell said property for $135 and give him credit for that amount on said note. In our view of the case, however, the difference as to the value of the property will make no difference in the decision of this case. It appears that the agent of the appellant took possession of said property and indorsed on said note $13 claimed to be the value of said harness, but neglected to indorse the value of the surrey thereon. Upon the execution of the contract above set forth in place of the first contract, the appellant company had been crowding the respondent for payment for said property, and the agent of the company met the respondent in Pocatello, and, according to the agent's testimony, he went over the matter with the respondent and told him it must be paid; that he figured up the principal on the note and found there was a balance of $189 principal, and interest to the amount of $24 or $25, and there informed the respondent that unless he raised the money he [557] would take the goods from him, and gave him until the next day to make the payment. The respondent thereupon went away, and the next morning one S. M. Nixon went to see the agent of the appellant at the Bannock Hotel. He informed said agent that the respondent had sent him to make some arrangements if he could with regard to this note, and that if he could purchase the note and purchase it right, he would take it up as the respondent was going to do some contract work for him. The appellant thereupon showed Nixon a copy of the note, and also informed him that there was an indorsement of $13 and another of $75, and also informed him that there had been paid on said note $13 and $75, making a total of $88, which, deducted from the total principal of $277, left a balance of $189 with interest. He there informed Nixon that he would let him have the note for $189, the balance of the principal due. Nixon replied that if he could not make twenty-five per cent on the deal, he would not take the note, for the reason that he had to wait to have the work done and take chances on getting it done. It was finally agreed that to the principal of $189 should be added the interest amounting to $24 or $25, and then discounted twenty-five per cent, leaving $160.30, which amount was paid by Mr. Nixon to the

agent of the appellant for said note. It clearly appears from the record that Nixon knew that the $75 for the surrey should have been credited on said note, and was deducted from the note at the time he purchased it, although it was not indorsed thereon through some carelessness or oversight of the bookkeeper of the appellant. The respondent himself testified that shortly after Nixon had bought the note he presented it to him for payment, and testified as follows: "I made no objection to the amount of the note claimed by Mr. Nixon, as the money received for the surrey and harness had never been credited on the note, and I made objection to the full amount of that note when Mr. Nixon presented it for payment. I afterward paid this note to Mr. Nixon through my attorneys some time in November." He further testified that shortly after Nixon showed him the note he informed the appellant that he had failed to credit him for the surrey and testified: "I knew at [558] the time that I paid the note that the credit had not been given. I had my attorney, E. C. White, take up the note and then notify Studebaker Bros. Co. to dig up." The evidence clearly shows that Nixon purchased the note with full knowledge that the $75, the value of the surrey, had not been credited thereon, but that that amount was deducted at the time he purchased the note. It also clearly appears that the respondent knew all about the credits he was entitled to before he paid the note.

Then the question arises under those facts whether the respondent, having voluntarily paid more than he knew was due on said contract or note and more than the holder thereof knew was due thereon, can recover the same from the appellant. Under this question it will be necessary for us to determine, first, whether said retaining contract or note is a negotiable instrument under an act of the legislature of this state entitled: "An act relating to negotiable instruments (being an act to establish a law uniform with the laws of other states on that subject), approved March 10, 1903 (Sess. Laws 1903, p. 380)." Section 5 of said act provides, among other things, as follows: "An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: First. Authorizes the sale of collateral securities in case the instrument be not paid at maturity," etc. No collateral security is involved in this case, as the title of the property remained in the seller.

On an inspection of the instrument in question, it will be observed that its first provision is for the payment on or before December 7, 1904, of $277, with twelve per cent interest per annum from date until maturity, and a reasonable attorney's fee if placed in the hands of an attorney for collection. If this contract had ended there, it would have been a negotiable instrument. The other provision of said contract contains a covenant and promise to do certain acts in addition to the payment of money and the time of payment is uncertain, and it is therefore not negotiable under the provisions [559] of said section 5 of said act. Under the provisions of said contract the appellant had full power to declare the money due thereon and take possession of said property whenever it deemed itself insecure "even before the maturity of the note." The money provided for in said contract is not payable on demand or at a fixed or determinable future time as required by the third subdivision of section 1 of said act relating to negotiable instruments. It also contains certain promises to do acts in addition to the payment of money, and is therefore clearly repugnant to the provisions of sections 1 and 5 of said act.

In Choate v. Stevens, 116 Mich. 28, 74 N. W. 289, 43 L. R. A. 277, the court had under consideration the negotiability of a note which contained a clause stating that it was given for certain property, the title to which should not pass until the note was paid, and which was subject to be retaken in case of nonpayment of the note. The court there held that said note was negotiable. The note involved in that case is set forth in the opinion, and on examination it will be observed that it is not such an instrument as the one under consideration in the case at bar. It does provide for the payment of the money at a fixed time in the future, but it does not further contain a provision that the payee had the full power to declare said note due and take possession of the property whenever it deemed itself insecure "even before the maturity of the note." To that case is attached an exhaustive note citing many authorities, many of them holding that instruments like the one under consideration are non-negotiable.

In Union Stock Yards Nat. Bank v. Bolan, 14 Idaho, 87, ante, p. 146, 93 Pac. 508, this court held a promissory note non-negotiable which contained a stipulation whereby the sureties, guarantors, indorsers and maker waived notice of the granting of an extension of time for payment, etc., thus leaving the time of payment uncertain. The title-retaining note sued on herein is non-negotiable, and was subject to all

of the defenses and equities which the maker had against the original payee therein. Said instrument being non-negotiable, the question next presented is whether the respondent, after having voluntarily paid more than was due thereon, could recover the same [560] from the appellant. In other words, should he have resisted payment to Nixon as assignee of the appellant so far as the credit for the value of said surrey is concerned? The doctrine is well settled that money voluntarily paid in satisfaction of an unjust or illegal demand with full knowledge of the facts and without any fraud, duress or extortion, cannot afterward be recovered by the payor. Both Nixon and the respondent knew all of the facts; Nixon knew he was not entitled to recover the amount on said note represented by the value of the surrey, as it was deducted at the time he purchased said non-negotiable instrument, and the respondent knew that he was entitled to credit thereon for the value of said surrey. He voluntarily paid it when he knew it was not due on said instrument. Under the law, therefore, he cannot recover it from the appellant, as it was not paid under fraud, mistake, duress or extortion.

Said note being non-negotiable, although assigned or transferred before maturity and for value, was subject to all the legal defenses which might have been interposed against it in the hands of the original payor: Dickerson v. Higgins, 15 Okl. 588, 82 Pac. 649; Warren v. Stoddart, 6 Idaho, 692, 59 Pac. 540.

As touching upon this question, see Wilcox v. Cheviott, 92 Me. 239, 42 Atl. 403; Wessel v. Johnson L. & M. Co., 3 N. D. 160, 44 Am. St. Rep. 529, 54 N. W. 922; Manning v. Poling 114 Iowa, 20, 83 N. W. 895, 86 N. W. 30; United States v. Edmondston, 181 U. S. 500, 21 Sup. Ct. Rep. 718, 45 L. ed. 971.

In Mays v. City of Cincinnati, 1 Ohio St. 268, touching upon the question under consideration, the court said: "The reason of the rule and its propriety are quite obvious when applied to a case of payment upon a mere demand of money unaccompanied with any power or authority to enforce such demand, except by suit at law. In such case, if the party would resist an unjust demand, he must do so at the threshold. The parties treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment. When he [the debtor] can only be reached by a proceeding at law he is bound to make [561] his defense in the first instance, and he

cannot postpone the litigation by paying the demand in silence and afterward sue to recover back."

It appears from the evidence that the respondent was anxious and eager to pay more than was due on said note to Nixon, and to bring suit against the defendant for the value of said harness and surrey. Under the well-established rule of law, a voluntary payment made under the facts of this case cannot be recovered back. The judgment of the court must be reversed and the cause remanded, with instructions to dismiss the action. Costs are awarded to appellant.

Ailshie, C. J., and Stewart, J., concur.

AGREEMENTS AND CONDITIONS DESTROYING THE NEGOTIABILITY OF A WRITING OTHERWISE NEGOTIABLE.

I. Conditions Affecting Certainty of Payment.
- a. Conditions and Contingencies in General, 192.
- b. Provision for Retention of Title to Property for Which Note was Given, 194.
- c. Provision for Return of Instrument, 195.
- d. Provision for Waiver of Exemption and Homestead Rights, 195.

II. Conditions Affecting Medium and Manner of Payment.
- a. Provision for Payment from Particular Fund, 196.
- b. Provision for Payment in Other Commodities than Money, 197.
- c. Provision for Payment in Currency or Current Funds, 197.
- d. Provision for Payment in Foreign Money, 198.

III. Conditions Affecting Time of Payment.
- a. Provision for Uncertain Date of Payment, 199.
- b. Provision for Payment on or Before Specified Date, 200.
- c. Provision Giving Maker Option to Pay Before Maturity, 200.
- d. Provision Giving Payee Option to Declare Due Before Maturity, 200.
- e. Provision for Extension of Time, 201.
- f. Provision for Payment on Contingency, 202.

IV. Conditions Affecting Amount Payable.
- a. Provisions Making the Amount Uncertain, 203.
- b. Provisions for Discount, 204.
- c. Provisions in Regard to Interest, 204.
- d. Provisions in Regard to Taxes and Insurance, 205.
- e. Provision for Attorney Fees.
 - 1. When Impairs Negotiability, 207.
 - 2. When does not Impair Negotiability, 209.
- f. Provisions for Exchange, 212.

I. Conditions Affecting Certainty of Payment.

a. Conditions and Contingencies in General.—It is essential to negotiability of an instrument that it be payable at all events, and not dependent upon any contingency or condition: Waters v. Carleton, 4 Port. 205; Henry v. Hazen, 5 Ark. 401; Carnahan v. Pell, 4 Colo. 190; Baird v. Underwood, 74 Ill. 176; Nicely v. Commercial Bank, 15 Ind. App. 563, 57 Am. St. Rep. 245, 44 N. E. 572; Nichols' Admr.

v. Davis, 4 Ky. 490; Strader v. Batchelor, 47 Ky. (8 B. Mon.) 168; Legro v. Staples, 16 Me. 252; Coolidge v. Ruggles, 15 Mass. 387; Grant v. Wood, 78 Mass. (12 Gray) 220; Skillen v. Richmond, 48 Barb. 428; Woods v. North, 84 Pa. 407, 24 Am. Rep. 201; Shelton v. Bruce, 17 Tenn. (9 Yerg.) 24; Martin v. Shumatte, 62 Tex. 188; Kirk v. Dodge County Mut. Ins. Co., 39 Wis. 138, 20 Am. Rep. 39. The following instruments have been held wanting in negotiability because they do not fulfill this requirement: A note with a memorandum that it is not to be binding unless a certain other described note shall not be paid: Grimison v. Russell, 14 Neb. 521, 45 Am. Rep. 126, 16 N. W. 819; an instrument promising to pay a sum as advance wages as seaman in a certain vessel, "provided he proceeds to sea in said vessel according to the shipping articles": Loftus v. Clark, 1 Hilt. 310; James v. Hagar, 1 Daly, 517; a promise to pay a certain sum, "provided the ship arrives at a European port of discharge free from capture and condemnation by the British": Coolidge v. Ruggles, 15 Mass. 387; a note given for the right to sell a patent pump, with the condition that "when the said A sells $50 worth of the water elevator and pays $25, this note to be considered paid": State v. Stratton, 27 Iowa, 420, 1 Am. Rep. 282; a promise to pay a certain sum on the condition that a railroad shall be built to a specified place on or before a named date: Eldred v. Malloy, 2 Colo. 320, 20 Am. Rep. 752; an instrument providing that, "For value received, I promise to pay F., or order, $25.00 in one year from date, for the rent of five rooms, and the said F. is to build a barnyard fence, and the said (maker) is to have all of the land back of the house": Fletcher v. Thompson, 55 N. H. 308; a note with a stipulation that "this note is given for part payment of rent of certain pasture fields, and is not to be paid unless I have the use of said premises, in accordance with a certain lease and agreement": Jennings v. First Nat. Bank, 13 Colo. 417, 16 Am. St. Rep. 210, 22 Pac. 777; an instrument reciting that "I agree to take of B. a fifty-saw cotton-gin, cast-steel saws, fine teeth, and improved brush, the gin to be delivered at my house by September 1st next. The said B. warrants the gin to perform well in every respect, or he will make it do so at his own expense, for which I promise to pay the said B. or bearer $100 by January 1, 1847": Hodges v. Hall, 5 Ga. 163; a writing for the payment of money six months after date on condition that the amount "is not provided for as agreed by A": Baird v. Underwood, 74 Ill. 176; an instrument for the payment of a specified sum, provided that prior to the time when payment becomes due the payee shall discharge a certain mortgage and have satisfaction entered of record: Hays v. Gwin, 19 Ind. 19; a promise to pay a certain sum, but joined with a stipulation concerning the title to premises, and containing an assurance in respect to the disposition thereof: Killam v. Schoeps, 26 Kan. 310, 40 Am. Rep. 313; an order for the payment of a certain sum in goods, payable on the condition that the payee shall be ready to deliver a deed to certain

property, and making the delivery of the goods and of the deed simultaneous acts: Kingsbury v. Wall, 68 Ill. 311; an order on a savings bank stipulating that the bankbook of the depositor must accompany the order: White v. Cushing, 88 Me. 339, 51 Am. St. Rep. 402, 34 Atl. 164, 32 L. R. A. 590; Iron City Nat. Bank v. McCord, 139 Pa. 52, 23 Am. St. Rep. 166, 21 Atl. 143.

The insertion of the term "mem" in a check, indicating that it is not to be presented immediately for payment, does not impair its negotiability: Dykers v. Leather M. Bank, 11 Paige, 12; a provision in a note that "The indorsers hereon contract as makers hereof and agree as to the holder hereof to be held liable as original makers," does not destroy the negotiability of the paper: Hatcher v. National Bank, 79 Ga. 542, 5 S. E. 109; a promise to pay a specified sum, but providing that it may be discharged by discharging the payee from a certain indorsement, is negotiable: Pool v. McCrary, 1 Ga. 319, 44 Am. Dec. 655; and a promissory note given for an insurance premium, is not rendered non-negotiable by a memorandum that if the maker fails to pay it at maturity the whole amount of the premium shall be considered earned and the policy void: Kirk v. Dodge County Mut. Ins. Co., 39 Wis. 138, 20 Am. Rep. 39. It has been decided that an instrument binding the makers to pay a certain sum if a college is located at a named place is negotiable after the college has been so located: Hart v. Taylor, 70 Miss. 655, 12 South. 553.

b. Provision for Retention of Title to Property for Which Note was Given.—The negotiability of a note is not impaired by a recital therein that title to the property for which the note is given shall remain in the payee until the note is paid: First Nat. Bank v. Slaughter, 98 Ala. 602, 39 Am. St. Rep. 88, 14 South. 545; Mott v. Havana Nat. Bank, 22 Hun, 354; Third Nat. Bank v. Bowman-Spring, 50 App. Div. 66, 63 N. Y. Supp. 410; Chicago Ry. etc. Co. v. Merchants' Nat. Bank, 136 U. S. 268, 10 Sup. Ct. Rep. 999, 34 L. ed. 349, affirming 25 Fed. 809. Many courts, however, take the view that the negotiability of a note is destroyed by a recital therein that title to the property for which the note is given shall remain in the payee, and that on default in payment, or whenever he may deem himself insecure, even though before maturity, he may declare the note due and take possession of the property: Kimpton v. Studebaker Bros.' Co., 14 Idaho, 552, ante, p. 185, 94 Pac. 1039; Smith v. Marland, 59 Iowa, 645, 12 N. W. 852 (distinguished in Bank of Carroll v. Taylor, 67 Iowa, 572, 25 N. W. 810); Third Nat. Bank v. Armstrong, 25 Minn. 530; Bannister v. Rouse, 44 Mich. 428, 6 N. W. 870; First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604; Carroll County Sav. Bank v. Strother, 28 S. C. 504, 6 S. E. 313; Morgan v. Edwards, 53 Wis. 599, 40 Am. Rep. 781, 11 N. W. 21; W. W. Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100. Other courts, however, take a different view: Howard v. Simpkins, 69 Ga. 773; Choate v. Stevens, 116 Mich. 28, 74 N. W. 289, 43 L.

R. A. 277; Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811. In South Bend Iron Works v. Paddock, 37 Kan. 510, 15 Pac. 574, it is held that a note is non-negotiable which provides that if it is not paid at maturity, the payee may take possession of and sell the property for which the note was given. And in Wright v. Traver, 73 Mich. 493, 41 N. W. 517, 3 L. R. A. 50, it is held that an instrument in the form of a note providing that "if not paid when due, the property for which it is given shall be the property of the payee," is not negotiable. A writing executed by the vendee of personalty is wanting in negotiability if it states that the sale is upon condition, and may be rescinded by either of the parties, as it does not call for payment absolutely and at all events: First Nat. Bank v. Alton, 60 Conn. 402, 22 Atl. 1010.

c. **Provision for Return of Instrument.**—A note given in payment of shares of stock which recites that the certificate of stock is to be surrendered when the note is paid has been held not negotiable: Van Zandt v. Hopkins, 151 Ill. 248, 37 N. E. 845. So an instrument whereby the maker promises to pay money on a return of his guaranty of a certain note is not negotiable: Smilie v. Stevens, 39 Vt. 315. Some authorities appear to hold that certificates of deposit "payable on their return, properly indorsed," are not negotiable: Patterson v. Poindexter, 6 Watts & S. 227, 40 Am. Dec. 554; Lebanon Bank v. Mangan, 28 Pa. 452; Dempsey v. Harm (Pa.), 12 Atl. 27; O'Neill v. Bradford (Wis.), 1 Pinn. 390, 42 Am. Dec. 574. It is generally conceded, however, that merely to make a certificate of deposit payable on its return has no effect on its negotiability: Hatch v. First Nat. Bank, 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908; Kirkwood v. Exchange Nat. Bank, 40 Neb. 497, 58 N. W. 1135; Kirkwood v. First Nat. Bank, 40 Neb. 484, 42 Am. St. Rep. 683, 58 N. W. 1016, 24 L. R. A. 444; Frank v. Wessels, 64 N. Y. 155; Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 4 Am. St. Rep. 526, 11 N. E. 799; Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377; Miller v. Austen, 54 U. S. (13 How.) 218, 14 L. ed. 119; but if the certificate further provides that it is assignable only on the books of the company issuing it, this destroys its negotiable character: Zander v. New York Security & Trust Co., 178 N. Y. 208, 102 Am. St. Rep. 492, 70 N. E. 449. A certificate with an indorsement on its face, "Deposit receipt, not transferable," is non-negotiable: Bank of Montreal v. Clark, 108 Ill. App. 163.

d. **Provision for Waiver of Exemption and Homestead Rights.**—The incorporation into an otherwise negotiable note of a waiver of all rights from stay, exemption and homestead laws does not impair its negotiability: First Nat. Bank v. Slaughter, 98 Ala. 602, 39 Am. St. Rep. 88, 14 South. 545; Lyon v. Martin, 31 Kan. 411, 2 Pac. 790; Hughitt v. Johnson, 28 Fed. 865; Schlesinger v. Arline, 31 Fed. 648. A note payable to order with interest "waiving the right of appeal and all valuation, appraisement, stay and exemption laws," is negotiable: Zimmerman v. Anderson, 67 Pa. 421, 5

Am. Rep. 447; but an instrument containing terms of negotiability, together with a power to confess judgment, and releasing all errors and waiving stay of execution and the right of inquisition on real estate, is not a promissory note entitled to days of grace: Overton v. Tyler, 3 Pa. 346, 45 Am. Dec. 645.

II. Conditions Affecting Medium and Manner of Payment.

a. Provision for Payment from Particular Fund.—When an instrument is made payable from a specific or particular fund, this ordinarily destroys its negotiability, for in such a case payment is not unconditional: Miller v. Poage, 56 Iowa, 96, 41 Am. Rep. 82, 8 N. W. 799; Mershon v. Withers, 4 Ky. (1 Bibb) 503; Strader v. Batchelor, 47 Ky. (8 B. Mon.) 168; McGee v. Larramore, 50 Mo. 425; Harriman v. Sanborn, 43 N. H. 128; Kenny v. Hinds, 44 How. Pr. 7; Kelley v. Brooklyn, 4 Hill, 263; Fulton v. Varney, 102 N. Y. Supp. 608, 117 App. Div. 572. Thus an instrument which reads: "Please pay to the order of W. $600, the same to be the last $600 due me on my contract, and charge the same to my account," is not negotiable: Woodward v. Smith, 104 Wis. 365, 80 N. W. 440. Neither is a writing that "the undersigned promise to pay J., or bearer, $100, in monthly pro rata installments out of the first net proceeds from sale of water": Stewart v. Street, 10 Cal. 372. An order payable from the proceeds of specified goods whenever they are sold, is not negotiable: De Forrest v. Frary, 6 Cow. 151.

The mere mention of a fund in an otherwise negotiable instrument, however, does not necessarily deprive it of the character of commercial paper, but it must further appear, in order to have that effect, that it contains either an express or implied direction to pay it therefrom, and not otherwise: Schmittler v. Simon, 101 N. Y. 554, 54 Am. Rep. 737, 5 N. E. 452. Moreover, the direction to charge the amount of an instrument to a particular account does not make it payable conditionally nor out of a particular fund. And an order for the payment of a sum certain does not lose its negotiability because it shows on what account it is to be applied or recites the particular consideration which has been received, or states the object for which the money is to be expended or refers to a fund for reimbursement: Siegel v. Chicago etc. Bank, 131 Ill. 569, 19 Am. St. Rep. 51, 23 N. E. 417, 7 L. R. A. 537; Beatty v. Western College, 177 Ill. 280, 69 Am. St. Rep. 242, 52 N. E. 432, 42 L. R. A. 797; Doherty v. Perry, 38 Ind. 15; American Ins. Co. v. Gallahan, 75 Ind. 168; First Nat. Bank v. Lightner, 74 Kan. 736, 118 Am. St. Rep. 353, 88 Pac. 59, 8 L. R. A., N. S., 1148; Bank of Kentucky v. Sanders, 10 Ky. 184, 13 Am. Dec. 149; Treat v. Cooper, 22 Me. 203; Collins v. Bradbury, 64 Me. 37; Whitney v. Eliot Nat. Bank, 137 Mass. 351, 50 Am. Rep. 316; Hillstrom v. Anderson, 46 Minn. 382, 49 N. W. 187; Newton Wagon Co. v. Diers, 10 Neb. 284, 4 N. W. 995; First Nat. Bank v. Michael, 96 N. C. 53, 1 S. E. 855; Coursin v. Ledlie's Admrs., 31 Pa. 506; Buchanan v. Wren, 10 Tex. Civ. App. 560, 30 S. W. 1077.

b. Provision for Payment in Other Commodities than Money.—In order to be negotiable, an instrument must be payable in money: Markley v. Rhodes, 59 Iowa, 57 12 N. W. 775; Chandler v. Calver, 87 Mo. App. 368; Hodges v. Clinton, 1 N. C. 53; Bank of Hamburg v. Johnson, 3 S. C. (3 Rich.) 42; First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334; Hasbrook v. Palmer, 2 McLean, 10 Fed. Cas. No. 6188. Instruments payable in services (Ransom v. Jones, 2 Ill. 291; Henry v. Hughes, 24 Ky. (1 J. J. Marsh.) 453; Prather v. McEvoy, 8 Mo. 661; Quinby v. Merritt, 30 Tenn. (11 Humph.) 439), or in goods (McCartney v. Smalley's Admts., 11 Iowa, 85; Coyle's Exr. v. Satterwhite's Admr., 20 Ky. (4 T. B. Mon.) 124; Gushee v. Eddy, 77 Mass. (11 Gray) 502, 71 Am. Dec. 728; Tibbets v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307; Brown v. Richardson, 20 N. Y. 472; Tindall's Exrs. v. Johnston, 2 N. C. 372; Rhodes v. Lindly, 3 Ohio, 51, 17 Am. Dec. 580), are not negotiable. Neither is an instrument payable in money or goods: Matthews v. Houghton, 11 Me. 377; Arnold v. Rock River etc. R. R. Co., 12 N. Y. Super. Ct. (5 Duer) 207; Thompson v. Gaylard, 3 N. C. 226; Alexander v. Oaks, 19 N. C. 513; Looney v. Pinckston, 1 Tenn. (1 Overt.) 383; Lawrence v. Dougherty, 13 Tenn. (5 Yerg.) 434; Howell v. Todd, Fed. Cas. No. 6783. In Dinsmore v. Duncan, 57 N. Y. 573, 15 Am. Rep. 534, it was objected that the note in question was in the alternative, and accordingly was not negotiable, to which effect were cited several cases. "But in these cases," said the court, "the alternative was with the debtor, so that it could not be said that the instrument was payable absolutley and at all events. No case was cited, nor is it believed can any be found, in which, where the note is payable absolutely, as far as the debtor is concerned, and the creditor has an option to convert the obligation of the debtor into another and different one, it is held to be not negotiable, so long as the creditor has not exercised his option."

c. Provision for Payment in Currency or Current Funds.—Many authorities have held that instruments payable in "currency," in "current funds," or in the notes of particular banks are non-negotiable because not payable in money: Bank of Mobile v. Brown, 42 Ala. 108; National State Bank v. Ringle, 51 Ind. 393; Huse v. Hablin, 29 Iowa, 501, 4 Am. Rep. 244; Haddock v. Woods, 46 Iowa, 433; Jones v. Fales, 4 Mass. 245; Besancon v. Shirley, 17 Miss. (9 Smedes & M.) 457; Lackey v. Miller, 61 N. C. 26; Johnson v. Henderson, 76 N. C. 227; Wright v. Hart's Admr., 44 Pa. 454; Whiteman v. Childress, 25 Tenn. (6 Humph.) 303. The doctrine of these authorities, however, is not applicable to present-day conditions. Said the supreme court of the United States in Bull v. First Nat. Bank, 123 U. S. 105, 8 Sup. Ct. Rep. 63, 31 L. ed. 97: "Undoubtedly, it is the law that, to be negotiable, a bill, promissory note, or check must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such in-

struments in notes of particular banks or associations, or in paper not current as money, has been held to destroy their negotiability. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term 'current funds' has been used to designate any of these, all being current and declared, by positive enactment, to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words."

The foregoing language of the United States supreme court is supported by Hatch v. First Nat. Bank, 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908; Laird v. State, 61 Md. 309; Kirkwood v. First Nat. Bank, 40 Neb. 484, 42 Am. St. Rep. 683, 58 N. W. 1016, 24 L. R. A. 444; Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176; Swetland v. Creigh, 15 Ohio, 118; Howe v. Hartness, 11 Ohio St. 449, 78 Am. Dec. 312; McCormick v. Campman (Tex. Civ. App.), 109 S. W. 492; Klauber v. Biggerstaff, 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357. In the Nebraska case above, it was contended that a note was not negotiable because payable "in current funds." But the court held otherwise, saying: "We are aware that many courts have held that such a clause does not require payment in money, and destroys the negotiability of the instrument. The cases so holding are either cases arising at a time when many forms of bank notes and bills were in use, varying in their values, for cases decided upon the authority of that class without regard to changed condition. With regard to existing condition, we think the supreme court of the United States has declared the law correctly in Bull v. Bank of Kasson, 123 U. S. 105, 8 Sup. Ct. Rep. 63, 31 L. ed. 97." The term "current funds," used as the expression of the medium of payment, should be construed to mean current money: Galena Ins. Co. v. Kupfer, 28 Ill. 332, 81 Am. Dec. 284; Hatch v. First Nat. Bank, 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908. In a recent Iowa decision, however, it is said that a cashier's check payable in "current funds" is not negotiable: Dille v. White, 132 Iowa, 327, 109 N. W. 909, 10 L. R. A., N. S., 510, and in Minnesota it is held that a note payable by bills of exchange is not negotiable, because not payable in money: First Nat. Bank v. Slette, 67 Minn. 425, 64 Am. St. Rep. 429, 69 N. W. 1148. A provision for payment in gold coin or its equivalent in currency of the United States, at the option of the holder, does not destroy the negotiability of the instrument: Wright v. Morgan (Tex. Civ. App.), 37 S. W. 627.

d. Provision for Payment in Foreign Money.—It is not material, so far as concerns the negotiability of a bill or note, whether it is made payable in foreign or domestic money. Thus a note made pay-

able in pounds sterling is none the less negotiable: King v. Hamilton, 8 Saw. 167, 12 Fed. 478. And the fact that a note is payable in Mexican silver dollars does not destroy its negotiability, but a recovery thereon must be for its value in American money: Hogue v. Williamson, 85 Tex. 553, 34 Am. St. Rep. 823, 22 S. W. 580, 20 L. R. A. 481. A note made in Michigan, payable in Canada in "Canada currency," is payable in money, and therefore negotiable: Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162; but a note made in New York and payable there in "Canada currency," has been held not negotiable: Thompson v. Sloan, 23 Wend. 71, 35 Am. Dec. 546. The court, however, observed in reaching this conclusion that "this view of the case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination, being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery. A note payable in pounds, shillings and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course, therefore, in an action on such instrument is to aver and prove the value of the sum expressed in our own tenderable coin."

III. Conditions Affecting Time of Payment.

a. **Provision for Uncertain Date of Payment.**—An instrument, in order to be negotiable, must call for payment at a time certain: Glidden v. Henry, 104 Ind. 278, 54 Am. Rep. 316, 1 N. E. 369; Lamb v. Story, 45 Mich. 488, 8 N. W. 87; Story v. Lamb, 52 Mich. 525, 18 N. W. 248; Specht v. Beindorf, 56 Neb. 553, 76 N. W. 1059, 42 L. R. A. 429; but if the time of payment must certainly arrive, it is not necessary that the precise date therefor should be actually expressed on the face of the paper: Protection Ins. Co. v. Bill, 31 Conn. 534; Cota v. Buck, 48 Mass. 588, 41 Am. Dec. 464; Henschel v. Mahler, 3 Denio, 428. And if no time of payment is designated in a note, then it is due immediately, and does not lack negotiability on that account: Hall v. Toby, 110 Pa. 318, 1 Atl. 369. A clause in a note authorizing the confession of judgment by an attorney, has been held illegal, and therefore not destructive of negotiability: Tolman v. Janson, 106 Iowa, 455, 76 N. W. 732. But a note containing a power of attorney to enter judgment on it at any time after its date, whether due or not, has been held not negotiable: Wisconsin Yearly Meeting of Freewill Baptists v. Babler, 115 Wis. 289, 91 N. W. 678. So has a note payable in ninety days and containing a power of attorney to confess judgment "at any time hereafter": Richards v. Barlow, 140 Mass. 218, 6 N. E. 68. A clause in a note authorizing the payee bank to appropriate on the note at any time any money which the maker may have on deposit does not make the time of payment uncertain so as to impair negotiability: Louisville Banking Co. v. Gray, 123 Ala. 251, 82 Am. St. Rep. 120, 26 South. 205. And the negotiability of a note is not destroyed by the addition of this sentence: "I have sold to T. M. Hubbard

(the payee) about 600 bushels No. 2 corn, at sixty-five cents, to be delivered between date and September 1; when such delivery is made this note to be due and payable": Jones v. Hubbard, 17 Ill. App. 564.

b. **Provision for Payment on or Before Specified Date.**—A note payable on or before a specified date has in some jurisdictions been said to be non-negotiable: Roads v. Webb, 91 Me. 406, 64 Am. St. Rep. 246, 40 Atl. 128; Hubbard v. Mosely, 11 Gray, 170, 71 Am. Dec. 698. It is conceded by the great weight of authority, however, that the negotiability of a note is in nowise affected because made payable on or before a specified date: Dorsey v. Wolff, 142 Ill. 589, 34 Am. St. Rep. 99, 32 N. E. 495, 18 L. R. A. 428; Mattison v. Marks, 31 Mich. 421, 18 Am. Rep. 197; First Nat. Bank v. Skeen, 101 Mo. 683, 14 S. E. 732, 11 L. R. A. 748; Curtis v. Horn, 58 N. H. 504; Jordan v. Tate, 19 Ohio St. 586; Albertson v. Laughlin, 173 Pa. 525, 51 Am. St. Rep. 777, 34 Atl. 216; Buchanan v. Wren, 10 Tex. Civ. App. 560, 30 S. W. 1077; Gill v. First Nat. Bank (Tex. Civ. App.), 47 S. W. 751. The negotiability of a note is not impaired by its being made payable one or two years after date: Duncan v. City of Louisville, 76 Ky. (13 Bush) 378, 26 Am. Rep. 201. But in Massachusetts a note payable "on demand or in three years from this date," with interest "during said term or for such further time as said principal sum or any part thereof shall remain unpaid," is not negotiable: Mahoney v. Fitzpatrick, 133 Mass. 151, 43 Am. Rep. 502.

c. **Provision Giving Maker Option to Pay Before Maturity.**—It has been thought by some courts that a stipulation in a note giving the maker the right to pay before maturity at his option impairs the negotiability of the instrument by rendering the time of payment uncertain: Way v. Smith, 111 Mass. 523; Stults v. Silva, 119 Mass. 137. The better rule, however, is that a provision in a note giving the maker an option to pay before maturity in no wise affects its negotiability: Cowing v. Cloud, 16 Colo. App. 326, 65 Pac. 417; Lowell Trust Co. v. Pratt, 183 Mass. 379, 67 N. E. 363; Bowie v. Hume, 13 App. D. C. 286. An instrument payable "within one year after date" fulfills the requirement of certainty as to time of payment: Leader v. Plante, 95 Me. 339, 85 Am. St. Rep. 415, 50 Atl. 54.

d. **Provision Giving Payee Option to Declare Due Before Maturity.**—A number of courts have announced the rule that a contract authorizing the payee to declare it due, whenever he deems himself insecure is not negotiable: First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604; Carroll County Sav. Bank v. Strother, 28 S. C. 504, 6 S. E. 313; Morgan v. Edwards, 53 Wis. 599, 40 Am. Rep. 781, 11 N. W. 21. But the general rule is that a provision in a note which gives the holder an option, on the happening of a certain contingency, to declare it due before the date fixed for maturity, does not destroy its negotiability: Hunter v. Clarke, 184 Ill.

158, 75 Am. St. Rep. 160, 56 N. E. 297. Thus, a clause in a note reciting that, in case of default in the payment of interest, the principal shall become due at the option of the holder, does not destroy the negotiable character of the paper: Clark v. Skeen, 61 Kan. 526, 78 Am. St. Rep. 37, 60 Pac. 327, 49 L. R. A. 190; Wilson v. Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Phelps v. Sargent, 69 Minn. 118, 71 N. W. 927; Roberts v. Snow, 27 Neb. 425, 43 N. W. 241; Stark v. Olsen, 44 Neb. 646, 63 N. W. 37; Merrill v. Hurley, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958; Wright v. Morgan (Tex. Civ. App.), 37 S. W. 627; Thorpe v. Mindeman, 123 Wis. 149, 107 Am. St. Rep. 1003, 101 N. W. 417, 68 L. R. A. 146.

e. **Provision for Extension of Time.**—A note does not lose its negotiability from the fact that it contains an agreement for an extension of time, if the extension is certain and definite. Hence, an agreement in a note that it is to be extended six months from maturity, if so desired by the makers and indorsers, does not destroy its negotiability: Anniston Loan & Trust Co. v. Stickney, 108 Ala. 146, 19 South. 63, 31 L. R. A. 234. And even a note in the following language has been held negotiable: "Brandon, March 14th, 1868. For value received, I promise to pay D., or bearer, $75 one year from date, with interest annually, and if there is not enough realized, by good management, in one year, to have more time to pay in the manufacture of the plaster bed on Stearn's land": Capron v. Capron, 44 Vt. 410.

But a provision in a note to extend the time of payment indefinitely is fatal to negotiability: Mitchell v. St. Mary, 148 Ind. 111, 47 N. E. 224; Oyler v. McMurray, 7 Ind. App. 645, 34 N. E. 1004; Matchett v. Anderson Foundry & Machine Works, 29 Ind. App. 207, 94 Am. St. Rep. 272, 64 N. E. 229; Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963; Coffin v. Spencer, 39 Fed. 262. Thus, a provision in a note that the "payee or his assigns may extend the time of payment thereof from time to time indefinitely as he or they may see fit," destroys the negotiability of the instrument: Woodbury v. Roberts, 59 Iowa, 348, 44 Am. Rep. 685, 13 N. W. 312; Smith v. Van Blareom, 45 Mich. 371, 8 N. W. 90. And a promissory note having on its face a written memorandum: "This note is given for advancements, and it is the understanding it will be renewed at maturity," is thereby deprived of the essential qualities of commercial paper: Citizens' Nat. Bank v. Piollet, 126 Pa. 184, 12 Am. St. Rep. 860, 17 Atl. 603, 4 L. R. A. 190.

A clause in a note that "without notice the payee or holder may extend the time of payment of the principal," has been held to impair negotiability: Rosenthal v. Rambo, 165 Ind. 584, 76 N. E. 404, 3 L. R. A., N. S., 678; so has a clause waiving "all defenses on the ground of any extension of time in its payment that may be given by its holders" to the makers: Merchants' & Mechanics' Sav. Bank v. Fraze, 9 Ind. App. 161, 53 Am. St. Rep. 341, 36 N. E. 378; Evans v. Odem, 30 Ind. App. 207, 65 N. E. 755. And the negotiability of a

note is destroyed by a stipulation therein that the sureties, indorsers and makers waive notice of the granting of any extension of time, and waive the right of defense on the ground that extensions have been made without notice: Union Stockyards Nat. Bank v. Bolan, 14 Idaho, 87, ante, p. 146, 93 Pac. 508; City Nat. Bank v. Gunter Bros., 67 Kan. 227, 72 Pac. 842. However, the mere stipulation, in a promissory note that the makers, indorsers and sureties consent that the time of payment may be extended without notice does not impair negotiability: Farmer, Thompson & Helsell v. Bank of Graettinger, 130 Iowa, 469, 107 N. W. 170; City Nat. Bank v. Goodlo-McClelland Commission Co., 93 Mo. App. 123; First Nat. Bank v. Buttery (N. D.), 116 N. W. 341; National Bank of Commerce v. Kenney, 98 Tex. 293, 83 S. W. 368.

f. **Provision for Payment on Contingency.**—If the payment of an instrument depends upon a contingency or an event which may never happen, it is not negotiable: Chicago Trust etc. Bank v. Chicago Title etc. Co., 190 Ill. 404, 83 Am. St. Rep. 138, 60 N. E. 586; Tradesmen's Nat. Bank v. Green, 57 Md. 602; Downer v. Tucker, 31 Vt. 204. Hence, a note payable when a specified person shall be elected to a certain office is not negotiable for there is no certainty of his election: Cooper v. Brewster, 1 Minn. 94; Specht v. Beindorf, 56 Neb. 553, 76 N. W. 1059, 43 L. R. A. 429. Likewise, a note payable to a person "when he is twenty-one years old" is not negotiable, for he may never attain that age: Kelley v. Hemmingway, 13 Ill. 604, 56 Am. Dec. 474. An agreement to pay on or before one year after the date of the completion of certain premises is not negotiable: Chicago Trust etc. Bank v. Chicago Title etc. Co., 190 Ill. 404, 83 Am. St. Rep. 138, 60 N. E. 586. Neither is a note payable upon the confirmation of a grant by Congress: Joseph v. Catron (N. M.), 81 Pac. 439; nor a contract to pay upon the determination of a certain suit in favor of the promisor: Shelton v. Bruce, 17 Tenn. 24; nor an obligation to pay a sum of money when a specified estate is "settled up": Husband v. Epling, 81 Ill. 172, 25 Am. Rep. 273. An order reciting, "At sight, after the arrival and discharge of coal of brig G., pay to the order of myself $1,500, value received," is not negotiable: Grant v. Wood, 78 Mass. (12 Gray) 220. An order payable out of the proceeds of specified goods whenever they are sold is not negotiable: De Forest v. Frary, 6 Cow. 151. And a note given for a patent right, payable upon the realization of a certain amount from sales of the article, is not negotiable: Martin v. Shumatte, 62 Tex. 188. A memorandum of settlement among the partners for the completion of a canal section, ascertaining the amount due to one of them at that date, with a promise to pay such amount on the final estimate of the section, is not negotiable: Weidler v. Kauffman, 14 Ohio, 455. And notes due in six months from date, with a clause that in case of the sale or removal of the goods for which the note was given it shall become due at once, is held non-negotiable in First Nat. Bank v. Carson, 60 Mich. 432, 27 N. W. 589.

An instrument otherwise negotiable does not lose its negotiability because payable on a certain event which is certain to happen: Smilie v. Stevens, 39 Vt. 315. Thus, an instrument payable on the death of the promisor is negotiable: Bristol v. Warner, 19 Conn. 7; Martin v. Stone, 67 N. H. 367, 29 Atl. 845. And a note suggesting the possible contingency upon which it must be paid at a date earlier than the one fixed is negotiable: Joergenson v. Joergenson, 28 Wash. 477, 92 Am. St. Rep. 888, 68 Pac. 913. Hence, a note payable on a certain day, or when a certain building is completed, is negotiable: Stevens v. Blunt, 7 Mass. 240; Goodloe v. Taylor, 10 N. C. 458. And a clause in a note payable on a certain date, "or before if made out of the sale" of a specified article, does not affect the negotiability of the note: Walker v. Woolen, 54 Ind. 164, 23 Am. Rep. 639; Noll v. Smith, 64 Ind. 511, 31 Am. Rep. 131; Woolen v. Ulrich, 64 Ind. 120; Charlton v. Reed, 61 Iowa, 166, 47 Am. Rep. 808, 16 N. W. 64; Ernst v. Steckman, 74 Pa. 13, 15 Am. Rep. 542. But it seems that a further provision that the note is not to be paid if the sales do not equal its amount, impairs the negotiability of the paper: Cochran v. Nebeker, 48 Ind. 459. The word "profits" in a note reading "one year after date, for value received, I, the subscriber, promise to pay R., or bearer, $40, profits, with interest," does not affect the negotiability of the note: Matthews v. Crosby, 56 N. H. 21. A note whereby the maker promises to pay a certain sum on a specified day is negotiable, although it provides that it shall become due immediately upon delivery of certain property by the payee: Dobbins v. Oberman, 17 Neb. 163, 22 N. W. 356.

IV. Conditions Affecting Amount Payable.

a. **Provisions Making the Amount Uncertain.**—One of the first essentials of a negotiable instrument is that it shall call for the payment of an amount certain at maturity: Dorsey v. Wolff, 142 Ill. 589, 34 Am. St. Rep. 99, 32 N. E. 495, 18 L. R. A. 428; Roblee v. Union Stockyards Nat. Bank, 69 Neb. 180, 95 N. W. 61; National Bank of Commerce v. Feeney, 12 S. D. 156, 76 Am. St. Rep. 594, 80 N. W. 186, 46 L. R. A. 732. The incorporation of a collateral agreement which requires payment of uncertain sums at uncertain times before maturity, and thus renders it impossible to say how much, if anything, will be due at maturity, is fatal to negotiability: Roblee v. Union Stockyards Nat. Bank, 69 Neb. 180, 95 N. W. 61. A note for rent and "subject to any offset that may arise for repairs" is wanting in negotiability: Jones v. Laturnus (Tex. Civ. App.), 40 S. W. 1010. But the negotiability of a note is not impaired by a provision authorizing the payee bank to appropriate on the note at any time any money which the maker may have in the bank: Louisville Banking Co. v. Gray, 123 Ala. 251, 82 Am. St. Rep. 120, 26 South. 205. The certainty required in negotiable instruments is commercial rather than mathematical certainty: State Nat. Bank v. Cudahy Packing Co., 126 Fed. 543; Cudahy Packing Co. v. State

Nat. Bank, 134 Fed. 538, 67 C. C. A. 662; and therefore many courts hold, as will hereafter appear, that the insertion in an instrument of provisions for the payment of exchange, attorneys' fees, and the like, does not deprive the paper of its negotiable character.

b. **Provisions for Discount.**—A provision in a promissory note for discount in an indefinite amount impairs the negotiability of the instrument; it is otherwise, however, if the provision for discount is certain and definite. Thus a note payable on October 1, 1903, with interest, "a discount of six per cent to be allowed if paid on or before October 1, 1903," is negotiable: Loring v. Anderson, 95 Minn. 101, 103 N. W. 722. But in National Bank of Commerce v. Feeney, 12 S. D. 156, 76 Am. St. Rep. 594, 80 N. E. 186, 46 L. R. A. 732, it is held that a promissory note having a statement written upon its face that it is to be discounted at a certain per cent if paid before maturity is non-negotiable, for, at the time of the execution, it is impossible to ascertain what amount will be required to pay it, without considering the discount, depending upon a condition uncertain of fulfillment.

c. **Provisions in Regard to Interest.**—A provision in a note for an increased rate of interest after maturity in a case of default does not, according to the weight of authority, introduce such uncertainty of amount into the instrument as to impair its negotiability: Towne v. Rice, 122 Mass. 67; Merrill v. Hurley, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958; De Hass v. Roberts, 59 Fed. 853. A contrary rule, however, prevails under the statutes in Montana: Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4. In Nebraska such a provision is regarded in the nature of a penalty, not enforceable, and therefore not impairing negotiability: Kendall v. Selby, 66 Neb. 60, 103 Am. St. Rep. 697, 92 N. W. 178. A note is none the less negotiable because it states that it is without interest if paid at maturity, but that it is to bear a certain rate of interest if not so paid: Hope v. Barker, 112 Mo. 338, 34 Am. St. Rep. 387, 20 S. W. 567; Christian County Bank v. Goode, 44 Mo. App. 129; Hope v. Barker, 43 Mo. App. 632. And a provision in a note, drawing interest at a specified rate, that if not paid when due it shall draw a higher rate from date until paid does not destroy the negotiability of the instrument: Crump v. Berdan, 97 Mich. 293, 37 Am. St. Rep. 345, 56 N. W. 559; Smith v. Crane, 33 Minn. 144, 53 Am. Rep. 20, 22 N. W. 633; although a different view has been taken of this question under statutes declaring that a negotiable instrument shall contain no condition not certain of fulfillment: Randolph v. Hudson, 12 Okl. 516, 74 Pac. 946; Hegeler v. Comstock, 1 S. D. 138, 45 N. W. 331, 8 L. R. A. 393.

A note for an amount certain, payable to a person named, or bearer, "with interest the same as savings banks pay," is uncertain as to the amount called for, and therefore not negotiable: Whitwell v. Winslow, 134 Mass. 343. And a note payable on or before two years with interest at ten per cent is non-negotiable, if it contains a clause

that if paid within one year it shall not draw interest: Lamb v. Story, 45 Mich. 488, 8 N. W. 87. The acceptance of a bill of exchange, with interest after maturity, is negotiable, since the provision as to interest becomes operative only after maturity: Farmers' Nat. Bank v. Sutton Mfg. Co., 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595. And the negotiability of a certificate of deposit is not impaired by a provision that the amount thereof shall bear interest if left six months, but no interest after six months: Kirkwood v. First Nat. Bank, 40 Neb. 484, 42 Am. St. Rep. 683, 58 N. W. 1016, 24 L. R. A. 444. A note is not rendered non-negotiable by a stipulation for the payment of interest on interest to maturity: Gilmore v. Hirst, 56 Kan. 626, 44 Pac. 603; and a provision that if interest is not paid semi-annually it shall become as principal and bear the same rate of interest does not impair the negotiability of the instrument: Brown v. Vossen, 112 Mo. App. 676, 87 S. W. 577. In Goodin v. Buhler, 57 Mo. App. 63, a note is declared negotiable though usurious on its face. An instrument providing for the payment of a sum certain at a designated date, with interest at six per cent per annum, and that unpaid interest shall bear interest at twelve per cent per annum, and if suit is commenced that customary attorneys' fees shall be added to the judgment and taxed as costs, is a promissory note: Cherry v. Sprague, 187 Mass. 113, 105 Am. St. Rep. 381, 72 N. E. 456, 67 L. R. A. 33.

d. **Provisions in Regard to Taxes and Insurance.**—While there are authorities which seem to lend themselves to a contrary interpretation (Gilbert v. Nelson, 5 Kan. App. 528, 48 Pac. 207; Corniah v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; Donaldson v. Grant, 15 Utah, 231, 49 Pac. 779), the better rule is that a provision in a deed of trust or mortgage that if the mortgagor fails to pay the taxes and insurance on the property the mortgagee may do so, and that the amount so paid shall become an additional indebtedness secured by the mortgage, does not impair the negotiability of the note secured by the mortgage. Such provision in the mortgage is not imported into the note; but the mortgage and the note form two separate contracts, both being a part of the same transaction, but each relating to its own subject matter, and not interfering with the other: Frost v. Fisher, 13 Colo. App. 322, 58 Pac. 872; Kendall v. Selby, 66 Neb. 60, 103 Am. St. Rep. 697, 92 N. W. 178; Thorp v. Mindeman, 123 Wis. 149, 107 Am. St. Rep. 1003, 101 N. W. 417, 68 L. R. A. 146. There are a number of decisions, however, to the effect that a provision in a mortgage for the payment of taxes by the mortgagor destroys the negotiability of the accompanying note, because it renders the amount uncertain. It would seem, however, that the agreement to pay taxes in these cases was to pay those which might be levied against the mortgagee or on his interest in the estate, which agreement had no connection with the preservation of the security: Wistrand v. Parker, 7 Kan. App. 562, 52 Pac. 59; Walker v. Thompson, 108 Mich. 686, 66 N. W. 584;

Carmody v. Crane, 110 Mich. 508, 68 N. W. 268; Brooke v. Struthers, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536; Garnett v. Meyers, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803; Consterdine v. Moore, 65 Neb. 291, 101 Am. St. Rep. 620, 91 N. W. 399, 96 N. W. 1021; Allen v. Dunn, 71 Neb. 83, 99 N. W. 680; Howell v. Todd, Fed. Cas. No. 6783; Farquhar v. Fidelity Ins. etc. Co., Fed. Cas. 4676. Said the Nebraska court in the above case of Garnett v. Meyers, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803: "If the terms and conditions of the mortgage are limited to the proper province of the mortgage—that is, to provide security for the indebtedness—its provisions relating solely to the security will not affect the negotiability of the note. If the holder of the note is compelled to pay the taxes or insurance on the mortgaged property to protect the security, and is afterward allowed to recover the amount so paid in addition to the principal indebtedness, this does not affect the amount of the indebtedness itself." And the Wisconsin court in the above case of Thorp v. Mindeman, 123 Wis. 149, 107 Am. St. Rep. 1003, 101 N. W. 417, 68 L. R. A. 146, makes this observation: "Without stopping to consider whether these decisions (referring to the Kansas, Michigan and Nebraska cases above) should be approved or not, it is enough to say that they are not at all in conflict with the present decision. The agreement to pay taxes was to pay taxes which might be levied on the mortgagee, not the taxes on the mortgaged property; hence the agreement had no connection with the preservation of the security, and was construed by the courts as an agreement to pay an indefinite sum as a part of the note." A provision in a mortgage that the mortgagor shall pay the taxes is not destructive of negotiability if the obligation to pay the taxes is imposed by law independently of the contract stipulation: Brooke v. Struthers, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536; Wilson v. Campbell, 119 Mich. 580, 68 N. W. 278, 35 L. R. A. 544; Bradbury v. Kinney, 63 Neb. 754, 89 N. W. 257.

In Illinois the amount to be paid on a note is not rendered uncertain by stipulations in the mortgage securing it, for costs, taxes, assessments, insurance, and attorneys' fees in case of foreclosure, and the note is negotiable notwithstanding such provisions: Hunter v. Clarke, 184 Ill. 158, 75 Am. St. Rep. 160, 56 N. E. 297. But in Montana, where a mortgage provides that the mortgagor shall pay all taxes and insurance on the property, and that on default the mortgagee may make such payments they to bear interest at the rate of twelve per cent and be secured by the mortgage, that the mortgagor shall keep the property in repair, that in case of default in the performance of any covenant therein the principal and interest shall become due, and that in case of foreclosure an attorney's fee for a specified sum may be allowed, the accompanying note is not negotiable: Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4.

e. Provision for Attorney Fees.

1. When Impairs Negotiability.—Not a few courts have taken the position that a clause in a promissory note providing for the payment of attorney's fees in case suit is brought to enforce the collection of the note, renders the instrument non-negotiable, on the ground that such a provision creates uncertainty, especially in the amount payable: First Nat. Bank v. Babcock, 94 Cal. 96, 28 Am. St. Rep. 94, 29 Pac. 415; Kendall v. Parker, 103 Cal. 319, 42 Am. St. Rep. 117, 37 Pac. 401; Findlay v. Potts, 131 Cal. 385, 63 Pac. 694; Garretson v. Purdy, 3 Dak. 178, 14 N. W. 100; Cayuga County Nat. Bank v. Purdy, 56 Mich. 6, 22 N. W. 93; Altman v. Rittershofer, 68 Mich. 287, 13 Am. St. Rep. 341, 36 N. W. 74; Altman v. Fowler, 70 Mich. 57, 37 N. W. 708; McCoy v. Green, 83 Mo. 626; First Nat. Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430; Clark v. Barnes, 58 Mo. App. 667; Johnston v. Speer, 92 Pa. 227, 37 Am. Rep. 675. Some of the courts that have come to this conclusion have been influenced by an express statutory provision that an instrument is not negotiable which contains "any condition not certain of fulfillment": Adams v. Seaman, 82 Cal. 636, 23 Pac. 53, 7 L. R. A. 224; Stadler v. First Nat. Bank, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111; Cotton v. John Deere Plow Co., 14 Okl. 605, 78 Pac. 321.

In denying the negotiability of notes containing this provision for attorney's fees the court in Roads v. Webb, 91 Me. 406, 64 Am. St. Rep. 246, 40 Atl. 128, used this language: "It is said that if the note should be paid at maturity there would be no attorneys' fees. This is true. But a note which, by its terms, is negotiable under the rules of law, does not lose that characteristic until merged in a judgment. The only infirmity attending its negotiation after maturity is that the indorser takes it subject to the same defense that the maker could have made against the original payee. A note cannot be negotiable before maturity and not negotiable after that, by reason of the terms of the note itself. After these notes were dishonored and had been placed in an attorney's hands, his fees commenced to run. How much they would amount to depended upon the service then rendered and to be rendered. But, until merged in judgment, they were still negotiable, if negotiable at any time after their creation. Hence, arose an uncertainty in the amount due. That uncertainty attached to the notes in their inception, although attorney's fees would not accrue until after dishonor. The notes provided for the payment of such uncertain fees, in case they should accrue, and thus rendered the amount the makers were liable to pay in one event uncertain. This infirmity destroyed the negotiable quality of the notes."

Another leading and oft-cited case is Woods v. North, 84 Pa. 407, 24 Am. Rep. 201, wherein it is held that a note is not negotiable which contains a promise to pay a certain sum of money" and five per cent collection fee if not paid when due." In the course of its opinion the court remarked: "In the paper now in question there

enters as to the amount an undoubted element of uncertainty. It is a mistake to suppose that if the note was unpaid at maturity, the five per cent would be payable to the holder by the parties. It must go into the hands of an attorney for collection. It is not a sum necessarily payable. The phrase 'collection fee' necessarily implies this. Not only so, but this amount of percentage cannot be arbitrarily determined by the parties. It must be only what would be a reasonable compensation to an attorney for collection. Interest and costs of protest after nonpayment at maturity are necessary legal incidents of the contract, and the insertion of them in the body of the note would not affect its negotiability. Neither does a clause waiving exemption, for that in no way touches the simplicity and certainty of the paper. But a collateral agreement as here, depending too as it does upon its reasonableness, to be determined by the verdict of a jury, is entirely different. It may be well characterized, like an agreement to confess a judgment was by Chief Justice Gibson, as 'luggage,' which negotiable paper, riding as it does on the wings of the wind, is not a courier able to carry. If this collateral agreement may be introduced with impunity, what may not be? It is the first step in the wrong direction which costs. These instruments may come to be lumbered up with all sorts of stipulations, and all sorts of difficulties, contentions and litigation result."

A provision for a "reasonable" attorney's fee in case suit is brought for collection has been held to destroy its negotiability: Strawberry Point Bank v. Lee, 117 Mich. 122, 75 N. W. 444; Jones v. Radatz, 27 Minn. 240, 6 N. W. 800; Samstag v. Conley, 64 Mo. 476; First Nat. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473; Lippincott v. Rich, 22 Utah, 196, 61 Pac. 526; Peterson v. Stoughton State Bank, 78 Wis. 113, 47 N. W. 368. So has a provision for a fee of ten dollars: Clowers v. Snowben (Okl.), 96 Pac. 596; and a provision for a fee of ten dollars and ten per cent of the amount collected: Cotton v. John Deere Plow Co., 14 Okl. 605, 78 Pac. 321; and a provision to pay as an attorney's fee and ten per cent for collection: First Nat. Bank v. Gay, 71 Mo. 627; Creasy v. Gray, 88 Mo. App. 454; First Nat. Bank v. Larsen, 60 Wis. 206, 19 N. W. 67, 57 Am. Rep. 365. A note payable with collection charges has been declared non-negotiable: Smith v. First Nat. Bank, 95 Minn. 496, 104 N. W. 369; Buck v. Harris, 125 Mo. App. 365, 102 S. W. 640; so has a note payable "with all expenses, if suit be instituted for collection": Smith Sons Gin etc. Co. v. Badham (S. C.), 61 S. E. 1031; and so has a note with a provision to pay all costs and charges for collecting it: Maryland Fertilizing etc. Co. v. Newman, 60 Md. 584, 45 Am. Rep. 750. A provision in a note for costs and expenses of collection including ten per cent of the amount collected as attorney's fees has been held non-negotiable: Green v. Spires, 71 S. C. 107, 50 S. E. 554; and so has a note payable with counsel fees and expenses of collection if sued on or placed in the hands of an attorney for collection: First Nat. Bank v. Bynum, 84 N. C. 24, 37

Am. Rep. 604; Morgan v. Edwards, 53 Wis. 599, 40 Am. Rep. 781, 11 N. W. 21. A provision for costs in a certain sum with attorney fees and "other costs, in case the holder is obliged to enforce payment at law," was held to destroy negotiability in Johnson v. Schar, 9 S. D. 536, 70 N. W. 838; Baird v. Vines, 18 S. D. 52, 99 N. W. 89; and a note with power of attorney to confess judgment thereon for such sum as might be unpaid, together with costs and attorney's fees, was held non-negotiable in Law v. Crawford, 67 Mo. App. 150.

A provision for attorney fees in a mortgage in case of foreclosure was held to destroy the negotiability of the note to secure which the mortgage was given in Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110, where the note and mortgage were a part of the same transaction and therefore were to be construed together. The weight of authority, however, is to the effect that a stipulation in a note for attorney's fees does not affect its negotiability, and in those jurisdictions where this rule prevails, it would seem clear that a provision in a mortgage for attorney's fees in the event of foreclosure does not destroy the negotiability of the secured note: Hamilton v. Fowler, 99 Fed. 18, 40 C. C. A. 47.

2. **When does not Impair Negotiability.**—A majority of the courts take the view that a provision in a bill of exchange or in a promissory note for the payment of an attorney's fee in the event of suit being brought to enforce collection does not impair the negotiability of the instrument: First Nat. Bank v. Slaughter, 98 Ala. 602, 39 Am. St. Rep. 88, 14 South. 545; Trader v. Chidester, 41 Ark. 242, 48 Am. Rep. 38; Cowing v. Cloud, 16 Colo. App. 326, 65 Pac. 417; Stapleton v. Louisville Banking Co., 95 Ga. 802, 23 S. E. 81; Nickerson v. Sheldon, 33 Ill. 372, 85 Am. Dec. 280; Dorsey v. Wolff, 142 Ill. 589, 34 Am. St. Rep. 99, 32 N. E. 495, 18 L. R. A. 428; Lauferty v. Johnson 17 Ill. App. 549; Gehlbach v. Carlinville Nat. Bank, 83 Ill. App. 129; Stoneman v. Pyle, 35 Ind. 103, 9 Am. Rep. 637; Proctor v. Baldwin, 82 Ind. 370; Sperry v. Horr, 32 Iowa, 184; Shenandoah Nat. Bank v. Marsh, 89 Iowa, 273, 48 Am. St. Rep. 381, 56 N. W. 458; Seaton v. Scoville, 18 Kan. 433, 21 Am. Rep. 212, 26 Am. Rep. 779; Gilmore v. Hirst, 56 Kan. 626, 44 Pac. 603; Gaar v. Louisville Banking Co., 74 Ky. (11 Bush) 180, 21 Am. Rep. 209; Deitrich v. Bayhi, 23 La. Ann. 767; Clifton v. Bank of Aberdeen, 75 Miss. 929, 23 South. 394; Commerce Bank v. Fuqua, 11 Mont. 285, 28 Am. St. Rep. 461, 28 Pac. 291, 14 L. R. A. 588; Roberts v. Snow, 27 Neb. 425, 43 N. W. 241; Stark v. Olsen, 44 Neb. 646, 63 N. W. 37; Benn v. Kutzschan, 24 Or. 28, 32 Pac. 763; Baird v. Vines, 18 S. D. 52, 99 N. W. 89; Hamilton Gin etc. Co. v. Sinker, Davis & Co., 74 Tex. 51, 11 S. W. 1056; Wright v. Morgan (Tex. Civ. App.), 37 S. W. 627; Elmore v. Rugely (Tex. Civ. App.), 107 S. W. 151; Howenstein v. Barnes, 5 Dill. 482, Fed. Cas. No. 6786; Wilson Sewing-Machine Co. v. Moreno, 6 Saw. 35, 7 Fed. 806; Adams v. Addington, 4 Woods, 389, 16 Fed. 89; Farmers' Nat. Bank v. Sutton Mfg. Co., 52

Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595. Likewise a provision for the payment of costs of collection in case of default in payment has been held not to destroy negotiability: Montgomery v. Crossthwait, 90 Ala. 553, 24 Am. St. Rep. 832, 8 South. 498, 12 L. R. A. 180; Nicely v. Winnebago Nat. Bank, 18 Ind. App. 30, 47 N. E. 476; Schlesinger v. Arlin, 31 Fed. 648. A stipulation to pay an attorney fee of ten per cent is held not to impair the negotiability of a note in White v. Harris, 69 S. C. 65, 104 Am. St. Rep. 791, 48 S. E. 41; Salisbury v. Stewart, 15 Utah, 308, 62 Am. St. Rep. 934, 49 Pac. 777.

Various reasons are advanced to sustain the proposition that a provision for attorney's fees is not fatal to negotiability. First, such a stipulation is said not to render the amount payable uncertain, for the law-merchant aims not at mathematical certainty but at commercial certainty; second, the agreement is said to be a collateral stipulation as distinct from the principal agreement as though written on a separate paper; third, the stipulation does not become operative until after maturity, and after maturity all commercial paper loses in any event its peculiar character of negotiability. Probably the soundest of these reasons is the first, that is to say, that a stipulation for attorney's fees does not, within the meaning of the law-merchant, render the amount payable uncertain. To quote from Cudahy Packing Co. v. State Nat. Bank, 134 Fed. 538, 67 C. C. A. 662: "The decisions which sustain the negotiability of notes containing a provision for the payment of attorney's fees have, in the main, been justified upon the ground that prior to the maturity of the note, and while it was current in the business world, the provision was inoperative; that it did not take effect until after the dishonor of the note, so that in any case the transferee would take subject to all the defenses existing between the original parties." This reasoning cannot be applied to provisions for the payment of exchange, and upon that ground notes containing such provisions have by many courts been held to be non-negotiable: Hughitt v. Johnson, 28 Fed. 865. We believe that the whole subject might well be rested on safer and more fundamental grounds. Judge Mitchell, in writing the opinion of the supreme court of Minnesota in the case of Hastings v. Thompson, 54 Minn. 184, 40 Am. St. Rep. 315, 55 N. W. 968, 21 L. R. A. 178, indicated the correct doctrine when he said: "The reason and purpose of the rule that the sum to be paid must be certain is that the parties to the instrument may know the amount necessary to discharge it without investigating facts not within the general knowledge of everyone, and which may be subject to more or less uncertainty, or more or less under the influence or control of one or other of the parties to the instrument." The rule requiring certainty in commercial paper was a rule of commerce before it was a rule of law. It requires commercial, not mathematical, certainty. An uncertainty which does not impair the functions of negotiable instruments in the judgment of business men ought not to be regarded by the courts. The fine phrase of Chief

Justice Gibson in the case of Overton v. Tyler, 3 Pa. 346, 45 Am. Dec. 645, that a negotiable instrument 'is a courier without luggage,' has been made to do much service in the discussion of this subject. The real question, however, is, Who shall determine what constitutes 'luggage'—the business world, or the judge in his library?"

The supreme court of Washington in holding that the negotiability of a promissory note is not affected by a stipulation therein for the payment of an attorney's fee in the event of suit to enforce collection, used this language: "It is only upon the conditions of such note being broken, and the promise to pay violated, that this condition has any force whatever; and even then it has no force until an action has been brought to enforce the liability growing out of such violation of the conditions of the note. After maturity a note without any such condition loses the protection awarded to negotiable paper by the rules of the law-merchant. Therefore, such condition, after it becomes effective, does not materially change the rights and obligations of the parties interested in such note. It seems illogical to hold that the force of a positive promise to pay a definite sum at a definite time shall be at all affected by a condition that, in case of the violation of such promise, a penalty may be imposed upon the promisor. The contingency that, upon the violation of his promise, the maker of a note may be called upon to pay an amount over and above that which he had promised to pay, ought not to have any effect upon such promise. We think it would be more logical to hold, if it was necessary so to do to preserve the integrity of the absolute promise contained in the note, that the additional sum to be paid upon the bringing of suit was an incident to the suit, rather than to the note itself; that the condition should be held to be in the nature of a stipulation that the law, as to costs of court, should be deemed to be such that in that particular case it should include either the definite sum provided for as an attorney's fee, as in the note in question, or such a reasonable sum as the court might allow, as is often provided in notes of this kind. The real object of such condition is to enable the holder of the note, if he is obliged to bring suit thereon, to recover such a sum by way of costs or attorneys' fees as will reimburse him in whole or in part for the expenses which he may incur by reason of being compelled to go into court to collect such note. Such being the case, it seems to us that penalties of this kind may logically be considered as part of the costs incident to the action, and as being as far separated from the principal promise to pay contained in the note as are the costs which are allowed by the statute to the prevailing party": Second Nat. Bank of Colfax v. Anglin, 6 Wash. 403, 33 Pac. 1056.

"Upon a careful review of the authorities," to quote from Oppenheimer v. Farmers' etc. Bank, 97 Tenn. 19, 56 Am. St. Rep. 778, 36 S. W. 705, 33 L. R. A. 767, "We can perceive no reason why a note, otherwise endowed with all the attributes of negotiability, is rendered

non-negotiable by a stipulation which is entirely inoperative until after the maturity of the note and its dishonor by the maker. The amount to be paid is certain during the currency of the note as a negotiable instrument, and it only becomes uncertain after it ceases to be negotiable by the default of the maker in its payment. It is eminently just that the creditor who has incurred an expense in the collection of the debt should be reimbursed by the debtor by whose default the action was rendered necessary and the expense entailed. So far from such a stipulation discounting the negotiability of the instrument, we think, with Mr. Daniel, that it is an indemnification assured by the maker against the consequences of his own act; that it is consonant with public policy because it adds to the value of the paper; has a tendency to lower the rate of discount, not only because it promises less expensive collection, but bears evidence of a greater degree of confidence on the part of the maker in his ability to pay without suit."

Stipulations in promissory notes for the payment of attorney's fees in case of forced collection are generally regarded as valid: See the note to Kittermaster v. Brossard, 55 Am. St. Rep. 438. In some jurisdictions, however, such stipulations are declared void by a statute, and where this is the law the insertion of such stipulations in commercial paper cannot affect its negotiability, for they are nullities, and without force and effect for any purpose: Jones v. Crawford, 107 Ga. 318, 33 S. E. 51, 45 L. R. A. 105; Chandler v. Kennedy, 8 S. D. 56, 65 N. W. 439; National Bank of Commerce v. Feeney, 9 S. D. 550, 70 N. W. 874, 46 L. R. A. 732; Merchants' Nat. Bank v. Sevier, 14 Fed. 662.

f. **Provisions for Exchange.**—There is a sharp conflict among the authorities on the effect of making commercial paper payable with exchange. A number of courts have held that a bill of exchange or a promissory note is rendered non-negotiable by a stipulation therein to pay the sum specified "with exchange" or "with current exchange" on a place other than the place of payment, since uncertainty is thereby introduced into the paper owing to variations in the rate of exchange: Nicely v. Commercial Bank, 15 Ind. App. 563, 57 Am. St. Rep. 245, 44 N. E. 572; John Church Co. v. Spurrier, 20 Ind. App. 39, 50 N. E. 93; Nicely v. Winnebago Nat. Bank of Rockford, 18 Ind. App. 30, 47 N. E. 476; Culbertson v. Nelson, 93 Iowa, 187, 57 Am. St. Rep. 266, 61 N. W. 854, 27 L. R. A. 222; Fitzharris v. Leggatt, 10 Mo. App. 527; Chandler v. Calvert, 87 Mo. App. 368; First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604; Flagg v. School Dist. No. 70, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363; Read v. McNulty, 12 Rich. 445, 78 Am. Dec. 467; Carroll County Sav. Bank v. Strother, 28 S. C. 504, 6 S. E. 313; Hughitt v. Johnson, 28 Fed. 865; Windsor Sav. Bank v. MacMahon, 38 Fed. 283, 3 L. R. A. 192; Second Nat. Bank v. Basuier, 65 Fed. 58, 12 C. C. A. 517; Russell v. Russell, 1 McAr. 263.

Other courts, however, have regarded such uncertainty as more apparent than real, and, acting from the standpoint of business expedieney, have affirmed that the insertion in a bill or note of an agreement to pay the sum specified with exchange of a place, other than the place of payment, does not impair the negotiability of the instrument: Clark v. Skeen, 61 Kan. 526, 78 Am. St. Rep. 337, 60 Pac. 327, 49 L. R. A. 190; First Nat. Bank v. Nordstrom, 70 Kan. 485, 78 Pac. 804; Smith v. Kendall, 9 Mich. 241, 80 Am. Dec. 83; Johnson v. Frisbie, 15 Mich. 286; Haslach v. Wolf, 66 Neb. 600, 103 Am. St. Rep. 736, 92 N. W. 574, 60 L. R. A. 434; Whittle v. Fond du Lac Nat. Bank (Tex. Civ. App.), 26 S. W. 1106; Morgan v. Edwards, 53 Wis. 599, 40 Am. Rep. 781, 11 N. W. 21. A leading decision to this effect is Hastings v. Thompson, 54 Minn. 184, 40 Am. St. Rep. 315, 55 N. W. 968, 21 L. R. A. 178, and the following is an extract from the opinion of the court therein rendered: "The reason and purpose of the rule that the sum to be paid must be certain is, that the parties to the instrument may know the amount necessary to discharge it, without investigating facts not within the general knowledge of every one, and which may be subject to more or less uncertainty, or more or less under the influence or control of one or other of the parties to the instrument. The provision for the payment of the current rate of exchange between the place of payment and some other place is not within the reason of this rule, or subject to the evils or inconveniences which it was designed to prevent. While the rate of exchange is not always the same, and while it is technically true that resort must be had to extrinsic evidence to ascertain what it is, yet the current rate of exchange between two places at a particular date is a matter of common commercial knowledge, or at least easily ascertainable by anyone, so that the parties can always, without difficulty, ascertain the exact amount necessary to discharge the paper. It seems to us that within the spirit of the rule requiring precision in the amount to be paid, a provision for the payment of the current rate of exchange, in addition to the principal amount named, does not introduce such an element of uncertainty as deprive the instrument of the essential qualities of a promissory note. The law-merchant, including the law of negotiable paper, is founded upon, and is the creature of, commercial usage and custom. Custom and usage have really made the law, and courts, in their decisions, merely declare it. The law of negotiable paper is not only founded on commercial usage, but is designed to be in aid of trade and commerce. Its rules should, therefore, be construed with reference to, and in harmony with, general business usages, and, as far as possible, with the common understanding in commercial circles. This was the very purpose of the statute of Anne, placing promissory notes on the same footing as bills of exchange, and thus setting at rest a question upon which there had been some difference of opinion in the courts. Now, we think we are safe in saying, and justified in taking notice of the fact, that if bankers or other business men accustomed

to dealing in commercial paper were asked whether such an instrument is a promissory note, and whether they would deal with it as negotiable paper, the answers would, in almost every instance, be unhesitatingly in the affirmative." In the subsequent case of Smith v. First State Bank, 95 Minn. 496, 104 N. W. 369, the supreme court of Minnesota declared that this doctrine should not be further extended, and held that a note with a promise to pay a sum definite and "collection charges" was not negotiable.

Where commercial paper is made payable at the place that it is drawn, all the authorities agree that the addition of the words "with exchange" does not impair its negotiability, for the reason that on such paper there can be no exchange. The expression "with exchange" in cases of this kind is meaningless, and may properly be rejected as surplusage: Hill v. Todd, 9 Ill. 101; Clauser v. Stone, 29 Ill. 114, 81 Am. Dec. 299; Christian County Bank v. Goode, 44 Mo. App. 129; Buck v. Harris, 125 Mo. App. 365, 102 S. W. 640; Orr v. Hopkins, 3 N. M. 45, 1 Pac. 181.

CASES

IN THE

SUPREME COURT

OF

IOWA.

McGOVERN v. INTERURBAN RAILWAY COMPANY.

[136 Iowa, 13, 111 N. W. 412.]

INTERURBAN RAILROADS—Duty to Provide Platforms—Negligence.—An interurban railway company operating a car which, for the accommodation of passengers, is stopped at highway crossings where they desire to alight need not provide a passenger platform at each of such crossings, but must exercise at least reasonable care to enable a passenger to alight with as little danger as practicable, and if the car is stopped and he is thereby invited to alight, at a place more hazardous than that at which the car might conveniently have been stopped, the railway company is negligent. (p. 217.)

INTERURBAN RAILWAYS—Negligence, Contributory.—A passenger on an interurban car which is stopped for him to alight at a highway crossing may reasonably assume that the car has been stopped in the portion of the highway where he is invited to alight, unless warned of danger, and he is not conclusively negligent in accepting the invitation to alight at a place which is in fact unsafe. (pp. 217, 218.)

INTERURBAN RAILWAYS—Negligence, Contributory—A passenger on an interurban railway does not assume the risk involved in stopping the car for him to alight at more dangerous place than that where it is usually stopped. (p. 218.)

INTERURBAN RAILWAYS—Negligence—Assumption of Risk. An interurban railway owes a duty to a passenger to furnish him a safe place to alight at his destination, and is not relieved of such duty by knowledge on the part of such passenger that it had not previously been discharging such duty as to himself or other passengers. (p. 218.)

TRIAL.—Instructions which can in no way be misleading cannot be complained of. (p. 219.)

INTERURBAN RAILWAYS—Negligence.—A contract by an interurban railway to carry a passenger to a specific destination implies a duty on its part to furnish such passenger a safe place to alight at such destination, and a failure to perform such duty is negligence. (p. 220.)

INTERURBAN RAILWAYS—Negligence—Question for Jury.—In general, it is not the duty of the employés of an interurban railway company to give passengers assistance in alighting at their destination, but, under special circumstances, such duty may arise, and it is then a question which may properly be submitted to the jury. (pp. 220, 221.)

INTERURBAN RAILWAYS — Negligence, Contributory.— A passenger on an interurban railway is not negligent in failing to ascertain that the place where he is invited to alight is dangerous, or the distance from the step to the ground. (p. 221.)

INTERURBAN RAILWAYS—Negligence—Measure of Recovery by Married Woman.—A married woman, seeking to recover from an interurban railway company, for injury received through its negligence is entitled to recover in her own right for physical pain, suffering and mental anguish suffered, but not for the loss of her earning capacity. (p. 221.)

TRIAL—Verdict—Amount of Recovery—Instructions.—It is improper to so state a limitation to the jury as to suggest a verdict for the amount claimed, but when the verdict rendered is for a much less sum than that claimed and is reasonable, it will not be disturbed. (pp. 221, 222.)

EVIDENCE.—Expert evidence, that plaintiff's injuries are due to some external violence, such as that which plaintiff suffered, is admissible, and does not usurp the functions of the jury. (p. 223.)

N. T. Guernsey, for the appellant.

Dowell & Parrish and Gillispie & Bannister, for the appellee.

15 McCLAIN, J. Plaintiff, carrying an infant and a small satchel, and accompanied by another small child, attempted to dismount from defendant's car, on which she had been carried as a passenger to her destination at a country highway crossing, designated on her passage receipt as "Dailey's," and while doing so she fell and was injured. At this crossing, though it was designated on the ticket as a station, there was, as plaintiff well knew, no station nor station platform, but in the highway the approaches to the rails on either side had been planked by the company, and the highway had been graded up to the planks; and it was usual to stop cars so that passengers could dismount by stepping from the car steps to the approach to the crossing. The negligence of defendants as alleged consisted in not furnishing plaintiff a safe place to alight; in stopping the car several feet east of this planking and approach in the highway, so that plaintiff was required to step down a greater distance, on account of the surface of the highway being lower at this point than the end of the ties, and inviting plaintiff to alight at this point, which was an unsuitable place for alighting; and in not notifying plaintiff of the danger or rendering her assistance in alighting.

1. The request of defendant that the jury be instructed to return a verdict in its favor, on the ground that there was no evidence of negligence, was properly overruled. While it was not the duty of defendant operating a car which, for the

accommodation of passengers, was stopped at any highway crossing where they desired to alight, to provide a passenger platform at each of such crossings, it was its duty to exercise at least reasonable care to enable plaintiff to alight with as little danger as practicable, and if the care was stopped, and plaintiff invited to alight, at a place more [16] hazardous than that at which the car might conveniently have been stopped, then the defendant was negligent. The question was properly for the jury: Richmond City R. Co. v. Scott, 86 Va. 902, 11 S. E. 404; Cartwright v. Chicago & G. T. Ry. Co., 52 Mich. 606, 50 Am. Rep. 274, 18 N. W. 380; Bullard v. Boston & M. R. Co., 64 N. H. 27, 10 Am. St. Rep. 367, 5 Atl. 838. The cases relied on for appellant are those in which it is held that a street-car company is not liable to a passenger alighting from its car for injuries received after alighting, due to defects in the highway: See, for example, Bigelow v. West End St. R. Co., 161 Mass. 393, 37 N. E. 367; Scanlon v. Philadelphia Rapid Transit Co., 208 Pa. 195, 57 Atl. 521; Conway v. Lewiston etc. Horse R. Co., 87 Me. 283, 38 Atl. 110. In the case last cited it is said: "It should also be remembered that the defendant's cars were drawn by horses, and operated without regular stations or established places for passengers to get on or off the cars. They were not run from station to station only, but, upon signal or request, stopped as near the point desired as practicable either to take on or to discharge passengers. It was undoubtedly the duty of the conductor to exercise all reasonable care, diligence and prudence to ascertain the conditions existing at all points where the car was to stop, and otherwise to promote the convenience and guard the safety of passengers at all times when entering or leaving the car." This language suggests a distinction which should be taken into account between street-cars operated in the streets of a city which are stopped on signal, and interurban cars operated through the country, and which may be stopped at highway crossings. Cars of the latter description are stopped at any highway designated by the passenger, but the particular place in the highway at which the car shall be stopped is under the control of the conductor or motorman, and care should be exercised to stop the car at such place as is reasonably suitable for the purpose, as safe a place as can be reasonably selected.

[17] 2. What has just been said as to the duty of defendant is applicable in considering the question whether there was contributory negligence on the part of plaintiff. The passenger alighting from a street-car does so at a place selected by

him through his signal, and may reasonably be required to look out that the street is in such condition where he attempts to step off that it is safe to use it; but a passenger on an interurban car, which is stopped for him to alight at a highway crossing, may reasonably assume that the car has been stopped in the portion of the highway where he is invited to alight, unless warned of danger, and is not conclusively negligent in accepting the invitation to alight at a place which is in fact unsafe. The question of contributory negligence was to be determined by the jury in view of the circumstances: Matthieson v. Burlington etc. R. Co., 125 Iowa, 90, 100 N. W. 51.

3. The court was not in error in failing to submit to the jury the question of assumption of risk. Plaintiff did not assume the risk involved in stopping the car for her to alight at a more dangerous place than that where it was usually stopped, for she had no knowledge of the added danger due to defendant's negligence. She had the right to assume that the car had not been stopped at a place for her to alight which was not the usual place and was more dangerous: Eastland v. Clarke, 165 N. Y. 420, 59 N. E. 202, 70 L. R. A. 751; Hogarth v. Pocasset Mfg. Co., 167 Mass. 225, 45 N. E. 629. As to the alleged negligence in not providing a safe place to alight, such as a platform or something equivalent to it, there could be no assumption of risk by a passenger, for, as will be hereinafter indicated, the defendant owed a duty to such passenger to furnish him a safe place for alighting, and the doctrine of assumption of risk does not apply "to a case where the negligent course of conduct which it is claimed had been assumed and recognized is connected with the discharge [18] of a general duty to the public": Carver v. Minneapolis etc. R. Co., 120 Iowa, 346, 94 N. W. 862.

The defendant owed the public duty to plaintiff to furnish her a safe place to alight at her destination fixed in the contract of transportation, and was not relieved of that duty by knowledge on the part of the plaintiff that it had not previously been discharging that duty as to herself or other passengers, stopping at that destination. That this is so must be self-evident, for, were it otherwise, the defendant could relieve itself entirely from the consequences of a violation of its duty to its passengers by so continuously and notoriously violating such duty, that the passengers would be charged with notice that the duty would not be observed. If plaintiff had known that she had been carried beyond the usual place for alighting, she would, no doubt, have assumed the risk of such

reasonably apparent dangers as were involved in alighting at such place; but the same facts would constitute contributory negligence, and there was no occasion to instruct on assumption of this risk, in view of the instructions given with reference to contributory negligence. Assumption of risk and contributory negligence are sometimes indistinguishable: 4 Thompson on Negligence, sec. 4611.

4. Error is assigned in submitting to the jury the question whether defendant was negligent, as alleged in her petition, in carrying plaintiff beyond the platform and regular stopping place at said station. Without now considering whether the planked crossing might not properly be designated as a platform, it is sufficient to say that, after telling the jury that they should "consider only the negligence alleged by the plaintiff in her petition as set forth in the statement immediately preceding these instructions," the court stated categorically the grounds of negligence which they could consider, and did not include therein the alleged negligence in carrying plaintiff beyond the platform. The jury could not have been misled.

[19] 5. Plaintiff specifically alleged negligence of defendant in not providing a suitable place at the station which was plaintiff's destination for her to alight, and the court submitted this question to the jury. Error is assigned on this instruction. As already stated, there was no station nor passenger platform at the highway crossing which was plaintiff's destination, although the place was designated on plaintiff's ticket by name as "Dailey's." The complaint is that by designating this place as a station, and telling the jury that if defendant stopped the car at this place for the purpose of having passengers alight therefrom, and invited plaintiff to alight at an unsuitable and unsafe place to discharge passengers from said car, and failed to furnish plaintiff a reasonably safe place to alight from said car, this would be an act of negligence on the part of the defendant, the court left it for the jury to say whether it was negligence on the part of the defendant not to have a station platform.

Now, it may be conceded that defendant was not bound to maintain a passenger platform at every highway crossing where it stopped its cars to enable passengers to alight at their request, and that it would be improper to instruct the jury broadly, in every case, that there was a duty on the part of defendant to furnish a safe place to alight wherever a car might be stopped, for such direction might be taken to authorize recovery for injury received in stepping from the

car step to the highway, no matter how carefully the place of stopping had been selected, on the theory that it was unsafe to step down even seventeen inches, the distance from the lowest step to the level of the top of the rail. The instruction referred to, which is too long to be set out in full, is not entirely clear as to whether the negligence therein referred to was in not furnishing a safe place in general for passengers to alight, or in not selecting a suitable place in the highway for that purpose. But, assuming that the jury could construe it as requiring defendant to furnish a safe [20] place in general, we think it was not erroneous as applied to the facts in this case. The contract was to carry plaintiff to "Dailey's," as a specific destination, which was thus indicated as a place where plaintiff might alight. This contract implied the duty to furnish plaintiff a safe place to alight at this destination: Dougherty v. Kansas City etc. Rapid Transit Co., 128 Mo. 33, 49 Am. St. Rep. 536, 30 S. W. 317; Missouri Pac. R. Co. v. Wortham, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368; Franklin v. Southern Cal. M. R. Co., 85 Cal. 63, 24 Pac. 723; Raben v. Central Iowa R. Co., 74 Iowa, 732, 34 N. W. 621.

With reference to the duty of defendant to furnish plaintiff a safe place to alight at "Dailey's," which was a place to which defendant specifically contracted to carry passengers, it was not error, therefore, to instruct that it involved the obligation to furnish them a safe place to alight. It does not follow that this duty involved the furnishing of a special platform in view of the nature of the transportation which defendant undertook to furnish, but it was for the jury to say whether, in view of the nature of the transportation, the place provided was a safe place. It may well be, as argued, that, at highway crossings not designated by the defendant as regular stopping places, it would not be negligent if it used due care in selecting as safe a place as practicable for a passenger to alight, although it did not provide any special conveniences or appliances for the use of passengers: Cincinnati etc. R. Co. v. Peters, 80 Ind. 168; Alabama etc. R. Co. v. Stacey, 68 Miss. 463, 9 South. 349. There was no error in the instruction as given under the record in this case.

6. Exception is taken to an instruction with reference to the duty of defendant to furnish plaintiff assistance in alighting. In general, it is not the duty of the employés of a railroad company to give passengers such assistance: Raben v. Central Iowa R. Co., 74 Iowa, 732, 34 N. W. 621. But under

special circumstances this duty may [21] arise: Allender v. Chicago etc. R. Co., 37 Iowa, 264; New York etc. R. Co. v. Doane, 115 Ind. 435, 7 Am. St. Rep. 451, 17 N. E. 913, 1 L. R. A. 157; Cartwright v. Chicago etc. R. Co., 52 Mich. 606, 50 Am. Rep. 274, 18 N. W. 380; Baltimore etc. R. Co. v. Leapley, 65 Md. 571, 4 Atl. 891. The court called the attention of the jury to certain facts shown in evidence, proper to be considered by them in determining whether in this case there was such duty, and left it for them to say whether there was negligence on the part of defendant's conductor in not giving plaintiff assistance. In this there was no error.

7. An instruction as to contributory negligence is complained of, on the ground that it allowed the jury to take into account the knowledge, if any, which plaintiff had as to the distance from the step to the ground at the place where she was invited to alight, and it is argued that she should have been required also to take into account what she could have known in the exercise of ordinary care. An instruction embodying this thought was requested for defendant. But the complaint of the instruction given, as well as of the refusal to give the instruction asked, is predicated on the claim that plaintiff was, as matter of law, negligent if she did not for herself ascertain whether it was dangerous to attempt to step to the ground at the place where the car was stopped, and she was invited to alight. This view is erroneous, as already pointed out in this opinion. Plaintiff had the right to assume that she was not invited to alight at a dangerous place.

8. In two respects there is complaint as to the direction to the jury with reference to the measure of damages. In the first place, it is said the jury were allowed to take into account loss of earning capacity, which would be erroneous, as plaintiff was a married woman. But we understand the [22] instruction complained of to limit recovery to physical pain and suffering and mental anguish. For this she could recover in her own right. As there was no evidence with reference to loss of earning capacity, it was not error to refuse defendant's requested instructions that plaintiff could not recover damages on that account.

The second ground of objection to the instruction on this subject is that the jury were told in no event to allow plaintiff more than fifteen thousand dollars, which was the amount claimed in her petition. It is said that this was misleading, as the jury might infer that a verdict up to that amount would be proper; whereas, the evidence would not justify any such verdict. It is no doubt improper to so state the limita-

tion as to suggest a verdict for the amount claimed: Rost v. Brooklyn Heights R. Co., 41 N. Y. Supp. 1069, 10 App. Div. 477; Gilbertson v. Forty-second St. etc. Ry. Co., 43 N. Y. Supp. 782, 14 App. Div. 294; Illinois Central R. Co. v. Souders, 178 Ill. 585, 53 N. E. 408; Joyce on Damages, sec. 207. But the verdict was for three thousand dollars, and there is no occasion to surmise that the amount fixed was in any way influenced by the statement that it should not exceed fifteen thousand dollars. Under the evidence, the amount allowed was not excessive, and we think it clearly appears that defendant was not prejudiced by the language used. Some direction on the subject is proper in connection with an instruction as to measure of recovery, and the court would not have been justified under the evidence in fixing an absolute maximum less than that named in the petition. We do not find in the language used any suggestion that a verdict of fifteen thousand dollars would be proper under the evidence. It might have been safer to explain in a few words that the maximum was stated because that was the sum claimed which must limit plaintiff's recovery; but in this case it clearly appears that the jury was not misled by the omission of such explanation.

9. Exceptions were taken to the overruling of objections [23] to questions asked medical witnesses as to what was the cause of the injury for which plaintiff asked recovery, and error is assigned on such rulings, because, as claimed, the witnesses were asked to usurp the functions of the jury. But the questions and answers, taken together, show that the witnesses only testified that plaintiff's injuries were due to some such external violence as that which plaintiff suffered, and there could have been no prejudice. There was no question under the evidence as to the fact that the injuries complained of resulted from the accident.

We have noticed as fully as reasonable space will allow all the alleged errors set out in appellant's argument.

Finding no error which would justify a reversal, the judgment is affirmed.

It is the Duty of a Railway Company to Keep Its Station Premises in a comfortable, safe and proper condition: See Klugherz v. Chicago etc. Ry. Co., 90 Minn. 17, 101 Am. St. Rep. 384, and cases cited in the cross-reference note thereto. And the rule that the duty of a railroad company to keep safe station premises extends to all who rightfully come there in pursuance of the invitation which it holds out to the public, and to all who come there on legitimate business to be transacted with its agent, applies to flag as well as regular

stations: Pineus v. Atlantic Coast Line R. R. Co., 140 N. C. 450, 111 Am. St. Rep. 856.

A Railway Company must Assume that if it fails to stop its train at the usual place for a passenger to alight, he will, if he thinks he can properly do so, endeavor to get off, and if he is injured in getting off, the failure to stop the train is the proximate cause of the injury: Martin v. Southern Ry., 77 S. C. 370, 122 Am. St. Rep. 575. A street railway company is not under any duty to caution passengers in alighting from cars against stepping into a gutter or defect in the street for the existence of which the corporation is not blamable, and a passenger injured by so stepping cannot recover: Thompson v. Gardner etc. Ry. Co., 193 Mass. 133, 118 Am. St. Rep. 459. A conductor does not perform his duty by simply waiting a reasonable time for a passenger to alight. He must exercise reasonable care to see that the passenger is off the car: Millmore v. Boston Elevated Ry. Co., 194 Mass. 323, 120 Am. St. Rep. 558. Though a railway company is under no obligation to supply servants to assist a passenger in descending from a car, yet if its conductor undertakes to do so, the passenger has a right to rely on his careful performance of his undertaking and may recover of the railway for injuries suffered by the conductor's failure to use reasonable care, as where he, suddenly withdrawing his support, causes the passenger to fall: Hanlon v. Central R. R. Co., 187 N. Y. 73, 116 Am. St. Rep. 591.

WOOD v. WOOD.

[136 Iowa, 128, 113 N. W. 492.]

JUDGMENTS—Divorce—Attack After Death of Parties.—After the death of one or more of the parties to a decree of divorce, it may be assailed the same as any other decree for fraud in so far as property rights are directly affected. (p. 225.)

JUDGMENT—Divorce—Attack After Death of Parties.—An administrator, or the heir of a party divorced and since deceased, may prosecute an application for the modification or vacation of the judgment, or for a new trial, when, such judgment directly affects the interests of the parties. (p. 226.)

JUDGMENT—Insanity—Limitation for Time for Attack.—The disability of an insane person terminates with his death, and a proceeding to vacate a judgment fraudulently obtained against him must be commenced within one year thereafter. (p. 226.)

JUDGMENTS—Setting Aside for Fraud.—A decree will not be set aside on the sole ground that an issue directly raised by the pleadings has been decided on perjured testimony. (p. 227.)

JUDGMENTS—Annulment for Fraud.—If a decree of divorce is obtained on false allegations and proof of the insanity of the defendant at the time of the marriage, and such issue has been previously adjudicated against the plaintiff by the same court and the fact thereof fraudulently concealed, such a fraud is perpetrated upon the court as justifies it in annulling the decree. (p. 227.)

JUDGMENT—Death of Party—Effect of Decree.—The status of a person while living cannot be affected by a judgment entered after his death, as it can only affect the property rights of others. (p. 229.)

Francis & Owen, for the appellants.

Deacon & Good and Prouty & Prouty, for the appellees.

[129] LADD, J. The petition alleged that B. H. Wood was married to Celista H. Wood, April 22, 1854, and there were born to them three children, C. H. Wood, Eva B. Anderson, and Etta S. Shealy, plaintiffs herein; that Celista H. Wood was insane and confined in one of the state hospitals for the insane and the county asylum of Linn county from 1884 until her death in 1904; that B. H. Wood began suit to annul his marriage with her in the district court of Linn county in 1886, caused notice to be served on her as provided by statute, defense being made by a guardian ad litem, and that on hearing, a decree was entered April 24, 1886, dismissing his petition; that on August 10, 1886, said Wood, through a different attorney, filed a second petition praying for like relief, caused notice to be served as before, and a guardian ad litem to be named, who filed answer, but did not plead a former adjudication; that evidence was introduced and a decree entered November 3, 1886, annulling said marriage; that the proceedings in the two suits were identical, save the decrees; that neither decree was appealed from; that thereafter, though in the same month, B. H. Wood was married to the defendant Lottie A. Wood, who survives him; [130] that said Wood died in 1903; that subsequent to the first marriage he had acquired title to several lots in Cedar Rapids now claimed by Lottie M. Wood and to two tracts of land claimed by the defendants Eby and Finch, respectively, in the conveyance of which the said Celista did not join. Plaintiffs, who are the administrator of the estate of and heirs of Celista H. Wood, in addition to the foregoing, aver that said Celista was not insane at the time of her marriage to B. H. Wood, and did not become so until 1879, which fact B. H. Wood well knew; that he was guilty of fraud in bringing the second suit, and concealed from the court the fact that on identical issues the relief sought had been denied and adjudicated against him; that the proceedings were erroneous as against an insane person, and, owing to the unavoidable casualty and misfortune of her condition, she was unable to make defense; that this action was begun within one year after her death; that the first decree referred to was not defeated by the second decree entered, and plaintiff's pray that the decree annulling the marriage be set aside, and held for naught. A general demurrer was sustained.

1. The proceeding purports to have been begun under the provisions of section 4091 of the Code, authorizing the district court, after the term at which rendered, to vacate or modify a judgment or grant a new trial; (1) for fraud practiced in obtaining the same; (2) for erroneous proceedings against a minor or person of unsound mind, when such errors or condition of mind do not appear in the record; (3) for unavoidable casualty or misfortune preventing the party from prosecuting or defending. It is apparent from a reading of the petition that plaintiffs were not entitled to relief on either of the last two grounds. No error is complained of, save such as appeared in the record, and the condition of the mind of the defendant in the divorce suit was disclosed by the record. Even if it were conceded that the casualty or misfortune mentioned in the statute contemplates unsoundness of mind, yet this did not prevent a defense by [131] guardian ad litem such as is provided for persons laboring under disability.

2. The only basis for the action, then, is the fraud alleged to have been practiced in obtaining the decree. The parties thereto are both dead, and their status while living is no longer a proper subject of judicial inquiry, save as it may affect the property rights of their heirs or survivors. On this ground, an action by the unsuccessful party to annul a decree of divorce was sustained in Lawrence v. Nelson, 113 Iowa, 277, 85 N. W. 84, 57 L. R. A. 583, while in Barney v. Barney, 14 Iowa, 189, where no property interests were involved, the court held that the action owing to its nature abated even after the entry of decree in the district court, so that an appeal could not be prosecuted by the survivor. Where property interests are directly affected, the rule quite generally prevails that the decree in a divorce suit may be assailed by appeal or otherwise the same as any other judgment. Thus in Nickerson v. Nickerson, 34 Or. 1, 48 Pac. 423, 54 Pac. 277, after recognizing the rule as announced in Barney v. Barney, 14 Iowa, 189, the court declared that, where the consequences of the divorce are such as affect the property rights of the parties to the suit, the heirs and personal representatives may have such an interest as that the cause may survive, not for the purpose of continuing the controversy touching the right of a divorce within itself, but for the ascertainment of whether the property has been rightly diverted from its appropriate channel of devolution, and to this end the court held that the heirs of deceased might prosecute the appeal to determine whether the divorce was rightly granted, in order that con-

flicting property rights as between them and the other party to the suit might be determined: See, also, Thomas v. Thomas, 57 Md. 504; Downer v. Howard, 44 Wis. 82; Danforth v. Danforth, 111 Ill. 236, and decisions cited in the case first cited. For like reasons, courts will annul or vacate decrees of divorce on sufficient showing after the death of one or both of the [132] parties thereto: Lawrence v. Nelson, 113 Iowa, 277, 85 N. W. 84, and valuable note thereto in 57 L. R. A. 583. Contra, see Dwyer v. Nolan, 40 Wash. 359, 111 Am. St. Rep. 919, 82 Pac. 746, 1 L. R. A., N. S., 351.

3. Thus far there is not serious controversy, and but two questions remain: (1) Can an administrator or the heirs of a party prosecute the application for the vacation or modification of a judgment or for new trial under section 4091 of the Code? And (2), if so, are the allegations of the petition sufficient to justify such relief? Ordinarily strangers to the record, unless authorized by statute, have no standing on which to base an application to vacate a judgment: Tyler v. Aspinwall, 73 Conn. 493, 47 Atl. 755, 54 L. R. A. 758. The petition under 4091 does not constitute a statement of a new cause of action, but merely an application for the opportunity of retrying the issues as presented in the original suit. For the purposes of such petition, and these only, the cause is treated as still pending. Section 3443 of the Code declares that "all causes of action shall survive, and may be brought notwithstanding the death of the person entitled or liable to the same." Section 3445 provides that any such action "may be brought, or the court, on motion, may allow the action to be continued by or against the legal representative or successors in interest of the deceased." These statutes should be liberally construed, so as to permit the substitution of the representative or successors of the deceased litigant in his place at any time before the cause is finally disposed of. The procedure is somewhat akin to that by bill of review in equity, which might be filed by anyone showing that he had an interest which was injuriously affected by the decree, and the manifest object of the last section quoted is to render available to the legal representative or successors in interest all the remedies to which the litigant, had he lived, might have resorted.

4. The petition for new trial, however, must be filed [133] within a year after the removal of the disability: Code, sec. 4094; Pollock v. Milburn, 112 Iowa, 528, 84 N. W. 521. The disability of the defendant in the former action was terminated by death. This must be so, else she will continue in-

sane forever, a condition inconsistent with dissolution: See McNeil v. Sigler, 95 Iowa, 587, 64 N. W. 604. In Gibbs v. Sawyer, 48 Iowa, 443, the court in deciding that death removed the disability of infancy, said: "Surely such would be the proper construction in case of the death of a married woman or a lunatic. In such case, if death does not remove the disability, it would continue forever, for no one could determine when the lunatic would have recovered his reason or the married woman her rights as feme sole." What is meant by the statute is such a change that an action may be prosecuted when the reason has been restored or upon his death, when suit may be prosecuted against his representatives or successors.

5. The only allegations of fraud contained in the petition are that the deceased husband, though he knew his wife Celista was sane when they were married, falsely asserted that she was insane, and procured the marriage to be annulled on that ground; also, that he concealed from the court the fact that such issue had been adjudicated against him in a like action but a few months previous. It is true, as contended, that a decree will not be set aside on the sole ground that an issue directly raised by the pleadings has been decided on perjured testimony: Graves v. Graves, 132 Iowa, 199, 109 N. W. 707, 10 L. R. A., N. S., 217. "But," as said in that case, "if accompanied by any fraud extrinsic or collateral to the matter involved in the original case sufficient to justify the conclusion that but for such fraud the result would have been different, a new trial may be granted." In a like action in which the issues and evidence were identical, as is alleged, the plaintiff therein had been denied relief but a few months prior to the entry in the last case, granting the very relief then denied; i. e., annulment [134] of the marriage. To accomplish this, he had employed a different attorney, and a guardian ad litem not connected with the former proceeding had been appointed. The defendant therein was in the insane asylum as she had been at the time of the first trial. Mere absence of the opposing party is given much weight by some courts (Laithe v. McDonald, 7 Kan. 254, 12 Kan. 340), and especially where the false testimony is given by the prevailing party alone: Jordan v. Volkenning, 72 N. Y. 300. In Peagram v. King, 9 N. C. 295, 11 Am. Dec. 793, the fact that the defrauding party had confessed that the action had been maintained by perjured testimony was regarded as controlling. In the case at bar, not only were the allegations of the petition and evidence supporting it false, but they had

been adjudicated to be false by the very court by which the decree was entered; the facts being concealed from its knowledge. Had the defendant been a person of sound mind to whom he owed no duty, no obligation of disclosing defensive matter would have rested on the plaintiff: Cooley v. Brayton, 16 Iowa, 10. But she was his wife, helpless and confined in the asylum for the insane, and for him to prosecute the second action under the circumstances disclosed was such a fraud upon the court as will justify setting aside the decree.

In Borden v. Fitch, 15 Johns. 121, 8 Am. Dec. 225, the wife had separated from her husband by virtue of an act of legislature of Connecticut, equivalent to a divorce, a menso et thoro, to continue at her pleasure. While this was in force, and with knowledge of its existence, the husband, as he had appeared in the matter before the legislature, procured a divorce in Vermont on the ground of desertion, without disclosing the act of the legislature, his wife still living in Connecticut, and the divorce was held to be fraudulent, though the decision was also based on another ground. In Vischer v. Vischer, 12 Barb. 640, suppressing the fact that a decree a menso et thoro had been rendered in New York from the court in an application for a divorce on [135] the ground of desertion, which was not true, was held to be such fraud as to invalidate the decree of divorce granted in the state of Michigan. But in Harrison v. Harrison, 19 Ala. 499, in a collateral attack on a decree of divorce entered in that state on the ground of abandonment, a decree from bed and board previously rendered in South Carolina was held not to render it void for fraud, because such defense was not disclosed in the bill. After a divorce in Scotland, and a second marriage, the second wife brought in her nullity suit on the ground that at the time of the second marriage the defendant had another wife living. Dr. Ludington, speaking of the disclosure with reference to the divorce, said: "If a fact of such magnitude had been suppressed, I am of opinion that any sentence pronounced by the court would have very little availed the parties; that it would have been finally binding, but would have been open to re-examination; that such suppression would, in short, have rendered all the proceedings liable to impeachment. An endeavor to obtain a sentence when any such material matter was withheld would be unfair toward the court, and prejudicial to the due administration of justice": Conway v. Beasley, 3 Hagg. Ecc. 638. It is to be observed that Graves v. Graves, 132 Iowa, 199, 109

N. W. 707, 10 L. R. A., N. S., 217, was an action in equity, and was not instituted within the time exacted by section 4091 of the Code: See Larson v. Williams, 100 Iowa, 110, 62 Am. St. Rep. 544, 63 N. W. 464, 69 N. W. 441. While grounds for new trial specified in that section are exclusive, relief, if granted after the time fixed therein, is by virtue of the equitable powers of the court, and not owing to statutory authority. Such an action is to be distinguished from an application for new trial in the original suit: Hintrager v. Sumbargo, 54 Iowa, 604, 7 N. W. 92. The latter is in the nature of an application to correct the record, and to prevent wrong and injustice from the effect of the decree as it now stands: Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393. We are of opinion that the fraud alleged was such, if proven, that a new trial should be awarded.

136 6. It follows from what we have said that this is not a collateral attack on the decree; nor is the point that the vacation of the decree was matter of personal privilege only. Celista Wood was insane when the decree was entered, and so continued until her death. Her status while living cannot be affected by any order or decree which may be entered, and the only effect these can have will be on the property rights of others. The reason for denying the guardian of an insane person the authority to prosecute divorce proceedings has no application: See Mohler v. Shank's Estate, 93 Iowa, 273, 57 Am. St. Rep. 274, 61 N. W. 981, 34 L. R. A. 161. It is suggested that the petition in the first cause must have been dismissed because of want of proof as to residence. This, however, is rebutted by the allegation that the issues in the actions "were identical, and the evidence upon which said proceedings were maintained was identical, and said former decree constituted an adjudication against the right of said B. H. Wood to have said marriage relation annulled on account of insanity existing at the time of marriage." This was tantamount to saying that the former adjudication was on the merits. Whether the same judge heard both suits does not appear from the record; and, even if so, this would be no more than an evidentiary circumstance bearing on the issue of concealment. The question of laches is not involved, as application for new trial was made within the statutory period.

We have touched upon every point argued. The petition alleges that the deceased husband owned certain real estate in his lifetime which defendants claim. It contains no allegation that he ever parted with title thereto, and, for this

reason, we have no occasion to determine whether a purchaser for value without notice of the infirmity of the decree and relying upon its validity will be protected: See, however, Colvin v. Colvin, 2 Paige, 385, 22 Am. Dec. 644; Whitcomb v. Whitcomb, 46 Iowa, 437.

Reversed.

WHEN AND TO WHAT EXTENT CAN A DECREE OF DIVORCE BE ATTACKED AFTER THE DEATH OF ONE OF THE PARTIES.

I. Introduction, 230.
II. Right of Surviving Party to Attack by Direct Proceedings to Set Aside or Vacate Decree.
a. By Appeal After Death of One Party, 231.
b. By Writ of Error, 231.
c. By Motion or Petition in Original Cause, 233.
d. By New Suit, 237.
III. Right of Stranger to Make Direct Attack, 242.
IV. Effect of Death of One of Parties Pending Appeal, 243.
V. Collateral Attacks.
a. By Surviving Party, 245.
b. By Strangers, 248.

I. Introduction.

The right to contest the validity of a decree in divorce after the death of one of the parties thereto has not been very often before the courts, especially, where any contention was raised by counsel, as to the effect of such death upon the right of the complaining party to have the decree reviewed; and in the absence of any such contention, and where property rights were involved, the courts seem generally not to have considered the fact that one of the parties was dead as having any important bearing in the right of the complainant to obtain relief, but to have decided the cases upon the same general principles as those involved in an attack upon any other final judgment in a civil action. It is, of course, recognized in all the cases, that death ends the marriage relation, and therefore terminates a suit which has no purpose except to accomplish that end—actio personalis moritur cum persona—but according to the decided weight of authority, as we shall see, when property rights are involved, a decree in divorce, like any other final judgment, may be vacated or set aside when obtained by fraud, notwithstanding the death of one of the parties thereto. The right of attack in such cases is not permitted for the purpose of continuing the controversy touching the right of divorce within itself, but for the ascertainment of the correctness of the decree with relation to such property rights. There are a few exceptions to this rule which will be duly noted. In those cases when the right to attack a divorce decree after the death of one of the parties has been upheld, the question of what procedure should be pursued does not seem to have been often raised or discussed, but we have thought it best to review each case under

the particular method of procedure adopted in that case, and leave the reader to judge how far the ruling made can be applied to the same state of facts, under a different mode of procedure.

II. Right of Surviving Party to Attack by Direct Proceedings to Set Aside or Vacate Decree.

a. By Appeal After Death of One Party.—We find but two reported cases where the question was squarely before the court whether the surviving party to a divorce decree can appeal therefrom after the other party has died. The oldest of these is Barney v. Barney, 14 Iowa, 189. In this case a wife obtained a decree of divorce from her husband, which awarded her the care and custody of the minor children, and also all rights of property which she had before her marriage or had accrued from her separate estate, free from all influence and control of her husband. She died a few weeks after the decree was obtained, and the defendant prosecuted an appeal within the statutory time. It was held that the action was ended by the death of the wife, and could not be revived or continued against her representatives. This case cannot be said to hold, however, that the appeal would not have been allowed, if it had appeared that any property rights were involved, for the court distinctly stated that the bill for divorce did not allege that the wife was possessed of any property either personal or real, to which she had any title, nor did it appear from the record that she had any property to which any right could survive. As to that portion of the decree awarding the custody of the children to the wife, it was held that that ceased to have any effect upon the death of the mother, that it was a right which could not survive her, or be transferred to any other person, so that, when she died, the husband stood in the same relation toward the children that he would have done had the decree never been made.

In the other case—Shafer v. Shafer, 30 Mich. 163—a husband had obtained a decree of divorce from his wife, and died shortly thereafter, leaving a considerable estate. Subsequently to his death, but within the time allowed for appeals, the wife appealed. It was held that the statute regulating chancery appeals was broad enough to authorize an appeal in a case thus circumstanced; but that before the appeal could be brought to a hearing, or any further proceedings had in the cause, the proper steps must be taken to bring in as parties, the representatives of the deceased complainant and his heirs at law. A motion to dismiss the appeal on the ground that it was unauthorized was therefore denied.

b. By Writ of Error.—Notwithstanding the general rule of law that a writ of error does not lie against any but him who is a party or privy to the first judgment, his heirs, executors or administrators, an exception to the rule seems clearly established where relief is sought from a divorce decree after the death of one of the parties, where property rights are involved. Thus in Israel v. Arthur, 6 Colo. 85, the plaintiff in error sued out a writ of error to reverse a decree

of divorce obtained against her by her former husband, then deceased. It was argued by counsel for respondent that inasmuch as the decree in the court below concerned only the marriage relations of the parties thereto, there was no one now, since the death of the plaintiff below, who could represent him in this relation. That if the decree were to be adjudged erroneous, the lower court would be without jurisdiction to try the cause, for the reason that the marriage had been dissolved by death. In overruling this objection and holding that a writ of error would lie, it is plain from the language of the court that it upholds the general right of a party to have a divorce decree reviewed under any proper form of proceeding when property rights are involved, and that its decision is not simply as to whether the proper remedy had been adopted in this case. Said Judge Beck: "If a decree of divorce affected the marriage relation only, there would be great force in the argument; but when it is considered that the decree in this case, as in other cases, affects the property rights of the parties as well as their marital rights, it would seem that the same reasons exist for determining its validity as in civil cases generally, notwithstanding the death of one of the parties, and regardless of the fact that the primary relief sought by the bill and afforded by the decree has been confirmed by death whose decree is irrevocable." And in When v. Moss, 7 Ill. 72, the plaintiff in a divorce suit died after obtaining a decree of divorce from his wife. The divorced wife at a subsequent term sued out a writ of error against the husband's administrator, the legatees under his will, and certain parties to whom he had transferred lands, in which she had not relinquished her right of dower. The same contention was made in this case as in the case of Israel v. Arthur, 6 Colo. 85, but it was held that if the wife had been injured by an erroneous decree, she ought to have a remedy, and if she could not bring error, she was remediless, since, under the practice, no appeal would lie in such case. It was further held that the defendants were properly made parties, because they had an interest in the effects, and consequently in a reversal of the decree—the legatee because they might lose their legacies in proportion to the wife's dower without a hearing, and the purchasers from the deceased husband because, without a relinquishment of dower, they would be liable to have the claim of dower preferred. This case, too, like the Israel case above cited, seems to recognize generally the right to vacate a divorce decree after the death of one of the parties, without reference to any particular mode of procedure. And in the recent case of Chatterton v. Chatterton, 231 Ill. 449, 121 Am. St. Rep. 339, 83 N. E. 161, the rule is extended even further than that announced in either of the above cases. Here it was held that a husband against whom a decree of divorce was granted at the suit of the wife may, after her death, sue out a writ of error to review the decree, though it does not appear from the record that the wife left property in which the surviving husband will take an interest on

the decree being reversed. This was an appeal, however, from the appellate court, and the appellant had filed in the appellate court an affidavit showing to whom the property of the deceased wife would pass under her will, and the court decided this was sufficient to sustain the writ, and the decision of the appellate court (132 Ill. App. 31) reversing the decree was affirmed. In answer to the contention that a decree in divorce should not in any event be reviewed, unless it appeared from the record that the party deceased left property in which the surviving husband or wife would take an interest upon the decree being reversed, the supreme court said: "If this be correct, and the investigation of the court of review is confined strictly to the record made in the divorce suit, the right of the party against whom the decree passed to have the decree reviewed after the death of the successful party is of little practical worth, as it is not often that the record shows what, if any, property was owned by the party who has obtained the decree of divorce." This language is clearly opposed to the ruling in Barney v. Barney, 14 Iowa, 189, heretofore cited, where, as we have seen, it was held that a husband's appeal from a divorce decree obtained by his wife would not be sustained when it did not appear from the record that she had any property to which any right could survive. What would have been the ruling in this case if any extraneous proof had been offered to show that she did have such property, as in the Illinois case, we can only conjecture.

c. **By Motion or Petition in the Original Suit.**—As relief from decrees in divorce can only be obtained when property rights are involved, it is generally held that a judgment of divorce cannot be attacked by motion or petition filed after the death of one of the parties in the original cause. Such was the ruling in Watson v. Watson, 1 Hun, 267, 47 How. Pr. 240, where a wife whose husband had obtained a decree of divorce and subsequently died intestate, sought by motion against the administrators of the husband's estate to have the decree set aside on the ground of fraud and irregularity. The court was of opinion that if the facts stated in the moving papers were true, there certainly ought to be some relief for the defendant, but as the administrator had no power to consent to the setting aside of the judgment, and no control or authority over it; and moreover, had no legal interest, as administrator, in the question whether the widow was entitled to a distributive share of the estate, that the motion could not be entertained. "We cannot avoid the conclusion," said the court, "that the motion was properly denied. An action, in the nature of a bill of revivor, bringing before the court all the heirs at law and other persons interested in the real estate left by the decedent, and such persons as may have taken conveyances thereof subsequently to the decree, as well as his representatives, seems to us the only mode in which the relief sought can properly be obtained"; and a similar ruling was made in Groh v. Groh, 35 Misc. Rep. 354, 71 N. Y. Supp. 985, and Zoellner v. Zoell-

ner, 46 Mich. 511, 9 N. W. 831. It is distinctly stated in the last case that, so far as property rights were affected by the decree, the suit had not abated, but that the relief sought could only be obtained by a new suit, with the proper parties representing the properties liable to be effected; and it was further said that as no proceedings had been instituted by the wife to set aside the decree until more than eight years after the husband's death, that she was guilty of such laches, that the petition should be dismissed, even if the manner in which relief was sought had been correct. The question of laches in this case was not, however, the ground upon which the case was decided. But in Roberts v. Roberts, 19 R. I. 349, 33 Atl. 872, delay on the part of a husband in applying for relief from a decree of divorce granted to his wife until after her death was held to be fatal. The wife had obtained the decree in February and died the following July, leaving considerable property. In August the husband sought by petition to have the docket entry granting the divorce set aside and the case reinstated because of alleged fraud in the procurement of the decree. Reference is made by the court to the Zoellner case just above cited, and the following language from that case quoted with approval: "Waiving all objections based on the manner in which the relief sought is applied for, and viewing the case as it stands explained by the petitioner, the court is of the opinion that the decision of the court below should not be disturbed. Nothing is now involved except property. The sole motive of the petitioner in assailing the judicial proceeding which purported to sever her connection with the deceased complainant, is to get, through a kind of post-mortem adjudication, a share of the property he left. We think she was not disposed to attack the proceedings during his lifetime, and when, if successful, the result would have been a revival of the state of marriage; but that she designedly abstained from moving until, in consequence of his death, the property interests might be pursued without the risk of any restoration of the conjugal relation." Chief Justice Matteson adding: "We should have regarded the petition with more favor if the respondent's solicitude for the court and the interests of the public had prompted him to move in the matter before the death of Mrs. Roberts."

In Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064, a wife had obtained a decree of divorce from her husband and subsequently died. Her administrator was substituted as plaintiff. Thereafter the husband, upon motion to the administrator, moved to vacate the judgment upon the ground that he had never been served with summons in the action, and that the decree had been procured by false testimony. It was held that the motion was properly denied. The ruling in this case was not based, however, upon the ground that a motion made in the original cause was not the proper method of procedure; in fact, the question of procedure does not seem to have been considered at all. The decision is based upon the ground that a suit for divorce is a purely personal action, which would not sur-

vive the death of either party. It was further held that the provision of section 473, Code of Civil Procedure, authorizing the court to allow a defendant, in case he has not been personally served with summons to answer to the merits of the action within a year after the rendition of judgment therein, has no application to a case in which, by the death of the plaintiff, the action has abated, and all opportunity of controverting its merits has been removed. Some of the language used by Judge Temple in delivering the opinion of the court is important, for this case has sometimes been referred to as being one of the very few cases which are opposed to the general rule that a divorce decree can be vacated for fraud after the death of one of the parties, where property rights are involved. The language used is as follows: "The effect of the plaintiff's death upon the action is not changed by reason of the question of property, which is suggested by the appellant. The complaint, as well as the judgment, is silent upon the subject of property; and, although there is an allegation in reference thereto in the answer which the appellant proposed to file, this did not prevent the abatement of the action, nor is it stated in his notice of motion as one of the grounds upon which he would make it. The primary and substantive subject of litigation in a suit for divorce is the personal relation of the parties, and their right to the community property, is but incidental thereto. If, before a decision upon that question is made, one of the parties dies, the action cannot be continued for the purpose of continuing the rights of property; and if there was originally no issue upon this subject, it cannot be revived in case of death after judgment, for the purpose of having this question adjudicated. In the absence of any reference thereto in the decree, the parties to the suit became tenants in common of the community property, and the death of the plaintiff after the entry of judgment did not impair the appellant's right thereto, but this right must be enforced in an independent action in which all who may have any interest therein should be made parties." It will be seen that the court does not hold that a divorce decree may not be vacated after the death of one of the parties, when property rights are involved, if such rights are involved in the original suit; and in fact the ruling in this case does not seem to us to go any further than the decision in the Iowa case heretofore cited (Barney v. Barney, 14 Iowa, 189), where it was held on appeal from a judgment of divorce, taken after the death of one of the parties, that, when the record failed to show that the deceased party had any property to which any right could survive, no appeal from the judgment would lie, although the decree recited that the deceased spouse should have "all the rights of property which she had before her marriage, or which had accrued from here separate estate." There is one case, however, which, though similar in many respects to the case of Kirschner v. Dietrich, 110 Cal. 502, 4 Pac. 1064, where the language used in the opinion goes even further than that in the California case, and though the case

was decided upon a motion made in the original cause, the court seems to hold that a divorce suit is of such a personal nature that a decree rendered therein cannot be vacated after the death of one of the parties, in a direct proceeding by the surviving party, even though rights of property are involved. The case to which we allude is that of Dwyer v. Nolan, 40 Wash. 459, 111 Am. St. Rep. 919, 82 Pac. 746, 1 L. R. A., N. S., 551. In this case a husband had obtained a decree of divorce from his wife and died several years thereafter. His executors were substituted as parties plaintiff in the divorce proceedings, and the divorced wife then appeared in the action by motion, and affidavits in support of the same, and sought to have the decree set aside and vacated upon the ground that she had never been served with summons, and that the court was without jurisdiction to render the decree. The motion to vacate the judgment was denied by the lower court, and in affirming the judgment of the lower court, Judge Dunbar, speaking for the supreme court, said: "We will not enter into an investigation of the question presented as to whether or not the service in the divorce proceeding was sufficient to give the court jurisdiction of the person of the defendant, for the reason that there are no proper parties to this proceeding, and, in the nature of things, the plaintiff having died, that the question of divorce cannot be relitigated. It will not be gainsaid that an action for divorce is a purely personal action. Nothing is sought to be affected but the marital status of the husband and wife. The distribution of property in such an action is incidental, and it is clearly incontestible that upon the death of either party, whether before or after the decree, the subject of the controversy is eliminated. If the death of the plaintiff in this case had occurred before judgment, it will not be urged that there could have been a substitution of his executor to represent him in the prosecution of the case. Such a proposition, for manifest reasons, would not be entertained by a court for a moment. What additional authority or power did they have to represent him in the same case, when he died after the judgment? Manifestly none. They cannot stipulate with reference to the decree. They cannot consent to setting aside the judgment. There is no conceivable particular in which they represent the deceased or the heirs with reference to the subject matter of the action in the slightest degree. The very nature of the action renders this impossible. In the light of this fact, a service upon them of a motion to vacate the judgment is farcical, and the case proceeded, if it proceeded at all, without notice and on a purely ex parte basis. Something has been said of the inherent jurisdiction of the court to set aside void decrees. Inherent jurisdiction is no more potent than jurisdiction that is conferred by statute, and it is as much prescribed by orderly methods. It is not a loose, arbitrary and unlicensed jurisdiction that the court can exercise without restraint, untrammeled by the observance of the methods prescribed by law, but it is simply jurisdictive, and no more. It is suggested that,

if the court, upon an examination, finds that the judgment was void for want of service, it will vacate the judgment for the purpose of clearing its records of void judgments. But the parties to an action have as much right to be heard upon that question as any other. So far as property rights are concerned, if there are any, if the judgment is void, such rights are in no way affected by it, and all the avenues are open for the determination of such rights,—where the parties affected can all be heard." The last paragraph quoted seems to somewhat modify some of the language previously used in the opinion, and to leave the impression that in proper proceedings, where all the parties interested in property affected by a decree of divorce were before the court, that the validity of the decree for want of jurisdiction in the court rendering it might be attacked.

d. **By New Suit.**—With the exception of motions or petitions made in the original cause, which, as we have just seen, are generally held not effective as a mode of attacking a divorce decree after the death of one of the parties, the decisions do not seem to have attached any great importance, so far as the right of attack is concerned, whether the procedure followed was by appeal, writ of error, or a new suit. The procedure which has found most favor, however, and the one most frequently adopted, has been by a new suit, or a proceeding in the nature of a bill of review. Whenever this mode of direct attack has been followed, the authorities are practically unanimous that a decree of divorce may be vacated for fraud after the death of one of the parties thereto. One of the older cases supporting this doctrine, and to which reference is frequently made, is Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193. Here the widow brought an action in the nature of a bill of review against the personal representatives of her deceased husband, and the heirs at law, to have a judgment of divorce declared void upon the ground that it had been obtained by fraud. It was held that the judgment could be annulled where the deceased husband had left real and personal property, and that both the administrator and the heirs were proper parties. In Brown v. Grove, 116 Ind. 84, 9 Am. St. Rep. 823, 18 N. E. 387, a divorced wife filed a complaint several years after her husband's death, seeking to annul the decree of divorce. The husband had procured the petition for divorce to be filed in the name of the wife while she was ill and almost blind, and answered the complaint, the wife having no notice or knowledge of the proceedings for more than twenty years after the decree was granted. It was held that the deceased husband had perpetrated a fraud upon his wife and the court, and that upon discovering the fraud, the wife was entitled to have the decree annulled, although long after the husband's death and more than twenty years after the date of the decree. "It would be a mockery to uphold a decree obtained by such fraud. Courts have inherent power to annul decrees obtained by means such as those resorted to by Henry W. Grove." The testimony of the plaintiff was objected to upon the ground that her claim affected the estate, and

the heirs were parties, and that under the statutes of the state she was incompetent to testify as to matters prior to her husband's death, but the court said: "The suit, it must be remembered, is one to annul a decree of divorce, and as to many matters the appellee was a competent witness, and the only question presented is whether she was competent to testify at all. We think it proper to say that the issue tried and determined was whether the appellee had a right to have the decree of divorce annulled, and that is the only issue upon which our judgment or that of the trial court is absolutely and directly conclusive. Whether property rights acquired upon the faith of the validity of the decree were affected, we have not inquired, and, of course, have not decided. All that we do decide is that Mrs. Grove had a right to relief against the decree procured by fraud. When she claims, should she ever do so, property rights, then other questions may arise; but now we decide only that she had a right to be relieved from the fraudulent decree." And this case is in entire harmony with the earlier case of Willman v. Willman, 57 Ind. 500, where it was held that a decree of divorce obtained by a husband in his lifetime, where no summons had been issued or served, could be set aside upon proceedings instituted by the wife after the death of the husband. In Lawrence v. Nelson, 113 Iowa, 277, 85 N. W. 84, 57 L. R. A. 583, the right to set aside a divorce decree, after the death of the successful party, where property rights are involved is clearly sustained; and it was held in this case that the former wife of a deceased pensioner, who is his widow, is, under the laws of the United States, entitled to a pension from the time of his death, has sufficient property interest to entitle her to sue to annul a fraudulent divorce decree obtained by him in his lifetime. The doctrine sustaining the right to set aside a decree of divorce for fraud after the death of one of the parties is also upheld in Bomsta v. Johnson, 38 Minn. 230, 36 N. W. 341. In this case a husband, after obtaining a judgment of divorce from his wife, married again, and died leaving issue by his second wife. After his death the divorced wife brought suit to set aside and annul the decree of divorce. A demurrer to the complaint upon the ground that it did not state a cause of action was sustained by the lower court, but the court went further, and in effect ordered judgment of dismissal. The ruling on the demurrer was approved on appeal, but as to the right to maintain the action the supreme court was of the opinion that in the absence of positive legislation upon the point a decree of divorce could be vacated for fraud, notwithstanding the death of the successful party. This ruling was not necessary to a decision on the appeal, but was made in view of the fact that the lower court might again have to pass upon the merits of the controversy. It has, however, been often referred to both by text-writers and the courts, not as dicta, but as a solemn adjudication of the point discussed. In Rawlins v. Rawlins, 18 Fla. 345, it was held that a widow and the children born of a cohabitation during the divorce proceedings, and subsequent to a decree of divorce, have an

equity upon the death of the husband to set aside such decree of divorce if it was procured by fraud and imposition of the husband, and that they could proceed by an original bill in the nature of a bill of review against the administrator and the children born before the decree of divorce. The object of the bill in this case was to recover plaintiff's share of the property of the deceased husband. It was contended that the bill was multifarious, and that there was misjoinder of parties, but the court said: "Their rights, while not identical in degree or in interest, are mutually dependent upon setting aside the decree, and as a consequence of a decree of this character they have each an interest in the subject matter of the suit which can be here readily adjudicated. The primary relief sought is the setting aside the decree of divorce, and all of the plaintiffs are interested upon the same side of this question. We can see no necessity for requiring this administrator to be subjected to four distinct suits, all concerning the distribution of the property of the estate, the principal question in each of which (the setting aside the decree of divorce) would be the same." As will be seen from the above, the main contention of the defendants in this case seems to have been over the mode of procedure, rather than the right to attack the decree, but in ruling that plaintiffs had pursued the proper method of procedure, the right of attack was clearly recognized, and the case of Johnson v. Coleman, 3 Wis. 452, 99 Am. Dec. 193, was referred to by the court in support of its position. Likewise in Rodgers v. Nichols, 15 Okl. 579, 83 Pac. 923, where a wife, after the death of her husband, brought an action to set aside and annul a decree of divorce obtained by her husband in his lifetime, upon the ground that she had never been served with summons in the divorce proceedings, it was held that as the evidence clearly and conclusively established that no service, actual or constructive, was had upon the defendant, and that gross fraud had been practiced upon the court and upon the defendant, that the decree should not be permitted to stand. Said the court: "The doctrine that, subsequent to the death of the party who obtained a decree of divorce by fraud, an action will lie to annul the same, is sustained by all the authorities." Such right is also upheld in Wood v. Wood, 136 Iowa, 128, ante, p. 223, 113 N. W. 492, 12 L. R. A., N. S., 891. There is one case, however, which does not sustain this doctrine, but it is clearly based upon statutory prohibition. In Owens v. Sims, 43 Tenn. (3 Cold.) 544, a wife from whom her husband had procured a decree of divorce made application by petition, after his death, to set aside the decree. The executor, with all the children and devisees under the husband's will, were made parties defendant. The defendants appeared and demurred to the petition, which was overruled by the court, and on motion, the decree of divorce was set aside, and the petitioner allowed to make defense against the bill for divorce. After this order was entered, the petitioner, by her solicitor, suggested the death of the husband, which was admitted of record,

and thereupon counsel for defendants moved the court to revive the cause in their names, which was disallowed. It was held on appeal that the action of the trial court in refusing to revive the cause was proper, but that the order setting aside the decree and permitting the wife to defend was erroneous. Said the court: "The circuit judge admitted the defendant, after final decree and the death of the complainant, to appear and defend. Defend what? Surely not a suit for divorce, for that had abated and passed beyond the limits of a revivor. The circuit judge so decided, and we think correctly; and yet, on the ex parte statement of the defendant, he set aside the decree dissolving the bonds of matrimony, solemnly pronounced upon the evidence, ... and permitted the wife to appear and defend in a case not in existence, nor which could, by revivor, be brought to life again." It is stated in the opinion that by positive declaration of the statute, a decree of divorce can only be reversed by an appeal; and therefore this provision of the statute would have required that the application to set aside the decree be denied, but the supreme court distinctly states that by the death of the husband the suit had abated and passed beyond the limits of revivor. The case, however, is a noticeable exception to the doctrine announced in the numerous cases heretofore cited, and is the only case we have been able to find which seems to hold that a divorce decree is conclusive against direct attack by the surviving party after the time for appeal has expired, though the rights of property may be involved, unless the California and Washington cases heretofore cited under a former subdivision of this note can be said to reach that far. But, while the great weight of authority undoubtedly upholds the doctrine that the surviving party to a divorce decree may attack the decree for fraud after the death of the successful party, and have the same set aside in a direct proceeding in the nature of a bill of review, still it is equally true that the courts move very cautiously in such cases, and will not vacate such decrees unless the evidence of fraud is clear and convincing, and unless the complaining party has used proper diligence to obtain relief after discovery of the fraud. Thus, in Evans v. Woodsworth, 115 Ill. App. 202 (affirmed 213 Ill. 404, 72 N. E. 1082), a wife obtained a decree of divorce from her husband in 1893, and died the following year, after devising her property to the defendant in this action and her minor daughter. Two years after the wife's death the husband filed a bill seeking to have the decree of divorce set aside and vacated upon the ground that it had been obtained by fraud. It was held that in a case such as this, "the evidence must be clear and cogent, and must leave the mind well satisfied that the allegation is true." "Moreover," said the court, "we are of opinion that appellant should be denied the relief here sought because of his laches, the death of Mrs. Evans and the fact that the interest of minors has intervened. The evidence shows that appellant knew of the filing of the circuit court bill by his wife before the rendition of the decree of divorce in that court, and expressed him-

self as not averse to her obtaining such a decree. The evidence also shows that he knew as early as February, 1894, that his wife had obtained a decree of divorce against him, and took no steps whatever during her lifetime [she died in the following August] to set it aside as he might have done, ... and delayed the filing of the bill in this case until almost two years after Mrs. Evans' death. These facts, without explanation, are, in our opinion, sufficient to justify a denial of any relief to appellant." In Day v. Nottingham, 160 Ind. 408, 66 N. E. 998, where complaint was filed to set aside a decree of divorce after the death of the party in whose favor it had been granted, the court said: "The court will be extremely cautious in the exercise of its powers to vacate the judgment, and the application to set aside must be timely made, and must present a strong case of fraud, in order to justify the court in disturbing the judgment." It was also held in this case that where a wife who had obtained a decree of divorce from her husband had died, and it does not appear that she was possessed of the property when she obtained the divorce, the court would hesitate to set the decree aside upon petition of the husband, where the only effect would be to permit him to inherit the property. And in In re Brigham, 176 Mass. 223, 57 N. E. 328, when a husband in whose favor a decree of divorce had been granted did not die until twelve years afterward, and the wife thereupon brought action against his executors to have the decree set aside on the ground of duress and fraud, a demurrer to the petition was sustained, the court saying: "The petitioner, relying on getting the advantages of a widow without any of the troubles which she found incident to being a wife, and thinking that she would be better able to prove her case if the opposition of her husband was removed, waited until his death before she took a step. Whether it be called laches or be given a harsher name, such a course put an end to any claim she ever may have had to be heard." So, too, where the surviving party to a divorce decree has accepted the benefits of the decree, he will not be permitted to impeach the decree for fraud after the death of the other party. Thus, in Sedlak v. Sedlak, 14 Or. 540, 13 Pac. 452, a wife to whom a decree of divorce had been granted nearly thirty years before, sought to impeach the decree for fraud after the husband's death. By the decree she had been granted the custody of the children and an interest in the defendant's estate. Said Chief Justice Lord: "The benefits of that decree she has accepted, taking the divorce, receiving the children, and the money awarded her under it. As such party to the record, after receiving all the advantages of the decree, and acquiescing in it for so many years, can she be now heard to impeach it on the ground that the decree was entered without notice, or her knowledge or consent? The general rule, without doubt, is that no lapse of time or delay in bringing the suit will be a bar to the remedy in equity, provided the injured party, dur-

ing the interval, was ignorant of the fraud. But the ignorance of such party must not have been negligent; for if by reasonable diligence the fraud could have been discovered, or ought to have been known, he will be deemed guilty of laches, or of acquiescence, and equity will refuse to interfere."

III. Right of Stranger to Make Direct Attack.

There are very few cases where a stranger to a decree of divorce has sought by direct proceedings to have the decree set aside and annulled after the death of one of the parties. In Tyler v. Aspinwall, 73 Conn. 493, 47 Atl. 755, 54 L. R. A. 758, plaintiffs were the heirs at law of a deceased who died intestate, leaving a large estate in which the defendant claimed an interest as his widow. The object of the action was to set aside for fraud a decree of divorce which had been obtained by the defendant from her former husband and before her alleged marriage to the deceased. The defendant pleaded by way of abatement that neither of the plaintiffs were parties to the action for divorce, and had no interest therein. On appeal from an order overruling a demurrer to the plea in abatement and rendering judgment for defendant the supreme court said: "The real question in this case is not whether the superior court possesses the power to set aside the judgment of divorce in question upon the grounds alleged in the complaint, but it is whether the court erred in not exercising that power in favor of these plaintiffs. The judgment which the plaintiffs seek to open is one of a peculiar character. It establishes the personal status of the parties to it in a particular which was of the highest importance to the parties and to the community. They had been married. It made them single and unmarried. If such a judgment can under any circumstances be reopened at the suit of a stranger, this judgment cannot be reopened at the suit of the plaintiffs. Its consequences, if harmful to them, are of too remote and indirect a character to give them any cause of action. Courts are instituted to give relief to parties whose rights have been invaded, and to give it at the instance of such parties; and a party whose rights have not been invaded cannot be heard himself to complain if the court refuses to act at his instance in righting the wrongs of another who seeks no redress. Courts will act only in behalf of parties who show themselves entitled to such action. They sit to vindicate rights at the instance of parties whose rights have been invaded, and not to vindicate mere abstract principles of justice at the instance of anyone. In the case at bar the complaint, as finally amended, is merely a petition to set aside the judgment of divorce upon equitable grounds; and it shows upon its face without the aid of the allegations in the plea in abatement that the plaintiffs were strangers to the judgment, and that their rights, legal or equitable, were in no way affected by it. The mere fact that the setting aside of the judgment would be an advantage to the plaintiffs is not enough. They must show that some legal

or equitable right of theirs was invaded by the judgment before they can complain of the refusal of the court to act upon their petition to have it set aside." The effect of the death of the alleged husband upon the rights of the plaintiffs is not mentioned in the opinion, the ruling seeming to be based entirely upon the ground that the plaintiffs had no such interest as permitted them to maintain the action to set the divorce decree aside, merely because, if not set aside, the subsequent marriage of the divorced wife would give her the interest in the estate of her husband, which otherwise the plaintiffs would have had. So, too, in Richardson v. Stowe, 102 Mo. 33, 14 S. W. 810, an appeal was taken from a judgment dismissing a bill brought by the heirs of a deceased person to have set aside and annulled for fraud a decree of divorce in favor of defendant from deceased, which awarded her a large sum of money for maintenance and costs, and made the sum a lien on the real estate of deceased. It was alleged that the defendant had never been legally married to the deceased, as deceased had a wife living at the time of his marriage with defendant. It was held that all the alleged grounds for setting aside the decree were put in issue by the plaintiff in the divorce proceedings, and as the court trying that case had jurisdiction and had passed upon these issues in favor of the defendant in the present suit, they were adjudicated and could not be again raised in this case; in the absence of any fraudulent act on the part of the wife in obtaining the decree of divorce being alleged or proven. The opinion in this case, like the one last above cited, is also silent as to the effect of the death of the husband on the right to maintain the action.

IV. Effect of Death of One of the Parties Pending Appeal.

According to the weight of authority, the death of one of the parties to a decree of divorce, pending an appeal therefrom, does not abate the appeal when property rights are involved. Thus, in the recent case of Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659, a wife appealed from a decree of divorce in favor of her husband. After submission of the case, the husband died. It was held that it was the duty of the appellate court to review the decree in order to settle the property rights. It was further held in this case that where one of the parties to the decree dies pending an appeal and before it is submitted, that the heirs at law of the deceased spouse must be brought in as parties to the proceeding; but that after the appeal has been submitted, they are not necessary parties, because the decision relates back to the date of submission. In Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345, the executor of the deceased husband was substituted in his place, pending an appeal from a decree of divorce rendered in favor of the wife. The effect of the husband's death pending the appeal does not seem to have been raised, or, if raised, was not considered of sufficient importance to be mentioned in the opinion. In Danforth v. Danforth, 111 Ill. 236, a decree

of divorce had been entered in favor of the husband upon an ex parte hearing. The wife filed a motion at a subsequent day of the same term to set aside the decree on the ground of fraud. The motion being overruled, an appeal was taken to the court of appeals. This court affirmed the judgment of the circuit court, and from this judgment of the appellate court an appeal was taken to the supreme court. After the case was argued and submitted, in the supreme court, but before final judgment, the husband died. No notice of his death was given, and thereafter this court reversed the judgment of the court of appeals. Upon motion made by the wife at a subsequent term of the supreme court to have the judgment of that court entered as of the date that the cause was submitted, it was held that, as the court had acquired full jurisdiction of the appellee during his lifetime, the judgment was not void because rendered after his death, but irregular only. The record of the judgment was accordingly amended, so as to make it appear as of the date the cause was submitted. It was urged in this case by counsel for the appellee that even if a suit would not ordinarily abate by the death of one of the parties after it had been submitted on appeal, that such rule had no application to an appeal from a decree of divorce, because death put an end to all further legal proceedings. Said Justice Dickey: "This is true where the death takes place before any final decree of divorce. But where a decree of divorce has been improperly obtained, and the proceedings are erroneous, the party whose property rights have been injuriously affected by such decree ought not to be concluded by reason of the subsequent death of the other party. While both parties live, a writ of error lies to reverse an erroneous decree of divorce, the effect of which is to restore both parties to their former status of husband and wife, in law, and after the death of one it ought to lie in favor of the other party, not for the same purpose, but to restore the survivor to his or her rights of property devested erroneously by the decree.

In Thomas v. Thomas, 57 Md. 504, a husband died pending an appeal by his wife from a decree of divorce rendered in his favor. Replying to the contention that the doctrine actio personalis moritur cum persona was applicable, and that the suit had abated by the husband's death, the court said: "So far as the question of the marital relation was concerned, that question was forever concluded by the death of the appellee, and no one had any interest in reviving it. But the decree which granted the divorce, at the same time determined the property rights of the appellant, and if unreversed, deprived her of all rights in her late husband's property. With respect to that question her interest survived, and if the decree was erroneous, she was aggrieved thereby, and had a standing in court to prosecute an appeal therefrom, for the purpose of having the decree reversed." So, also, in Downer v. Howard, 44 Wis. 82, it was held that where a party seeking a divorce appeals from a judgment simply denying it, the death of either party pending the appeal abates

the action, and it cannot be revived; but that upon the death of either party pending an appeal from a judgment granting a divorce, the court would probably permit the appeal to be revived for the purpose of protecting any property interests which might be affected by the judgment. And, likewise, in Nickerson v. Nickerson, 34 Or. 1, 48 Pac. 423, 54 Pac. 277, it was held that an appeal by a husband from a decree for divorce, whereby his wife became entitled to one-third of his property, does not abate by his death, but survives to his heirs. The opinion clearly recognizes that an action for divorce does not survive the death of a party where the only relief sought is a dissolution of the marriage relation, "for death effectuates more surely the very end which it is the especial purpose of the suit to accomplish." "But," said the court, "where the consequences of the divorce are such as affect the property rights of the parties to the suit, the heirs or personal representatives may have such an interest in the litigation as that the cause will survive, not for the purpose of continuing the controversy touching the right of divorce within itself, but for the ascertainment of whether the property has been rightfully diverted from its appropriate channel of devolution." As the husband in this case had also sought divorce by way of a cross-bill, which was dismissed, it was held that the suit had abated by his death so far as it pertained to the cross-bill, but not otherwise, and that the cause and the appeal both survived to the heirs of the husband for the purpose of determining whether the divorce was rightfully granted, to the end that conflicting property rights might be determined. There is one case where the doctrine that an appeal by one of the parties from a divorce decree pending at the time of the death of the other party does not abate, is opposed. This is the case of McCollum v. McCollum, 48 Tenn. (1 Heisk.) 566, note, but as the appeal in this case was only from a decree so far as it related to alimony, the opinion may be regarded as mere dicta. It was held that the death of the complainant in a bill to modify or vacate a decree for alimony does not abate either the appeal or the suit, but that in this respect it differed from a decree in divorce. This dicta of the Tennessee court is the only authority we find which seems opposed to the rule so generally advocated.

V. Collateral Attacks.

a. By Surviving Party.—There are a good many cases where the surviving party to a divorce decree has attacked the validity of the decree in collateral proceedings, but in very few of them does the effect of the death seem to have been considered, and the decisions were based on the general principles which apply to collateral attacks upon a final judgment in any civil action. In many of these cases, in fact, the only reference made to the death is where the complainant had accepted benefits under the decree, and, though having the opportunity to do so, had made no effort to have the decree set aside until after the other party to it had died. In such cases it is usually

held that the complainant is estopped from attacking the validity of the decree in a collateral proceeding after the death of one of the parties, for the purpose of securing the estate of the other: Arthur v. Israel, 15 Colo. 147, 22 Am. St. Rep. 381, 25 Pac. 81, 10 L. R. A. 693; Ellis v. White, 61 Iowa, 644, 17 N. W. 28; Mohler v. Shank's Estate, 93 Iowa, 273, 57 Am. St. Rep. 274, 61 N. W. 981, 34 L. R. A. 161; Owen v. Yale, 75 Mich. 256, 42 N. W. 817; Marvin v. Fester, 61 Minn. 154, 52 Am. St. Rep. 586, 63 N. W. 484; and in Ashbury v. Powers, 23 Ky. Law Rep. 1622, 65 S. W. 605, it was held that where an absolute divorce was granted to the wife in an action brought by her from bed and board and for alimony, she is estopped, after the lapse of more than twenty-five years, and after the remarriage and death of the husband, to attack the judgment of divorce in a collateral proceeding to settle the husband's estate, upon the ground that the court rendering the decree was without jurisdiction by reason of the fact that neither she nor her husband resided in the county in which the action was brought, and that the action was brought in that county and an amended petition seeking the absolute divorce was filed, without her authority, as it must be presumed that the jurisdictional facts were alleged. "Whether any person could," said the court, "by impeaching an averment of jurisdictional fact, destroy the judgment of a court of general jurisdiction after the lapse of twenty-five years, may be a debatable question; but we think it clear that a party to the record, and especially the plaintiff invoking the jurisdiction, cannot after so great a lapse of time, impeach, in a collateral proceeding, a decree of divorce or other decree fixing the status of the parties." So, too, in Larimer v. Knoyle, 43 Kan. 338, 23 Pac. 487, a wife brought an action to set aside the will of her deceased husband, and to have his estate declared to belong to her. The husband had obtained a decree of divorce from the wife during his lifetime, and this decree was set up in defense, but attacked by the wife in her reply, as fraudulent, upon the ground that no legal service of summons in the divorce proceedings had ever been served upon her, either personal or constructive. It was held that the affidavit for service by publication could not be contradicted in a collateral proceeding for the purpose of avoiding the judgment, and furthermore, that the failure of the wife to state in her reply that she did not have knowledge of the divorce proceedings, within time, by the exercise of reasonable diligence, to appear in court and make her defense, and that she did not discover the fraud perpetrated upon her within less than two years before filing her reply, was fatal to her case. But where one of the parties to a divorce decree has made an attack upon it, for fraud, in a collateral proceeding after the death of the other party, and has not been guilty of any laches, or was not estopped by having accepted any benefits under the decree, the right to make such attack has generally been upheld. Thus, in Gaines v. Gaines' Exr., 9 B. Mon. (Ky.) 95, 48 Am. Dec. 425, a husband had procured a legislative divorce

from his wife, and subsequently died. After his death the wife filed a bill against his representatives claiming dower in his lands. The defendants set up the legislative divorce as a bar to her claims to dower or distribution. It was held that, without deciding upon the effect of legislative divorces so far as they might operate upon the personal relations of the parties, the divorce was inoperative so far as it respected the rights of property involved, and could not "deprive the wife of her interest in the estate of her husband as it would have existed had there been no divorce." So, also, in Newcomb's Exrs. v. Newcomb, 13 Bush (Ky.), 544, 26 Am. Rep. 222, a wife who was of unsound mind, but who had never been adjudged a lunatic, instituted an action by her next friend to recover dower and her distributive share of the estate of her husband, who had, prior to his death, secured a decree of divorce from the wife. This decree of divorce was set up as a bar to the wife's action. It was held that the decree of divorce, thus pleaded as a defense, was subject to collateral attack by the wife for fraud in its procurement, in her action to recover dower and distribution of the estate of the deceased husband. The ruling in this case, however, is based entirely on the fact that the wife was insane at the time the alleged fraud was committed.

In Stanton v. Crosby, 9 Hun (N. Y.), 370, an appeal had been taken from a decree revoking letters of administration previously issued on the estate of a decedent to one claiming to be his widow. The application to revoke the letters of administration was founded upon an alleged false representation that the woman to whom the letters were issued was the widow of the decedent. It was admitted that the petitioner had been married to the intestate, but it was claimed that the marriage had been dissolved by the decree of a court of competent jurisdiction in another state. It appeared that the divorce had been granted on constructive service, and that the petitioner had no notice of the divorce suit until after the decree had been made, and the right to attack the decree was upheld. Said the court: "It is true, as a general rule, that fraud, in obtaining a judgment, cannot be set up in a collateral proceeding by a party or one representing or in privity with him. But this rule only relates to fraud which involves the merits of the judgment. It does not govern the case of jurisdiction fraudulently attempted to be obtained." In Daniel v. Benedict, 50 Fed. 347, the wife of a decedent brought a partition suit for partition of his estate. It was contended by the defendants that the plaintiff had no interest in the estate, because the intestate had obtained a decree of divorce from her during his lifetime. The plaintiff's bill set forth her marriage to the decedent, and also alleged that she had agreed that the suit for divorce should be begun against her on the sole ground of desertion, and that a decree of divorce should be entered therein, in consideration of a sum of money needed for her temporary support; that such agreement was procured through decedent's paid

agents, when plaintiff was greatly infected by disease; and that decedent fraudulently obtained a decree of divorce on the ground of adultery, of which fact plaintiff did not learn until after she had left the state when the decree was obtained, and that said charge of adultery was wholly false. It was further alleged that as soon as plaintiff learned that the divorce had been obtained on the ground of adultery, she began proceedings in the court where the decree had been rendered to have the same set aside and annulled, which suit was pending when the husband died. It was held that the divorce decree was subject to collateral attack on the ground of fraud. Said Judge Parker: "It is well established that a court will not set aside a judgment, or disregard the same, because it was founded on a fraudulent instrument or perjured testimony, or on any matter intrinsic to the matter tried by the first court, or on a fraud in the matter on which the decree was rendered. But it is equally well settled that a court of equity will, on account of fraud growing out of matter extrinsic or collateral to the matter tried by the first court, set aside or annul a judgment or decree between the same parties. I take it that the true rule is that a decree of divorce stands on the same footing as every other judgment or decree, and, if obtained by fraud growing out of matter extrinsic or collateral to the matter tried by the court rendering the decree, it will be set aside or disregarded."

b. By Strangers.—We have been able to find but one case where the effect of the death of one or both of the parties to a divorce decree has been passed upon, when an attack upon the decree was made by strangers in a collateral proceeding, and the decision in this case seems based more on the finding that those seeming to attack the decree had been guilty of laches, rather than the fact that they were precluded because of the death. The case in point is that of Thomas v. Thomas, 88 Wis. 88, 59 N. W. 504. In this case the brothers and sisters of a decedent sought to set aside the settlement of the wife as administratrix, after her death, and seven years after such settlement and distribution of the estate. The ground alleged in the plaintiffs' petition was that the wife had a husband living at the time of her marriage to the decedent, from whom she had never been divorced, and that she had fraudulently represented herself as the widow of decedent, and thereby procured an assignment of the estate to her. The defendants admitted the prior marriage of the wife before her marriage to decedent, but alleged that she was duly divorced from the first husband in the state of Ohio before her marriage to decedent. The validity of the divorce decree was attacked by the plaintiffs upon the ground that she had not resided in Ohio a year prior to the decree. It was also claimed by the petitioners that they did not know of the fact of her former marriage, or of the invalidity of the decree of divorce until after her death. It appeared from the evidence that it was common talk and rumor in the neighborhood that she had been previously married and divorced, and

there was no evidence of any denial or untrue statement as to her former marriage or divorce made by her or by anyone, to her knowledge, either to petitioners or to anyone else. It was held no fraud was shown authorizing setting aside the settlement of the administratrix. Said Winslow, J.: "Whether, therefore, we regard this proceeding as founded upon fraudulent concealment of fact by Mrs. Thomas or mere ignorance of fact by the petitioners pending the settlement of the estate, in either case, if their failure to defend was wholly or partially the result of their own intentional or negligent ignorance of fact, they cannot now be granted relief. They were of full age, and we think were fairly put on inquiry by the facts within their knowledge during the administration proceedings. We think, under well-established rules, the petitioners must be held guilty of laches. They might and ought to have made the discovery long before. Not having made any inquiry, even of Susan herself, when they ought to have made it, they will not be allowed to make it six years later, when the opposing party is dead, and the main source of evidence thereby cut off, and thus overturn a judgment rendered without fraud, and on due and personal notice to all."

In McDermott v. Gray, 198 Mo. 266, 95 S. W. 431, the heirs of a decedent sued to set aside certain deeds to the defendant as the widow of decedent, on the ground that defendant was not the wife of decedent because a decree divorcing defendant from a former husband was invalid. The ground insisted upon as to the invalidity of the divorce decree was that the clerk of the court which granted the decree had failed to sign and attest the order of publication in the divorce proceedings. It was held that this was only an irregularity, which could not be attacked in a collateral proceeding. The court said, however: "Unless the decree of divorce is absolutely null and void, mere irregularities in the securing of it can furnish no relief to plaintiffs in this suit"; thus seeming to recognize the right of a stranger to attack a void decree of divorce in a collateral proceeding after the death of one of the parties, though no mention is made in the opinion of the fact that one of the parties to the decree in this case was dead.

WHITEHOUSE v. WHITEHOUSE.

[136 Iowa, 165, 113 N. W. 759.]

WILLS.—Extrinsic Evidence is Admissible for the purpose of identifying the subject matter of a devise in a will. (p. 252.)

The words of the will, in so far as material to this controversy, are as follows:

"First, I give and devise to my son, Francis Whitehouse, Jr., his heirs and assigns, forever the southwest quarter of the southeast quarter and the south half of the northwest quarter of the southeast quarter of section 17, township 80, range 25, Polk county, Iowa.

"Second, I give and devise to my son Edmund Isaac Whitehouse, his heirs and assigns, forever the north half of the northwest quarter of section 29, township 80, range 25, Polk county, Iowa, subject to the payment by him of the sum of $500—which is hereby made a charge upon said real estate so given and devised to him—in equal sums to my said sons, Francis Whitehouse, Jr., and Arthur William Whitehouse and which I hereby direct shall be paid within two months after my death.

"Third, I give and devise to my son Arthur William Whitehouse, his heirs and assigns, forever the southeast quarter of the southeast quarter of section 17, township 80, range 25, Polk county, Iowa."

The judgment being adverse to Edmund I. Whitehouse, he appealed.

Brown & Dille, for the appellant.

Bowen & Brockett, for the appellees.

167 LADD, J. The second clause in the will described the land devised to testator's son, Edmund Isaac Whitehouse, as the north half of the northwest quarter in section 29, township 80, range 25 west, Fifth P. M. Neither then, nor at any other time, had the testator been the owner thereof or of any interest therein. It was owned by and then in possession of another. But he then owned the north half of the northeast quarter of the same section, which he acquired in 1876, and this was the only parcel owned by him in Polk county, Iowa, and probably in America, at the time of his death. At the date of the will, he also owned the forty acres devised to Arthur William Whitehouse and the sixty acres devised by Francis Whitehouse, Jr.; but these were conveyed by

him to Francis Whitehouse, Jr., in 1893. The evidence disclosed that the testator, having had some trouble with his wife prior to 1870, came to this country that year with his three sons, who seem to have sided with him. His first wife died in 1877, and, upon marrying again in 1880, he returned to England. At that time Francis was twenty-seven, Edmund twenty-five, and Arthur sixteen years of age. He had acquired the three tracts of land only, and these had been somewhat improved. Being a jeweler, and not a practical farmer, he did little of the work, relying upon the two eldest sons, Francis and Edmund, to perform most of the labor required. Before leaving for England, he executed a lease to them of the forty and sixty acre tracts correctly described and of the "north half of the southeast quarter of section 29" not owned by him, at the annual rental of three hundred and sixteen dollars with other conditions, including payment of taxes, not necessary [168] to be mentioned. The sons took possession of the land in controversy with the other parcels and farmed all together five years, when Edmund assigned his interest in the lease to Francis, who continued in possession until his father's death.

Under the circumstances disclosed by the record, there can be no doubt but that it was the intention of the testator to devise the land in controversy to his son, Edmund. The will disposed of the only other parcels of land to his remaining sons. He had no land other than the north half of the northeast quarter of section 29. Edmund had a claim on his bounty equal to that of Francis. Moreover, Edmund had done most of the work in breaking and improving this land. In making his will he is presumed to have intended to dispose of all his property, and certainly the presumption ought to prevail that he did not intend in his last testament to pretend to leave property to his son to which he had no title or claim, especially when burdened with the payment of a legacy, as in this case. True, extrinsic evidence may not be received to supply an omission or cure a defect in a will, even though occurring through mistake or inadvertence: Fitzpatrick v. Fitzpatrick, 36 Iowa, 674, 14 Am. Rep. 538. The instrument alone speaks the testator's intent, but the rule is universal that evidence may be received tending to identify the subject or person described. In Stewart v. Stewart, 96 Iowa, 620, 65 N. W. 976, the description in the will was the south half of the northeast quarter of section 30, which he did not own, and the only land the testator had, not included in the will, was the south half of the southeast quarter of

that section, and because the will purported to divide his estate among all his children, burdening that to different ones with legacies to others, and the particular tract was so burdened the court concluded that testator intended to leave the south half of the southeast quarter of the section to the devisee named. Speaking through Robinson, J., the court said: "The evidence shows that the description of the land is in part wrong. After rejecting the erroneous portion, the remainder [169] describes the south half of the east quarter of section 30. The section contains two tracts, which may be properly spoken of as 'the east quarters,' and under the rules of interpretation cited we are of opinion that extrinsic evidence may be received to show what quarter was intended by the testator." If this is sound, there can be no question as to the conclusion which should be reached in the case at bar for, by omitting the word "west," erroneously used in the description, it would read the north half of the north quarter, and extrinsic evidence was admissible to show to which of the north quarters the description should be applied. The decision followed Eckford v. Eckford, 91 Iowa, 54, 58 N. W. 1093, 26 L. R. A. 370, where the land was described in the will as southeast quarter of section 14. Testatrix did not own that quarter, but did own the southwest quarter of that section, and the court, after quoting the rule as laid down in Christy v. Badger, 72 Iowa, 581, 34 N. W. 427, directed attention to the fact that the county and section were correctly stated, and description to part only was false, and proceeded: "If the language had been 'one-quarter of section 14, township 98, range 17,' the estate would have passed because she described the land as being owned by her, and this language is sufficient to lead to an identification of the land actually owned by her. This identification may be made by extrinsic evidence. It involves what may be called a latent ambiguity."

We are not inclined to take the view of Kenne, J., in Stewart's case (96 Iowa, 620, 65 N. W. 976), that it is an extension of the doctrine there announced, for the presumption should prevail that the testator is undertaking in his will, without saying so in express terms, to dispose of property which he believed belonged to him, rather than to belong to another. If so, the description of the property devised as his own is entitled to little or no significance. The Eckford case (91 Iowa, 54, 58 N. W. 1093, 26 L. R. A. 370) was determined on great consideration after a rehearing had been granted. It is inconsistent with much that was said in Fitz-

patrick v. Fitzpatrick, 36 Iowa, 674, 14 Am. Rep. 538, though the relief [170] there sought was the correction of the will, while here we are merely asked to say what property the testator intended to devise in one of the clauses of the will. It has the support of Patch v. White, 117 U. S. 210, 6 Sup. Ct. Rep. 617, 710, 29 L. ed. 860, where the description as "numbered lot 6 in square 406" was held to be ambiguous, and extrinsic evidence received to show that lot 3 in square 406 was intended, though this was by a divided court. The tendency of later decisions is in harmony with those of this court, as will appear from an examination of Decker v. Decker, 121 Ill. 341, 12 N. E. 750, and Whitcomb v. Rodman, 156 Ill. 116, 47 Am. St. Rep. 181, 40 N. E. 553, 28 L. R. A. 149, apparently overruling Bingel v. Volz, 142 Ill. 214, 34 Am. St. Rep. 64, 31 N. E. 13, 16 L. R. A. 321, Huffman v. Young, 170 Ill. 290, 49 N. E. 570, explaining that Bingel's case was an application to reform a will; Seebrock v. Fedawa, 33 Neb. 413, 29 Am. St. Rep. 488, 50 N. W. 270; Priest v. Lackey, 140 Ind. 399, 39 N. E. 54, Winkley v. Kaime, 32 N. H. 268; Riggs v. Myers, 20 Mo. 239. See, also, Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447.

A latent ambiguity arises dehors the will. To establish it courts must listen to extrinsic evidence, not for the purpose of adding to or detracting from the will, but to ascertain the existence or nonexistence of the latent ambiguity. In no other way can such an ambiguity be shown. And, if so established, it should be added that only by resorting to the same kind of evidence—extrinsic—can it be removed. On the face of the third clause of the will, the subject matter is clear; but, upon inquiry, a part of the description is found to be false. The parcel of land named did not belong to the testator. If, by striking from the description of the premises devised the part which is false, enough remains in the will, interpreted in the light of surrounding circumstances at the time it was executed, to point out and identify the premises intended by the testator to be devised, the ambiguity is removed, and the disposition of [171] the property as thus indicated will be upheld. The facts are as diverse as the cases presented, and while reference to property by the use of the possessive pronoun in some instances may be significant, other circumstances may prove quite as controlling, and those to which we have alluded leave no possible doubt as to the deceased's intention of devising the eighty acres of land in dispute to the appellant.

The district court erred in holding otherwise, and for this reason its decree is reversed.

Extrinsic Evidence is Admissible When Necessary to Identify the devisee or the property devised in a will: See the note to Chappell v. Missionary Society, 50 Am. St. Rep. 289; Gaston's Estate, 188 Pa. 374, 68 Am. St. Rep. 874; Willard v. Darrah, 168 Mo. 660, 90 Am. St. Rep. 468; Synder's Estate, 217 Pa. 71, 118 Am. St. Rep. 900. And a devise of land by a description partly false may be effective if what remains, after rejecting the false, reasonably corresponds with real estate indicated by extrinsic evidence: Pate v. Bushong, 161 Ind. 533, 100 Am. St. Rep. 287; Douglas v. Bolinger, 228 Ill. 23, 119 Am. St. Rep. 409.

MEIER v. WAY, JOHNSON, LEE & COMPANY.

[136 Iowa, 302, 111 N. W. 420.]

NEGLIGENCE—Accidental Death.—An accidental death when urged in defense of an action for negligence, is a question for the jury. (p. 255.)

EVIDENCE—Res Gestae.—The Declarations of the superintendent of a grain elevator that he had sent a boy into a bin for the purpose of removing a board obstructing the flow of grain, made within a few minutes afterward and before his death, are admissible as part of the res gestae. (p. 256.)

MASTER AND SERVANT—Vice-principal.—A person who is in charge of a grain elevator, and who has power to employ men and give them directions as to their work, is a vice-principal, for whose negligence the master is responsible. (p. 256.)

MASTER AND SERVANT—Negligence—Dangerous Place to Work.—It is negligence for the master to send an employé into a dangerous place to do work he is not employed to do, without warning him of the danger. (p. 256.)

TRIAL.—Instructions Should be Read as a Whole in determining their correctness. (p. 258.)

MASTER AND SERVANT—Negligence—Assumption of Risks. The question as to whether the danger to a servant is open and obvious, and the duty to warn him thereof, is for the jury to determine. (p. 258.)

MASTER AND SERVANT—Assumption of Risk.—If an employé goes into a place with which he is not familiar, pursuant to a specific order from the master, the servant does not assume the risk of the danger incident to the work. (p. 258.)

MASTER AND SERVANT—Presumption as to Due Care.—In an action to recover for the death or injury of a servant, it is presumed that he was in the exercise of due care when he received his injury. (p. 258.)

Carr, Hewitt, Parker & Wright, and Sullivan & McMahon, for the appellant.

Healy Brothers & Kelleher, and P. T. Vaughn, for the appellee.

[303] DEEMER, J. Prior to and on July 28, 1903, defendant, a corporation, owned and was operating a line of elevators; one of which was at Hanna, a small station on the line of the Minneapolis and St. Louis Railway. One Fox was in its employ in connection with the last-named elevator. On or about July 25, 1903, defendant was informed that Fox was short some oats, and on or about the 27th of that month one Granger, defendant's superintendent, went to investigate the shortage. When Granger appeared Fox notified him that he had discovered some oats in a shipping bin of the elevator which he did not know about, and Granger notified him (Fox) that these must be weighed and again placed in the elevator, directing Fox to procure a team to haul the oats. Thereupon Fox arranged with the father of plaintiff's intestate for a man and a team to appear at the elevator next morning. When the morning came, Emil Meier, the deceased, a boy of a little over sixteen years of age, appeared with a team, and undertook the work of transferring the oats. The boy leveled the oats in the wagon and drove the [304] team. While removing the oats some obstructions interfered with their free flowage from the bin, and it is claimed that Fox sent the boy into the apartment for the purpose of having him remove this obstruction, and that while there the oats fell in upon him and smothered him to death. There is no doubt that the boy was smothered to death by reason of the oats falling over and upon him; but defendant denies that it, or any of its agents, ordered the boy to go into the bin, or that they knew he was there until some time after he had disappeared.

Many points are relied upon for a reversal, to some of which we shall give attention. That the bin was a dangerous place for a boy either at work or in play is frankly conceded, but it is claimed that the death of the intestate was an accident, for which no one is responsible. That question, as we think, was clearly for a jury, and, with its finding in this respect, we shall not interfere: McGovern v. Central Vermont R. R. Co., 123 N. Y. 280, 25 N. E. 373; Grimmelman v. Union Pac. R. R. Co., 101 Iowa, 74, 70 N. W. 90.

Both Granger and Fox testified that they did not send the boy into the bin, and each said on the witness-stand that they told him not to go. The boy is dead, and, of course, his lips are sealed. It appears, however, from some of the testimony that within five minutes from the time the boy was last seen, plaintiff, who is his father, was called from his field by Granger, and that he ran over to the elevator as fast as he

could. When he arrived there, attempts were being made to rescue the boy by going into the bin and attempting to secure his removal from above. This failing, a hole was chopped in the bottom of the bin, and the body was removed in this way some twenty-five or thirty minutes from the time the boy was last seen alive. Plaintiff testified that when he appeared after Granger had called to him, Fox said that he (Fox) had sent the boy up into the bin, and that they could not find him. [305] Plaintiff's wife and another son almost immediately appeared upon the scene, and to each of them it is claimed that Fox said he had sent the boy into the bin to remove a board which was on the spout leading from the loading bin. When these declarations were made, all parties seemed to think the boy was still alive, and efforts were then being made to extricate him, but all without success until he was suffocated. That the declarations of Fox were admissible as part of the res gestae is too clear for argument: Alsever v. Minneapolis & St. L. R. R. Co., 115 Iowa, 338, 88 N. W. 841, 56 L. R. A. 748; Keyes v. Cedar Falls, 107 Iowa, 509, 78 N. W. 237; Christopherson v. Chicago etc. R. R. Co., 135 Iowa, 409, 109 N. W. 1077, and cases cited.

2. It is claimed that Fox was nothing but a fellow-servant, for whose acts defendant was not responsible. The testimony, however, shows that he (Fox) was in charge of the elevator, that he was accustomed to employ men to assist him therein, that deceased was employed by him, and that he gave deceased, as well as others, directions as to their work. In ordering deceased into the bin, and directing him as to his work, Fox was clearly the alter ego of defendant, and manifestly a vice-principal: Foley v. Cudahy Packing Co., 119 Iowa, 246, 93 N. W. 284; Newberry v. Getchel & Martin Co., 100 Iowa, 441, 62 Am. St. Rep. 582, 69 N. W. 743; Cushman v. Carbondale F. Co., 116 Iowa, 618, 88 N. W. 817; Blazenic v. Iowa & W. Co., 102 Iowa, 706, 72 N. W. 292, and many cases cited.

That it was negligence to send the boy into a dangerous place, and to do a work for which he was not employed without warning him of the dangers, is well settled by our own cases above cited: See, also, Lund v. Woodworth, 75 Minn. 501, 78 N. W. 81; Nash v. Kansas City H. P. B. Co., 109 Mo. App. 600, 83 S. W. 90.

3. But it is said that Granger warned the boy that the place was an unsafe one, and if this be not true, that there is no proof that he was not warned. Upon both propositions there is direct testimony to the effect that the boy was not

warned. Even if [306] there were no testimony upon the point, this would not justify a reversal: Grimmelman v. Union Pac. R. R. Co., 101 Iowa, 74, 70 N. W. 90.

4. The seventh instruction, which reads as follows, is complained of: "One of the charges of negligence on the part of the defendant is that the defendant failed to give the said Emil Meier any caution, warning, or instruction as to the dangers or hazards of the place where he was set to work, or the work he was required to do. In relation to this matter, you are told that it is the duty of a master to use reasonable and ordinary efforts to warn or instruct young or inexperienced servants respecting the danger, if any, of obeying directions given to such servant, whenever obedience to such orders or directions will expose such servant to danger of injury from any cause which is known, or which would, in the exercise of ordinary care, be known, to the master, whenever the master knows, or, in the exercise of ordinary care, should know, that the servant, because of youth or inexperience, is not aware of the danger; and providing the danger is not known, or open and obvious, so that in the exercise of ordinary care the servant would be aware of such danger. As applied to this case, if you find from the evidence that the defendant directed Emil Meier to go into the bin where he met his death, and if you further find from the evidence that the same was a dangerous place, and going into the bin was a dangerous undertaking, and if you further find from the evidence that the defendant, through his agents or employés in charge of the work, knew that Meier was about to go into the bin, then you are told that it was the duty of the agents in charge of the work to notify and warn Meier of the dangers which, in the exercise of ordinary care, they either knew, or should have known, he was about to encounter. However, if you should find from the evidence that the defendant, through its agents in charge, directed Meier to go into the bin, yet if you should find from the evidence that at the time Meier went into the bin he knew the condition thereof, or if you should find from the evidence that the dangers he did encounter were open or obvious, so that in the exercise of ordinary care Meier could be aware of the dangers he was about to encounter, then the defendant would not be liable for the injuries sustained, or for the death of Meier."

[307] The instruction is manifestly correct: See Grimmelman's (101 Iowa, 74, 70 N. W. 90) and Newberry's cases (100

Iowa, 441, 62 Am. St. Rep. 582, 69 N. W. 743). The instruction should be read as a whole in determining its correctness.

Further, it is said that the dangers were open and obvious, and that there was no duty to warn. This was a question for the jury. In this connection, it must be remembered that the lad went into a place with which he was not familiar pursuant to a specific order. In such cases the doctrine of assumption of risk has no place: Strong v. Iowa Cent. R. R. Co., 94 Iowa, 380, 62 N. W. 790; Stomne v. Hanford Produce Co., 108 Iowa, 137, 78 N. W. 841; Cushman v. Carbondale Fuel Co., 116 Iowa, 618, 88 N. W. 817.

The testimony showed that the place was dark, and that plaintiff's intestate had never been in it before. In such cases the doctrine of assumption of risk has a very narrow application: Cote v. Lawrence Mfg. Co., 178 Mass. 295, 59 N. E. 656. In any event the doctrine of assumption of risk was for the jury. The same may be said of the question of contributory negligence.

The boy being dead, the case is aided by the presumption that he was in the exercise of due care when he received his injuries. The dangers were not obvious, and in any event the age of the deceased should be considered in solving the question as to his care.

The case was peculiarly one for the jury, and with its finding we shall not interfere. The judgment must therefore be, and it is, affirmed.

As to Who is a Vice-principal, see the note to Mast v. Kern, 75 Am. St. Rep. 584. A master is liable for negligence in the performance of a personal duty due to his servants, delegated by him to another as vice-principal, whether such other is a foreman or co-servant, or whatever his position may be: Baier v. Selke, 211 Ill. 512, 103 Am. St. Rep. 208; Sullivan v. Wood & Co., 43 Wash. 259, 117 Am. St. Rep. 1047.

The Doctrine of Assumption of Risks and Contributory Negligence in the law of master and servant is not applied with the same rigor in the case of young or inexperienced employés: Shirley v. Abbeville Furniture Co., 76 S. C. 452, 121 Am. St. Rep. 952; Siegel-Cooper & Co. v. Trcka, 218 Ill. 559, 109 Am. St. Rep. 302; Tucker v. Buffalo Cotton Mills, 76 S. C. 539, 121 Am. St. Rep. 957; Bare v. Crane Creek Coal etc. Co., 61 W. Va. 28, 123 Am. St. Rep. 966.

The Liability of an Employer to Direct an Employé to Perform extrahazardous duties is discussed in the note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884. If a servant proceeds under the order of his master or superior employé in performing an act whereby he is exposed to unusual danger, the master is liable for the resulting injury to the servant, unless the risk is fully realized by the servant, or is so apparent that no man of ordinary prudence situated as he is would undertake it: Long v. Illinois Cent. R. R. Co., 113 Ky. 806, 101 Am. St. Rep. 374; Tuckett v. American Steam etc. Laundry, 30 Utah, 273, 116 Am. St. Rep. 832; Shirley v. Abbeville Furniture Co., 76 S. C. 452, 121 Am. St. Rep. 952.

TALBERT v. MASON.

[136 Iowa, 373, 113 N. W. 918.]

DEEDS—Implied Covenant of Right of Way.—A conveyance of part of a lot with a private right of way over the grantor's land to an adjoining alley contains an implied covenant as to the existence of such alley, which the grantor is estopped to deny. (p. 260.)

DEEDS—Implied Covenants—Alleys—Measure of Damages for Breach of Covenants.—If a deed is given with a private way annexed, and it is agreed that the grantee shall have the right to pass over such way on the grantor's land to an adjoining public alley, and no such alley exists, the measure of damages is the market value of the land with such way annexed, together with such value as it would have had if the public alley in fact existed. (p. 263.)

ALLEY—Definition.—The word "alley" when used in connection with platted ground in a city or town usually has reference to a public alley, and when a deed conveying such platted ground refers to an alley, it means an alley platted for public purposes. (p. 264.)

J. R. Clarkson and R. T. Mason, for the appellant.

J. C. Mabry, for the appellees.

375 LADD, J. The appeal involves the right to recover the damages due to falsely representing the existence of a public alley through which the purchaser of a part of a lot might reach the street in front, and a breach of warranty in the deed conveying the same. The deed to Mrs. Talbert specifically described the right of way back of the tract sold to her and "to an alley running east and west on the north side of out lot six." This amounted to a distinct assertion of the existence of such an alley. The sole object had in providing a north and south right of way extending to this alleged alley was to enable the grantee to obtain access to Harrison street from the rear end of her lot. This supposed alley had been traveled somewhat by defendant for several years, and was used by the grantee and her heirs up to the time it was closed in 1902 by one Hastie, who had purchased all of lot 5 and the part of lot 6 remaining, specifically described so as to include the right of way for alley purposes conveyed to Mrs. Talbert, as well as the alleged east and west alley, from one Teas, to whom defendant had deeded it by like description. Each of these deeds, however, contained a clause saying it was "made subject to right of way over the above tracts in a deed to Flora E. Talbert." This clause, while general, clearly directs the grantee's attention to the recitals contained in the deed to plaintiffs' decedent. From these it appeared, not only that a right of way for alley purposes a rod wide from the railroad to the alley along the north side of the lot had been conveyed to her, but also the

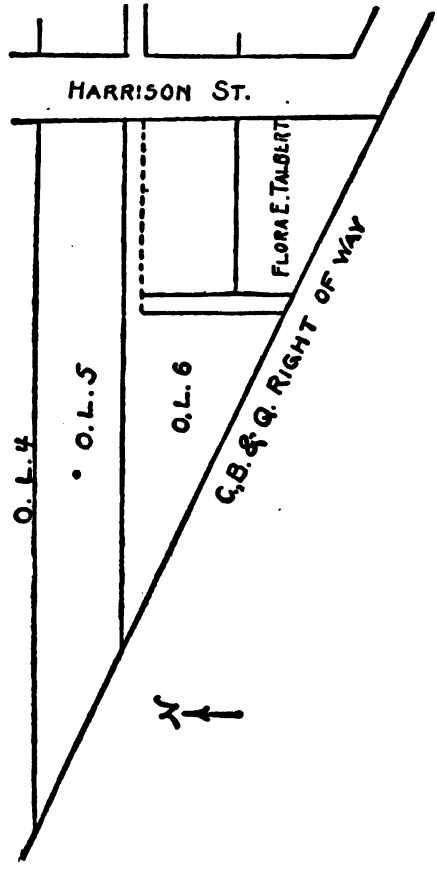
existence of such an alley was asserted. But no alley had [376] been platted, and there is no claim that it had been established by prescription. If it existed, it was by virtue of an implied covenant of its existence. Certainly there was no alley, private or public, prior to the execution of the deed. The entire tract belonged to defendant, and the place traveled was merely made use of to gain access to his premises and after the conveyance by plaintiff and their decedent. But the deed described it as an alley, and conveyed a way to it for alley purposes.

In passing on the admissibility of evidence and in giving and refusing instructions, the court ruled the measure of damages to be the difference between the market value of the parcel of land conveyed as it was without a way along the north line of lot 6 and such value of the lot as it would have been had there been a public alley as represented. Appellant contends that this was error, in that, though there was no public alley, a private way passed as appurtenant to the land by implied covenant of the grantor that an alley was there. This is on the theory that the grantor, having described the alley as forming a part of the boundary, or as an extension of the way forming the boundary, is estopped from asserting that there was no such passageway. The doctrine was recognized in Garstang v. City of Davenport, 90 Iowa, 359, 57 N. W. 876, where one of the boundaries was a "twenty-foot alley to be laid out," and the right to such alley was sustained on the theory expressed in Tufts v. City of Charlestown, 2 Gray, 271: "When a grantor conveyed land, bounding it on a way or street, he and his heirs are estopped to deny that there is such a street or way. This is not descriptive merely, but an implied covenant of the existence of the way." This statement of the rule is fully confirmed by authority. See Jones on Easements, section 227, where authorities are collected, and Dill v. School Board, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276, where the earlier cases are noticed, among them Roberts v. Karr, 1 Taunt. 495, in [377] which Chief Justice Mansfield tersely stated the principle on which the decisions proceed thus: "If you (lessor) have told me in your lease that this piece of land abuts on a road, you cannot be allowed to say that the land on which it abuts is not a road." The necessity that the grantor own the fee in the land represented as a street or way is apparent: Howe v. Algert, 4 Allen, 206. Also that the street or way be designated as a boundary is equally essential. If merely referred to as part of the description as a starting point or the termination of a line, or if the street or way

is coincident merely with the line described, this will not suffice because not amounting to the assertion of the existence of the street or way as a boundary: Lankin v. Terwilliger, 22 Or. 97, 29 Pac. 268; Brizzalaro v. Senour, 82 Ky. 353. On the other hand, if designated as a boundary, this does not limit the street or way to that abutting the land conveyed. Thus, in McConnell v. Rathbun, 46 Mich. 303, 9 N. W. 426, included in the conveyance was "the right of way of an alley ten feet wide on rear end of said eighty-two feet." The grantor had owned the land between this description and the street, and the court held that "this vi termini implies a passageway leading away from the land conveyed" to such street. In other cases, where lots are sold by a plat as on a street, the grantee is held to have an easement in such other street also as will afford him reasonably convenient access to his property: See Regan v. Boston Gas L. Co., 137 Mass. 37; Bell v. Todd, 51 Mich. 21, 16 N. W. 304, and Fox v. Union Sugar Refinery, 109 Mass. 292, where the land was conveyed by a description which bounded it in a private way not defined in the deed, but shown upon a plan referred to therein, and the court held that the deed operated as an estoppel upon the grantor, and precluded his denying the existence, not only of the abutting way, but of any of the connecting ways represented on the plan which would enable the grantee to reach the public roads in any direction. [378] In Langmaid v. Higgins, 129 Mass. 353, the principle is lucidly stated by Colt, J.: "A deed in which the premises conveyed are bound on a defined and existing passageway gives to the grantee by estoppel rights, not only in that part which adjoins his own land, but also by necessary implication in such portion of the whole way as will make the same available and useful as an appurtenance to the estate granted. The extent of the grantee's right beyond the limits of his land will depend upon the nature and character of the way and its connection with the public streets as affording a convenient outlet from his land. When the extent or limits of the way are defined in the deed by reference to a plan or otherwise, the estoppel is not confined to so much of the way as is necessary for the enjoyment of the granted premises, but extends to the whole way as defined." It is apparent that much of necessity depends on the intention of the parties to the instrument in determining whether an easement passes by implied covenant, and this is to be gathered from the nature of the transaction in so far as revealed, the situation of the parties, and the state of the thing granted: In re Opening Brook Ave., 58 N. Y. Supp. 163, 40 App. Div. 519;

Huttemeier v. Albro, 18 N. Y. 48; Winston v. Johnson, 42 Minn. 398, 45 N. W. 958.

It can make no difference whether the seller exhibit a way on a plan or assert one in his conveyance. If he conveys land bounded by a street or way used as appurtenant to the premises conveyed in connection with another street or way necessary as an outlet in such a manner as to unequivocally assert the existence of the latter, he cannot be heard to deny its existence thereafter, and because of this a covenant that it exists is implied which runs with the land. In the case at bar the way described as extending from the railroad to the east and west alley was appurtenant to the land conveyed, and the only conceivable object in including it in the deed was to afford the grantee an outlet [379] from the back end of his premises to Harrison street. This is manifest from an examination of a map of the lots:



The way was for alley purposes, and extended from along the premises conveyed to the alley on the north side of lot 6 with the manifest object of enabling the grantee to pass along this way to the "alley," and then down to the street. The defendant then owned the land at the place where he asserted the east and west alley existed, and in harmony with the decisions cited could not be heard to say that no alley, in fact, existed there. From these circumstances [380] a covenant is implied under which a private way passed to the grantee, and the court erred in not defining the measure of damages as the difference between the market value of the property with this private way annexed and appurtenant thereto, and such value of the property as it would have been with a public alley along the north side of lot 6.

2. Error is also assigned in an instruction to the jury that "if the defendant told plaintiff, J. H. Talbert, that there was an 'alley' running east and west on the north side of out lot 6, and made no explanation as to whether such alley was a public alley or a mere private way, then and in that case the term 'alley,' under the circumstances of this case, would imply that it was a public alley; that is, a permanent right of way, open to the use of the public generally." The statutes relating to platting a townsite or additions thereto authorize the dedication of alleys. Section 916 of the Code expressly requires that subdivisions "shall be divided by streets into blocks with alleys separating abutting lots, and such blocks, streets and alleys shall conform as nearly as practicable to the size of blocks and the width of streets and alleys in such city or town, and such streets and alleys shall be extensions of the existing system of streets and alleys thereof." Such alleys, upon the acceptance of the dedication tendered by filing the plat, are under the authority of the cities and towns, whose councils may "widen, straighten, narrow, vacate, extend, improve and repair them": Code, sec. 751. Of course, alleys may be private, and these are ordinarily such as have not been dedicated to the public use, and to which the general public is denied access or which are set apart for some particular purpose. A private passage or way is sometimes referred to as a private alley, especially when bordered by trees or otherwise defined or inclosed. But alleys in cities and towns usually are public, and the private alley therein [381] is exceptional. Density of population render them necessary for easy access to abutting properties, and, though sometimes confused with streets in attempts to define them, they are readily distinguishable. An alley may

be so extensively used for public travel as to justify designating it a "narrow street in common use," as was done in Bailey v. Culver, 12 Mo. App. 175, or referring to it as a road, as Sharett's Road, 8 Pa. 92: See, also, Kalteyer v. Sullivan, 18 Tex. Civ. App. 488, 46 S. W. 288. Their principal purpose is to furnish the owners of abutting lots and those dealing with such owners convenient access thereto: Dodge v. Hart, 113 Iowa, 685, 83 N. W. 1063. See, also, Milliken v. Denny, 135 N. C. 19, 47 S. E. 132; City of Chicago v. Borden, 190 Ill. 430, 60 N. E. 915. Alleys are not a substitute for streets, but serve as means of accommodation to a limited neighborhood for chiefly local convenience: Beecher v. People, 38 Mich. 289, 31 Am. Rep. 316. When one is dealing with lots in platted ground, and refers to an alley or alleys therein, the presumption is that he has reference to an alley or alleys included in the plat. Such ways are ordinarily public in cities and towns, and, when a deed conveying platted grounds refers to an alley, the fair inference is that an alley platted for public purposes is intended. The same is true in speaking of such an alley, for, if not qualified by the term "private," the alley is conventionally understood, in its relation to plats in cities and towns, to mean the narrow way in common use for the convenience of owners of lots abutting thereon, and those dealing with them: Bailey v. Culver, 12 Mo. App. 175. See 2 Am. & Eng. Ency. of Law, 2d ed., 148. The instruction was correct.

3. The fifth instruction was rightly refused: Jamison v. Jamison, 113 Iowa, 720, 84 N. W. 705. The question as to whether decedent was charged with notice of the plat was disposed of in White v. Smith, 54 Iowa, 233, 6 N. W. 284. Whether the [889] cause of action based on deceit alleged might be maintained by plaintiffs was not raised in argument.

Because of the erroneous ruling with reference to the measure of damages, the judgment is reversed.

Implied Easements in a Street or Way Where Land Bounded Thereon is conveyed, are discussed in the recent note to Powers v. Hefferman, 122 Am. St. Rep. 216.

McNIGHT v. PARSONS.

[136 Iowa, 390, 113 N. W. 858.]

BILLS AND NOTES—Bona Fide Purchaser.—Knowledge that a note was given in consideration of an executory agreement of the payee which has not been performed will not deprive the indorsee of the character of a bona fide holder, unless he also has notice of such agreement and its breach. (p. 266.)

BILLS AND NOTES—Bona Fide Purchaser—Consideration.—A bank receiving negotiable paper in consideration of credit upon its books, which credit is not absorbed by an antecedent indebtedness or exhausted by subsequent withdrawals, is not a purchaser in due course of business. (p. 267.)

EVIDENCE—Written Instruments—Parol Evidence to Vary.—As between the original parties, the delivery of a written instrument which is in form a complete contract will not exclude parol evidence that such delivery was conditional and that it was not to become a binding obligation upon the maker until the performance or discharge of such condition precedent. (p. 268.)

BILLS AND NOTES—Conditional Delivery—Fraud—Defense. If a person to whom the conditional delivery of a note has been made puts it in circulation in violation of that agreement, such act is a fraud, and constitutes a good defense to an action thereon by one who is not a bona fide holder. (p. 269.)

BILLS AND NOTES—Bona Fide Purchaser—Burden of Proof. The title of any person who negotiates an instrument in breach of faith or under circumstances amounting to a fraud is defective, and the burden is cast upon the holder to show that he or some other person through whom he claims acquired the paper innocently. (p. 270.)

TRIAL—Direction of Verdict.—To justify a court in directing a verdict for the plaintiff, the evidence in support of the issues essential to a recovery must be so clear and undisputed that no question of fact is left to the jury. (p. 271.)

BILLS AND NOTES—Bona Fide Purchasers—Evidence.—The evidence of the cashier of a bank that he or the bank purchased a note before maturity is not necessarily sufficient to enable the court to say as a matter of law that the bank received it in good faith, nor does it negative notice or knowledge on the part of the other officers of the bank, that the note was not received in good faith. (p. 271.)

TRIAL—Credibility of Witness.—On the question as to whether a bank received a note in good faith, the credibility of the testimony of its cashier to that effect is for the jury to determine. (p. 271.)

BILLS AND NOTES—Notice of Infirmity.—Notice which will invalidate a note in the hands of an indorsee is actual knowledge of its infirmity, or of such facts that his action in taking the paper amounts to bad faith, but if the facts shown have any fair tendency to show bad faith, the question remains one of fact, and not of law, especially if the evidence of fraud is sufficient to put the burden of showing good faith on the holder. (pp. 271, 272.)

WITNESSES' CREDIBILITY.—If testimony of a person is offered to overcome an unfavorable presumption or to satisfy the proof cast on the person offering it, the question of its credibility and weight is for the jury to determine. (p. 272.)

McElroy & Cox, E. J. Salmon, and J. B. Murphy, for the appellant.

Popham & Havner, for the appellee.

391 WEAVER, C. J. The note in suit, which is negotiable in form, was made and delivered to C. C. Bigler & Sons, who transferred the same by indorsement to the Farmers' Bank of Victor, Iowa, which, in turn, indorsed and transferred it to the plaintiff. The answer of the defendant is, in substance, that the note was given by him to Bigler & Sons for the purchase price of a certain thoroughbred cow upon a warranty and representation that the animal was a breeder, and upon a further agreement by Bigler & Sons that they would retain possession of her for several months, breed her to a certain named bull, and deliver her when with calf to the defendant. He further alleges that said warranty and representations were untrue, that the cow when delivered to him was not with calf, and was not a breeder, and therefore comparatively worthless. He also pleads that he delivered the note to Bigler & Sons under an agreement that said instrument would not be negotiated by them, but retained in their possession until it was ascertained whether the cow was with calf, and, in case she failed so to be, the note was to be void and of no effect, and returned to the defendant. Defendant also denies that plaintiff is a holder of the note in good faith and without notice of his defense thereto. The fact that the note was given for a cow that was warranted to be a breeder, and that it was thereafter to be bred and delivered, in calf, to the defendant, and that this warranty 392 was broken and the agreement was not performed, is shown without substantial controversy. The one question presented by this record is whether the plaintiff is a good faith holder of the paper against whom the defense is not available. As this question may involve both the first indorsement to the Farmers' Bank and the subsequent indorsement to the plaintiff, we will consider them in their order.

1. The evidence tends to show that the Farmers' Bank, which was the first indorsee, had notice of the consideration of the note and of the warranty or representation made by Bigler & Sons, breach of which is pleaded in the answer, and this knowledge the appellant insists was such notice as puts the indorsee upon inquiry, and deprives him of the character of a bona fide holder. The proposition here contended for is opposed to the decided current of authority. The

courts quite universally hold that knowledge that a note was given in consideration of the executory agreement or contract of the payee which has not been performed will not deprive the indorsee of the character of a bona fide holder, unless he also has notice of the breach of that agreement or contract: See 1 Edwards on Bills and Notes, sec. 519; 1 Daniel on Negotiable Instruments, 740-748; Rublee v. Davis, 33 Neb. 779, 29 Am. St. Rep. 509, 51 N. W. 135; Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306; Porter v. Pittsburg B. Steel Co., 122 U. S. 267, 7 Sup. Ct. Rep. 1206, 30 L. ed. 1210; 2 Randolph on Commercial Paper, secs. 1018, 1019. The case made by the defendant lacks in this respect the element of notice to the indorsee of the breach of the warranty or failure of consideration, and the bank must be held to have received the note in good faith, unless its position be found vulnerable to some of the other objections made.

2. The good faith of the indorsement of the bank is also challenged, on the ground that it does not appear to have become an indorsee or purchaser in due course of business. This objection is grounded on the fact that the cashier, [293] while testifying that the bank purchased and paid for the note, says that the so-called payment therefor was effected by giving Bigler & Sons credit on the books of the bank. He further says that, to the best of his recollection, the account of Bigler & Sons was not then or at any time thereafter overdrawn, and there is no showing or suggestion that such credit was ever canceled by withdrawals or applied by the bank to the payment of claims in its hands against Bigler & Sons. In this condition of the record, it is very clear that such transaction did not constitute the bank an innocent holder in due course of business, unless its claim is strengthened or improved by another fact about to be stated: City Deposit Bank v. Green, 130 Iowa, 384; Lancaster Co. Nat. Bank v. Huver, 114 Pa. 216, 6 Atl. 141; Manufacturers' Nat. Bank v. Newell, 71 Wis. 309, 37 N. W. 420; Mann v. National Bank, 30 Kan. 412, 1 Pac. 579; Drovers' Nat. Bank v. Blue, 110 Mich. 31, 64 Am. St. Rep. 327, 67 N. W. 1105; Central Nat. Bank v. Valentine, 18 Hun, 417; Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 14 Sup. Ct. Rep. 94, 37 L. ed. 1063; First Nat. Bank v. Nelson, 105 Ala. 180, 16 South. 707; Scott v. Ocean Bank, 23 N. Y. 289.

The doctrine of these cases is that the transfer of negotiable paper to a bank in consideration of credit upon its books, which credit is not absorbed by an antecedent indebtedness or exhausted by subsequent withdrawals, is not a purchase

in the ordinary sense of the term. To avoid the application of this rule in the case at bar, reliance is had on the conceded fact that after this transaction, and before the beginning of this suit, Bigler & Sons were adjudged bankrupts, and it is said we must therefore presume that the credit of said firm on the books of the bank was exhausted, and the bank's status as a purchaser in due course thus perfected. Whether this presumption obtains is a question upon which, if necessary to the disposition of the appeal, the members of this court might not be fully agreed, but, for reasons hereinafter shown, we need not now undertake to pass upon it.

3. Appellant argues that the note in suit having [394] been delivered upon the condition that it was not to be negotiated, and to be of no effect if the payee failed to deliver the cow in calf as agreed, the act of the payee in negotiating and putting the note in circulation was such a fraud upon defendant as casts upon the plaintiff the burden of showing that he received the instrument in good faith and without notice. This point is met by the appellee with the contention that proof of the matter alleged by appellant must be excluded under the rule prohibiting the admission of parol evidence to vary the terms of a written contract. The soundness of the latter rule thus appealed to is elementary, but its application is not to be so extended as to exclude oral testimony to establish failure of consideration or a plea of fraud where the controversy is between the original parties to a note, or between the maker and one who is not a good faith holder of the instrument: Marsh v. Chown, 104 Iowa, 556, 73 N. W. 1046; First Nat. Bank v. Snyder, 79 Iowa, 191, 44 N. W. 356; Day v. Lown, 51 Iowa, 364, 1 N. W. 786; First M. E. Church v. Sweny, 85 Iowa, 627, 52 N. W. 546; Dowagiac Mfg. Co. v. Gibson, 73 Iowa, 525, 5 Am. St. Rep. 697, 35 N. W. 603; Humbert v. Larson, 99 Iowa, 275, 68 N. W. 703. As between such parties, it is also a well-established general rule that the delivery of a written instrument which is in form a complete contract will not exclude parol evidence that such delivery was conditional, and was not to become a binding or enforceable obligation upon the maker until the performance or discharge of such condition precedent: See Cavanagh v. Iowa Beer Co., 136 Iowa, 236, 113 N. W. 856; and Hinsdale v. McCune, 135 Iowa, 682, 113 N. W. 478; and see, also, Sutton v. Weber, 127 Iowa, 361, 101 N. W. 775; Hilsdale College v. Thomas, 40 Wis. 661; Juilliard v. Chaffee, 92 N. Y. 529; Seymour v. Cowing, 1 Keyes, 532; Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. Rep. 816, 38 L. ed. 698.

It is also held that, if a party to whom the conditional delivery of a written obligation has been made puts it in circulation in violation of that agreement, such act is a fraud, tainting the inception of the instrument, and constitutes a
[295] good defense to an action thereon by one who is not a bona fide holder: Merchants' Bank v. Luckow, 37 Minn. 542, 35 N. W. 434. The general rule is ordinarily stated as follows: "Where negotiable paper has been lost, or stolen, or obtained by duress, or procured or put in circulation by fraud, proof of these circumstances may be given against the plaintiff, and, on such proof being given, it is incumbent on the plaintiff to show himself to be a holder bona fide and for a valuable consideration": Cummings v. Thompson, 18 Minn. (Gil. 228) 246. The reason of this rule is said by the English courts to be found in the presumption that the holder of paper affected in his hands by fraud or illegality would be likely to indorse it away without consideration to some confederate or agent, and it is therefore but just to require one who sues upon it to prove his bona fides: Fitch v. Jones, 5 El. & B. 238. This reasoning has also had the approval of the courts of this country. In Perrin v. Noyes, 39 Me. 384, 63 Am. Dec. 633, it is said that, if the note in suit has been fraudulently put in circulation, the burden is cast upon the plaintiff "to show that he came by the possession fairly in due course of business, and without any knowledge of the fraud and unattended with circumstances justly calculated to awaken suspicion." Mr. Justice Cooley, of Michigan, applied this rule to the plaintiff in an action upon a promissory note put in circulation in violation of an agreement that, if the representations upon which the sale was made proved to be false, the consideration might be returned and the note surrendered: Conley v. Winsor, 41 Mich. 253, 2 N. W. 31.

In National Revere Bank v. Morse, 163 Mass. 383, 40 N. E. 180, we have a case directly in point upon the proposition now being considered. It was there held that, where a note given under an agreement that it should not be negotiated until a certain contingency arose was negotiated in violation of such agreement, this was a sufficient showing of fraud in putting the paper into circulation to require the plaintiff
[296] to show that he took it for value and in good faith before maturity. Such, also, was the holding in Merchants' Nat. Bank v. Haverhill Iron Works, 159 Mass. 158, 34 N. E. 93. Without further quotation, we may add the following citations, bearing more or less directly on the question: Farrar v. Mathews, 37 Iowa, 418; Graham v. Remmel, 76 Ark. 140, 88

S. W. 899; Vosburgh v. Diefendorf, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801; Joy v. Diefendorf, 130 N. Y. 6, 27 Am. St. Rep. 484, 28 N. E. 602; Sistermans v. Fields, 9 Gray, 331; Williams v. Huntington, 68 Md. 590, 6 Am. St. Rep. 477, 13 Atl. 336; Griswold v. Scott, 13 Ga. 210; Barlow v. Fleming, 6 Ala. 146; Labbee v. Johnson, 66 Vt. 234, 28 Atl. 986; Lyons v. Stills, 97 Tenn. 514, 37 S. W. 280; Trumbull v. O'Hara, 71 Conn. 172, 41 Atl. 546; Monroe v. Cooper, 5 Pick. 412; Smith v. Sac Co., 11 Wall. 139, 20 L. ed. 102; Stewart v. Lansing, 104 U. S. 505, 26 L. ed. 866; Landauer v. Sioux Falls Imp. Co., 10 S. D. 205, 72 N. W. 467; Benton County Sav. Bank v. Boddicker, 105 Iowa, 548, 67 Am. St. Rep. 310, 75 N. W. 632, 45 L. R. A. 321; Sullivan v. Langley, 120 Mass. 437; First Nat. Bank v. Holan, 63 Minn. 525, 65 N. W. 952; 2 Encyclopedia of Evidence, 524, note 48; Oakland C. Assn. v. Lakins, 126 Iowa, 121, 101 N. W. 778, and note to same case in 3 Am. & Eng. Ann. Cas. 560. The rule is held equally applicable whether the delivery be to a third person in escrow or to the payee or obligee: Ware v. Allen, 128 U. S. 590, 9 Sup. Ct. Rep. 174, 32 L. ed. 563; Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. Rep. 816, 38 L. ed. 698.

There is, perhaps, room to doubt whether the doctrine that the negotiation of a promissory note in violation of an agreement by the payee not to do so until certain conditions have been performed is a fraud which casts upon the indorsee the burden of showing the good faith of his possession of the instrument was recognized by this court prior to the passage of our present statute, but whatever may be the fact in this respect, legislative enactment has brought the law of the state into harmony with the rule of the cases to which [397] attention has been called: Code Supp. 1902, secs. 3060-a55, 3060-a59. By this statute the title of any person who negotiates an instrument in breach of faith or under circumstances amounting to a fraud is defective, and the burden is cast upon the holder to show that he or some person through whom he claims acquired the paper innocently: Keegan v. Rock, 128 Iowa, 39, 102 N. W. 805.

4. It is suggested in argument that, even if the law be as we have here indicated, there was no evidence on which to submit the fact in question to the jury. Counsel either misapprehend the record, or fail to make proper application of the rule. Defendant swears that he made the note on the express agreement of Bigler that the latter would retain it and give it back to defendant if the cow was not delivered to him safely with calf. Such an agreement, if established,

would, as we have seen under the authorities cited, make the act of Bigler & Sons in putting the note in circulation in violation thereof a fraud upon the defendant. True, such fraud was not necessarily established by the testimony of the defendant, but the value and weight of his testimony in that regard were for the jury, and not for the court. Such being the situation, the burden was upon the plaintiff to show the good faith of the transfer of the note either to himself or to his immediate indorser, the bank. To uphold the ruling of the trial court in directing a verdict for the plaintiff, it must appear that the plaintiff has established the good faith of one or both of these transactions by evidence of such clear and undisputed character that no question of fact was left for the finding of the jury. But this we are not prepared to affirm.

The testimony of the cashier of the bank that he or the bank purchased the note for value before maturity, even though he be not disputed by any other witnesses to the transaction, is not necessarily sufficient to enable the court to say as a matter of law that he [398] received it in good faith. Such evidence does not negative notice or knowledge on part of other officers of the bank. Moreover, the bank being an interested party, the credibility of the testimony of the cashier was a matter for the jury to pass upon in the light of all the facts and circumstances surrounding the matter under inquiry. In Joy v. Diefendorf, 130 N. Y. 6, 27 Am. St. Rep. 484, 28 N. E. 602, the plaintiff sought by his own evidence to prove the circumstances attesting good faith of his possession of the note; and in Canajoharie Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676, the bank gave like evidence by its cashier, and it was held in each case that even though undisputed, the credibility of such evidence and its sufficiency to satisfy the burden of proof resting upon the plaintiff were matters for the jury, and not a question of law to be disposed of by the court: See, also, Elwood v. Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140. It follows, therefore, that, so far as plaintiff's case rested on the indorsement of the note from Bigler & Sons to the bank, the motion to direct a verdict was improperly sustained.

Concerning the showing of good faith in the transfer from the bank to the plaintiff, it may be conceded that the general rule of the cases, as well as of our statute (Code Supp. 1902, sec. 3060-a56), is to the effect that the notice which will invalidate a note in the hands of an indorsee is actual knowledge of the infirmity or defect, or of such facts that his

action in taking the paper amounts to bad faith. It is equally true that, if the facts shown have any fair tendency to show bad faith, the question remains one of fact, and not of law. It is especially the case where the evidence of fraud is sufficient to put the burden of showing good faith on the holder. Where the taint of fraud once attaches to a written contract, negotiable or otherwise, the law is careful to require every person who seeks to profit by it to show that he comes into court with [399] clean hands. Speaking to this point, the supreme court of Indiana says: "It would be a departure from principle to hold that the maker must prove that the holder had notice of the fraud. Whether he had notice or not is a matter peculiarly within his own knowledge. It needs no more than a bare statement of the proposition that the plaintiff's possession or nonpossession of notice is a matter peculiarly within his own knowledge to establish it to the satisfaction of a candid mind; and, if this proposition be established, then it must follow that proof should come from him, for few rules of law are better settled than that a party whose cause of action or defense rests upon facts peculiarly within his own knowledge must prove those facts": Giberson v. Jolley, 120 Ind. 301, 22 N. E. 306. While it is not to be presumed that a witness will testify falsely, yet it may be presumed that the testimony of a party will be more or less colored by his interest or bias, and, generally speaking, where such testimony is offered to overcome an unfavorable presumption of law or evidence, or to satisfy the burden of proof which the laws casts upon him, the question as to his credibility and of the weight and effect of his testimony is for the jury.

The record in this case discloses evidence tending to show that the bank received the note about June 20, 1902, and continued to hold the same until about March 1, 1903. On the latter date, the bank held notes which had been indorsed to it by Bigler & Sons, including the one in suit, amounting to seventeen thousand six hundred and forty-five dollars and sixty-three cents. The plaintiff herein was at that time a resident of Iowa City. He was employed as an assistant manager of a manufacturing company, and was not engaged in the business of buying and selling notes. He had no acquaintance with Bigler & Sons, but had heard of them, and knew that they were then involved in bankruptcy proceedings. It does not appear that he had any acquaintance with the defendant Parsons, or any personal knowledge as to his financial ability. Some time in February, [400] 1903, the bank,

for the conceded purpose of avoiding any defense or setoff against these notes, consulted their attorney, and was advised to transfer or negotiate them. Thereupon they placed the matter in the hands of the attorney for that purpose, and he arranged the transaction with the plaintiff. By the plaintiff and his witnesses the deal is variously designated as a "sale" of the notes, as a "loan" to the plaintiff, and as an "exchange of notes." The notes which were the subject of the deal amounted, as we have already said, to seventeen thousand six hundred and forty-five dollars and sixty-three cents. Plaintiff gave his note for that sum to "A. M. Henderson, Trustee." Henderson was then cashier of the Marengo Savings Bank, of which the attorney was a director, and the deal was entered on the books as a bank transaction. The plaintiff deposited or undertook to deposit as collateral to this note all of the notes which he was professedly purchasing from the Victor Bank. The Marengo Bank did not have the money with which to make such a loan, and the sum was beyond the limit of its legal power to loan, but the attorney undertook to have the necessary money furnished by the Victor Bank, and, upon this understanding, the Marengo Bank then credited the plaintiff with the sum on its books. This credit was at once canceled by plaintiff's check to the Victor Bank for the full amount, which check was then returned to the Marengo Bank in exchange for the note given by plaintiff, indorsed by "Henderson, Trustee," without recourse. The plaintiff himself did not appear at either bank with reference to this transaction until all the terms of the deal had been arranged by the attorney, when he went to the bank at Marengo, and executed the note prepared for his signature. Indeed, we find no testimony showing in express terms or by necessary inference that plaintiff ever saw or had in his possession the note in suit or any of the notes which were the subject of the alleged transfer. No money changed hands in the alleged purchase. Plaintiff's note was for the full amount of the notes he professedly purchased with no [401] margin of profit therein for himself, except the difference of one per cent in the rate of interest. In his testimony as a witness he makes no attempt to assert the good faith of his purchase of the notes or to negative the fact that he had notice of any defense thereto. Even had he expressly denied notice or knowledge, yet, taken as a whole, the transaction was of such an extraordinary character and of such elaborate workmanship it is exceedingly difficult to avoid the con-

clusion that plaintiff occupies no better position than that of a mere agent, or person consenting to act as a voluntary medium through whom the Victor Bank could make merely colorable transfer of the title to the notes, and thereby be able to avoid a defense which it had reason to believe the maker of the note could rightfully assert in an action brought by itself. To say the very least, the showing is such that a finding by the jury that plaintiff is not a good faith holder of the note in suit could not be properly set aside as having no support in the evidence.

For the reasons stated, a new trial must be ordered, and the judgment of the district court is therefore reversed.

A Collateral Agreement that a Note shall not be Paid if an Executory Contract forming the consideration thereof is not performed, does not affect the rights of an indorsee with notice of the agreement, unless a breach of the agreement has occurred to his knowledge at the time of his purchase: Jennings v. Todd, 118 Mo. 296, 40 Am. St. Rep. 373; Miller v. Ottaway, 81 Mich. 196, 21 Am. St. Rep. 513; Parker v. Sutton, 103 N. C. 191, 14 Am. St. Rep. 795. As to the effect of such an agreement as between the original parties, see Gandy v. Weckerly, 220 Pa. 285, 123 Am. St. Rep. 691.

Possession of a Negotiable Note Properly Indorsed is Prima Facie evidence that the holder is a bona fide purchaser: Clark v. Skeen, 61 Kan. 526, 78 Am. St. Rep. 337, 60 Pac. 327; Manhattan Sav. Inst. v. New York Nat. Ex. Bank, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079. And if the defendant admits the execution of a note in suit, but denies that the holder is the owner thereof by purchase, before maturity, and alleges want of consideration, the burden of proving such allegations is on the defendant: Yates v. Spofford, 7 Idaho, 737, 97 Am. St. Rep. 267.

Parol Evidence is Admissible to Show that a Note was not Delivered; McFarland v. Sikes, 54 Conn. 250, 1 Am. St. Rep. 111; and to show the nonperformance of a condition upon which the note was given: McCormick Harvesting Machine Co. v. Faulkner, 7 S. D. 363, 58 Am. St. Rep. 839. Parol evidence is also admissible to prove an agreement collateral to a promissory note: Carroll v. Nodine, 41 Or. 412, 93 Am. St. Rep. 743; Citizens' Bank v. Millet, 103 Ky. 1, 82 Am. St. Rep. 546; Sloan v. Gibbes, 56 S. C. 480, 76 Am. St. Rep. 559.

DONALDSON v. EATON & ESTES.

[136 Iowa, 650, 114 N. W. 19.]

CHAMPERTY—Contract Between Attorney and Client—Divorce.—A contract between a married man and his attorney with reference to the procurement of the annulment of his marriage and the settlement of the wife's alimony, involving a lump sum agreed by the husband to be paid to his client in consideration of such annulment being granted and the alimony being settled, is champertous and void as against public policy. (p. 278.)

DIVORCE—Contract to Procure—Public Policy.—A contract with reference to procuring a divorce or to facilitate its procurement is void as against public policy. (p. 279.)

ATTORNEY AND CLIENT—Void Contract.—A contract between client and attorney is void if made without a fair and full disclosure by the attorney of the facts on which it is predicated. (p. 279.)

ATTORNEY AND CLIENT—Contracts Between.—As between attorney and client a settlement, though voluntarily made, will be inquired into by the courts, and money or property procured by the attorney will be restored to the client if he has been imposed upon. (pp. 279, 280.)

ATTORNEY AND CLIENT—Evidence—Burden of Proof.—The burden is on an attorney to show that in any contract or settlement with his client or dealing with his client's property he has acted in fairness and good faith, with a disclosure of all the facts. (p. 280.)

ATTORNEY AND CLIENT—Contracts Between.—An attorney who acts in bad faith and seeks to secure his personal advantage to the prejudice of his client may be denied any compensation for his service. (p. 280.)

Action to require defendants, as attorneys, to refund to plaintiff, their client, $2,000 for extortionate fees exacted from him by them in excess of a reasonable compensation as his attorneys in an action instituted by them in his behalf. Judgment dismissing plaintiff's action, and he appealed.

W. P. Ferguson, for the appellant.

W. E. Mitchell, for the appellees.

651 McCLAIN, J. The evidence, without substantial conflict save as to one point to be hereafter noticed, shows that in November, 1904, the plaintiff, who was seventy years of age, a farmer and a resident of Freemont county, consulted defendants, as attorneys practicing in that county, with reference to difficulties and disagreements with his wife, to whom he had been married about eight months, and expressed to them the desire for a divorce from his wife in order that she might not have her statutory share of his property should she survive him. The defendants were not able to discover in plaintiff's statement any ground for divorce, and the sub-

ject, for the time being, was dismissed. About December 1st following, plaintiff consulted defendants again with reference to a threatened proceeding for an annulment of marriage on the part of the wife, in which he understood she would ask $10,000 as alimony, and the homestead consisting of a house and lot in town of the value of about $1,000. The member of defendant firm thus consulted expressed the belief that no more than $2,000 would probably be allowed to the wife. In this conversation plaintiff disclosed to defendants that his wife had a cause for the annulment of marriage on the ground of his impotency, and expressed desire that she procure such annulment, saying that he was worth about $38,000, and that another person of larger means had settled with his wife for $5,000, and expressed a willingness to settle for that amount. On December 3d plaintiff, with one of the defendants, went to the town of plaintiff's residence, where his wife was occupying the homestead, and the attorney had a conversation with the wife, not in the presence of the plaintiff, with reference to the threatened legal proceedings. The attorney reported to the plaintiff that the wife was [652] claiming $10,000 and the homestead, and that she would not settle for less without consulting her attorney, who had already been sent for. The attorney arrived in the afternoon by train, a conference was held between the wife and her attorney on the one side and the attorney for the plaintiff on the other, plaintiff not being present, and an arrangement was made by which the wife was to bring the action, which was not to be resisted, and was to be allowed $1,200 and the homestead, by way of alimony, and the plaintiff in this action was to pay all costs and expenses, including the fees of the wife's attorney. These terms of settlement were embodied in a written stipulation entitled as in an action and in form an application to the court with reference to the disposition of the property rights and alimony of the plaintiff in case a decree should be granted, and was signed by the respective attorneys for their clients. The conference closed before 7 o'clock in the evening, and the wife's attorney departed on the train. According to the testimony of the member of defendant firm who carried on these negotiations for plaintiff, a written contract between the plaintiff and defendant had been drawn up by him and signed by plaintiff between these two interviews, stipulating as to the compensation to be paid defendants in the event of the successful termination of the proceedings for annulment of marriage, which was in the following terms:

"This agreement made and entered into this 3rd day of Dec., 1904 by and between Eaton & Estes, Attys. of Sidney, Ia., and David Donaldson of Farragut, Iowa, Witnesseth:

"That whereas David Donaldson desires a divorce from his wife, Henrietta Donaldson, and an adjustment of the matter of her alimony, at the earliest possible date, now.

"The said David Donaldson, hereby agrees to pay to the said Eaton & Estes, the sum of Four Thousand Dollars and to convey to them or to whomsoever they order, his town property in Farragut, Freemont county, Iowa, consisting of one-half acre of land in Lot 51, Coy's Addition to said town of Farragut, Ia., and the house and all other appurtenances thereunto belonging. The payment of said $4,000 and conveyance of said property are in consideration of Eaton & Estes securing for said David Donaldson a divorce from the bonds of matrimony, or of any services of said Eaton & Estes whereby a severing of the bonds of matrimony is secured as between the parties aforesaid, and settlement of all alimony and all claims of said Henrietta against the estate and property of said David Donaldson. It is expressly understood that said $4,000 and said property shall include and pay all costs of suit, attorney's fees and all other expenses whatever connected with said divorce proceeding and shall be paid and performed as soon as or upon the procurement of said divorce and settlement of alimony. Witness our hands on the day and date above written, at Farragut, Iowa."

Plaintiff testified that this contract was drawn up and signed in the evening after the conference between his attorney and the wife and her attorney at which the final terms of settlement were agreed upon. But we regard this conflict in the evidence as wholly immaterial. It appears from plaintiff's evidence, which is not contradicted, that after the negotiations of the afternoon his attorney desired that the contract or arrangement, whatever it may have been at that time, with reference to defendants' fees, be modified so as to provide for payment of $6,000 instead of $5,000 as contemplated in the written contract above set out, on account of the fact that the wife's attorney was asking so much. Three days later notice of a proceeding for annulment of marriage was served upon this plaintiff, in which it was stated that the wife asked $2,500 and the homestead by way of alimony. Plaintiff seems to have been surprised that the claim for alimony was so small, and demanded from defendants the written stipulation which had been entered into for by him, which demand was refused, but a copy of the stipula-

tion was given to him, whereupon he notified defendants by letter that they were dismissed from the case, and consulted another [654] attorney. The day before the convening of the term of court in January following, when the case according to the notice was to come on for disposition, plaintiff called upon defendants at their office with reference to the letter dismissing them from the case; arrangements were made by which defendants were to carry out their contract and have the marriage annulled as provided for in their stipulation, defendants consenting that the new attorney be recognized if compensated by the plaintiff; and on the second day of the term a decree was entered in accordance with the stipulation, save that plaintiff agreed to pay his wife $800 in lieu of conveying to her the homestead, so that the decree provided for alimony in the sum of $2,000 and the payment of all costs by the defendant. Before the entry of this decree defendants insisted on a settlement with plaintiff under the written contract, and plaintiff gave them two checks for $2,000 each and one for $800, all to be held in escrow until the decree should be rendered, and thereafter they applied the proceeds of these checks in payment to the wife of $2,000 alimony, to her attorney of $300, in settlement of costs and expenses $29, and retained in balance $2,471 as their net compensation under the contract.

The contract between defendants and plaintiff with reference to the procurement of annulment of marriage by plaintiff's wife against him and the settlement of her alimony, involving a lump sum agreed by plaintiff to be paid to defendants in consideration of an annulment being granted and the alimony settled, as agreed, was illegal and void for two reasons: First, it was a champertous contract; second, it was a contract against public policy for facilitating and bringing about a divorce. As to the champerty there can be no question. It was not a contract for a contingent fee, but one in which the defendants speculated as to the settlement which could be secured from the wife. This is on the theory that the written contract was entered [655] into, as testified by the member of defendant firm who made it, prior to the final stipulation for settlement entered into on the afternoon of December 3d. It is hardly necessary to cite authorities in support of the proposition that an attorney cannot lawfully make such a contract: Boardman v. Thompson, 25 Iowa, 487; Adye v. Hanna, 47 Iowa, 264, 29 Am. Rep. 484; Hyatt v. Burlington etc. R. Co., 68 Iowa, 662, 27 N. W. 815; Jewel v. Neidy, 61 Iowa, 299, 16 N. W. 141.

That a contract with reference to procuring a divorce or to facilitate its procurement is void as against public policy is also well settled: Barngrover v. Pettigrew, 128 Iowa, 533, 111 Am. St. Rep. 206, 104 N. W. 904, 2 L. R. A., N. S., 260. If a contract to promote a marriage, not between the parties to the prospective marriage, but between one of them and a stranger who undertakes to assist in bringing it about, is contrary to public policy, as was held in Estate of Grobe, 127 Iowa, 121, 102 N. W. 804, then certainly a contract with reference to procurement of a divorce is equally invalid, and an attorney who engages in the business of divorce brokerage for his own profit and as a means of speculation goes wholly beyond the limits of the legitimate business of an attorney at law: Barngrover v. Pettigrew, 128 Iowa, 533, 111 Am. St. Rep. 206, 104 N. W. 904, 2 L. R. A., N. S., 260; Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548; Jordan v. Westerman, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826.

If, in fact, the contract between the defendants and plaintiff was entered into after the member of defendant firm had concluded the negotiations for settlement, then it was void also on the ground that the terms of settlement had not been disclosed to plaintiff and defendants were not dealing fairly with him. That a contract between client and attorney will be disregarded by the courts if made without a fair and full disclosure of the facts on which it is predicated is too well settled to justify anything more than the mere citation of a few pertinent cases: Shropshire v. Ryan, 111 Iowa, 677, 82 N. W. 1035; Ryan v. Ashton, 42 Iowa, 365; [656] Cassem v. Heustis, 201 Ill. 208, 94 Am. St. Rep. 160, 66 N. E. 283; Henry v. Raiman, 25 Pa. 354, 64 Am. Dec. 703.

Counsel for the defendants do not, however, seriously question the invalidity of the contract made between them and the plaintiff with reference to the procurement of an annulment of marriage by the wife. Their contention is that plaintiff made a voluntary settlement with them under such contract, and that a payment voluntarily made cannot be recovered back. The soundness of this general proposition as applied to parties dealing with each other at arm's-length may be fully conceded, and it is not necessary to refer to the many authorities cited by counsel in its support. It is equally well settled, as between attorney and client or other persons between whom such confidential relations exist, that the one is entitled to rely on the good faith of the other; a settlement, though voluntarily made, will be inquired into by

the courts, and money or property procured by the attorney or person owing the duty to the other party to protect his interests will be restored to him if he has been imposed upon and injured by reason of the fiduciary relation: Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; Cunningham v. Jones, 37 Kan. 477, 1 Am. St. Rep. 257, 15 Pac. 572; Polson v. Young, 37 Iowa, 196.

The burden is on the attorney to show that in any contract or settlement with his client or dealing with his client's property he has acted in fairness and good faith with a disclosure of all the facts: Prouty v. Bullard, 77 Iowa, 42, 41 N. W. 559; Miles v. Ervin, 1 McCord Ch. 524, 16 Am. Dec. 623.

An attorney who acts in bad faith and seeks to secure his personal advantage to the prejudice of his client may properly be denied any compensation for his services: Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 79 Am. St. Rep. 400, 80 N. W. 953, 81 N. W. 210.

A settlement is not voluntary where the parties are not [657] dealing on an equal footing: City of Marshall v. Snediker, 25 Tex. 460, 78 Am. Dec. 534. As this court has said in Polson v. Young, 37 Iowa, 196: "Transactions between attorney and client, as in all other cases where fiduciary relations exist between parties, one of whom possesses superior knowledge and ability and the other is subject to his influence, are regarded with a scrutinizing and jealous eye by the courts of equity, and will be set aside and the clients protected whenever advantage has been taken of them through influence or knowledge of the attorneys possessed by reason of their peculiar relations." If the attorney is not to be allowed to procure his client's property in an unfair transaction which is prejudicial to his client's interest, then certainly he may be required to return to his client any money exacted in settlement under an illegal contract, the settlement being exacted by the attorney while the relation of confidence continues to exist between them and while the very matter is pending in court as to which the relation has arisen, so long as it is within the power of attorney to say "that which you require shall not be done except upon conditions which I choose to impose," the attorney and the client are not standing on an equal footing: City of Marshall v. Snediker, 25 Tex. 460, 78 Am. Dec. 534. It is to be borne in mind that the settlement between plaintiff and defendants under which defendants exacted from plaintiff $2,471 in excess of all disbursements under their contract for simply negotiating the procurement of annulment of marriage by plaintiff's

wife from him and the determination of the amount of her alimony cannot be regarded as otherwise than grossly excessive. Nothing but a formal trial was contemplated, for the ground of annulment was mutually understood to be sufficient. There had never been any contest, save as to alimony, and this contest had been fully adjusted before the settlement between plaintiff and defendants. The contract for compensation was illegal, and the only right which defendants had was to be [658] paid the reasonable value of their services. When the settlement was made the decree had not yet been entered, and the defendants were in possession of the instrument controlling the allowance of alimony, so far as such allowance could be controlled by mutual agreement of the parties. Certainly such a settlement was not made between persons dealing at arm's-length, but was, on the other hand, between attorney and client in the very business with reference to which the employment had arisen, which business had not yet been completed. The view suggested by one of defendants in his testimony, that defendants' services were "worth just what [plaintiff] thought it was worth to get a separation from his wife," cannot be approved. The client, no matter how ignorant or unduly exercised he may be, may properly look to his attorney to furnish him the judgment and discretion which he lacks.

That plaintiff had by letter dismissed the defendants from the case and employed another attorney is of no significance, for the reason that the relation of client and attorney between plaintiff and defendants had been resumed by mutual consent before the case came on for disposal, and the other attorney was by consent of the defendants simply brought in to assist in protecting plaintiff's interests as against his wife. There is no evidence that the other attorney was representing plaintiff in any controversy with the defendants in relation to the payment of their fees.

The trial court should have sustained plaintiff's motion, and required the return by defendants to plaintiff of the amount asked, as having been paid in excess of a reasonable compensation.

The judgment of the trial court is therefore reversed.

The Validity of Contracts Between Attorney and Clients is discussed in the note to Shirk v. Neible, 83 Am. St. Rep. 159; and champerty and maintenance are discussed in the note to Thallhimer v. Brinckerhoff, 15 Am. Dec. 317. That an attorney contracting for a contingent fee has the burden to prove that the contract is fair to his client, see Lynde v. Lynde, 64 N. J. Eq. 736, 97 Am. St. Rep. 692. It has been held that any agreement conditioned on the obtainment of a

divorce, or intended or calculated to facilitate the same is void; and that an agreement to prosecute an action for divorce and to pay witness fees in a stated sum is champertous and void: Barngrover v. Pettigrew, 128 Iowa, 533, 111 Am. St. Rep. 206.

Attorneys are not Entitled to Any Pay for Their Services, Where they have been guilty of actual fraud or bad faith toward their clients in the matter of their employment: Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 79 Am. St. Rep. 400.

The Right to Recover Payments Voluntarily Made is discussed in the note to New Orleans etc. Co. v. Louisiana etc. Co., 94 Am. St. Rep. 408.

CASES

IN THE

SUPREME COURT

OF

MAINE.

YOUNG v. HILLIER.

[103 Me. 17, 67 Atl. 571.]

WILLS—Life Estate—Power to Sell.—If a husband by will devises and bequeaths all his estate, both real and personal, for the use of his wife during her life, "whatever remains of said estates" at the death of his wife to his daughter, he creates a power of sale of both the real and personal property, which, being exercised by the wife, devests the title of the remainderman. (pp. 284, 285.)

C. A. Bailey and T. D. Bailey, for the plaintiff.

P. H. Gillin, for the defendant.

[19] SAVAGE, J. This is a real action which involved a construction of the will of Nathan P. Marston. The particular clauses which are in question are these:

"Item. I give, devise and bequeath to my wife, Elizabeth A. Marston, all my estate both real and personal wherever found and however situate for her use during life.

"Item. At the death of my said wife Elizabeth, whatever may remain of said estates, I give, devise and bequeath to my daughter Elizabeth A. Young."

Elizabeth A. Marston is now deceased, and the plaintiff, who is the Elizabeth A. Young named in the second devise, claims title as remainderman. The defendant claims title under Elizabeth A. Marston, who in her lifetime mortgaged the demanded premises to Mary F. Blethen. The mortgage was foreclosed, and subsequently the premises were conveyed by the mortgagee to the defendant, Mrs. Marston joining in the deed, as a grantor.

There can be no question but that the first clause of the will, above quoted, standing alone, created a life estate in the widow, and only a life estate. It follows that the only question at issue is whether by the terms of the will, properly in-

terpreted, a power of disposal was annexed to the devise for life. If so, the estate demanded now belongs to the defendant. If not, it belongs to the plaintiff.

It is contended by the defendant that from the use of the words "whatever may remain of said estates" in the devise of the remainder to the plaintiff, it is to be implied that the testator intended to give to the life tenant more than the mere use of the estate real and personal; that he intended, in fact, to give her a power of disposal both of the real and the personal estate.

To give effect to the intention of the testator, provided it is consistent with the rules of law, lies at the foundation of every judicial construction of a will. The questions always are, what was the intention of the testator, and can it be given effect without [20] violating legal principles. It is the intention as expressed that must control: Cotton v. Smithwick, 66 Me. 360. The language must be construed according to settled canons of interpretation (Ramsdell v. Ramsdell, 21 Me. 288), even though it may defeat the probable intention: Pickering v. Langdon, 22 Me. 413. But a will, if ambiguous, is to be read and construed in the light of such existing conditions as may properly be supposed to have been in the mind of the testator, such as the situation and relationship of his beneficiaries, and the situation and amount of the estate: Smith v. Bell, 6 Pet. 68, 8 L. ed. 322; Follweiler's Appeal, 102 Pa. 581.

After making provision for his wife, then sixty-seven years old, by creating a life estate in real and personal property for her use, this testator devised "whatever may remain of said estates," at the death of the wife, to his daughter. It is generally conceded that by the use of such an expression in the devise of a remainder after a life estate is expressly created, or by the use of the expression "if any remains," or by the use of any words of similar import, a power of sale is annexed to the devise of the life estate by implication. This rule has been many times affirmed in this state: Ramsdell v. Ramsdell, 21 Me. 288; Shaw v. Hussey, 41 Me. 495; Warren v. Webb, 68 Me. 133; Stuart v. Walker, 72 Me. 145, 39 Am. Rep. 311; McGuire v. Gallagher, 99 Me. 334, 59 Atl. 445. So in Massachusetts Harris v. Knapp, 21 Pick. 412; Johnson v. Battelle, 125 Mass. 453. Some courts have held that when a life estate in both real and personal property has been created, a devise of "whatever remains," or the use of words of similar import, annexes to the life estate, by implication, a power of sale of the personal property only. In Foote v.

Sanders, 72 Mo. 616, for instance, a case cited by the plaintiff here, such was held to be the rule. But the court in that case said that the contrary doctrine was favored by the cases in Maine and Massachusetts, and expressed the opinion that the "extreme views" held in these two states were met and answered by Smith v. Bell, 6 Pet. 68, 8 L. ed. 322, and Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 23 L. ed. 927. In this connection it is worth while to notice that our own court, speaking by Chief Justice Peters in Stuart v. Walker, 72 Me. 145, 39 Am. Rep. 311, characterized Smith v. Bell, 6 Pet. 68, 8 L. ed. 322, as "a case differing [21] somewhat from many of the authorities," and declined to follow it.

But whatever may be the rule in other states, we regard it as well settled in this state that such an implication raised from the general expression "whatever may remain" may apply to real estate as well as to personal estate, when the life estate consists of both, and will so apply, if such appears to have been the intention of the testator: Ramsdell v. Ramsdell, 21 Me. 288, and other cases cited supra. So that, if such an intention appears in this will, it can be enforced.

And we think it clear that such was the testator's intention. He was providing for an aged wife—surely in greater need of care than the daughter. He gave her, by implication, the power to sell some of the estate at least. Was that power intended to be limited to the personal estate? It is hardly credible that it was. The personal estate only amounted to one hundred and eighty-six dollars and twenty-five cents. The real estate from which she could receive only the income or use unless she could sell it, amounted to only eight hundred dollars. If such be the construction of the will, but scant provision was made for the wife, and the bulk of the estate, small though it was, went to the daughter in the end. But we are not left to conjecture. The testator having created a life estate in real estate and a life estate in personal estate, in the wife, devised "whatever may remain of said estates," both of them. It was not whatever should remain of his estate in general, but whatever should remain of the real estate and of the personal estate. The word "estates," in the plural, naturally has this significance, and we think it expressed the real intention of the testator. By saying that only so much of the real estate as might "remain" at the death of the wife should pass to the daughter, he expressed his purpose that the use given to the wife should extend to a sale of it, if she wished or needed. Otherwise there

is no practical significance in the use of the word "remain" in this connection.

Accordingly, the law implies a power of sale as annexed to the estate for life in the real estate. That power was effectually exercised by the life tenant in her lifetime, and no estate in remainder in the real estate fell to the daughter at the death of the mother. The title to the demanded premises is in the defendant.

Judgment for the defendant.

The First Taker in a Will is presumed to be the favorite of the testator, and the tendency is to adopt such a construction as will give him an estate of inheritance: Platt v. Brannan, 34 Colo. 125, 114 Am. St. Rep. 147; Joplin Brewing Co. v. Payne, 197 Mo. 422, 114 Am. St. Rep. 770; Strawbridge v. Strawbridge, 220 Ill. 61, 110 Am. St. Rep. 226. Under a will by which a testator gives his property to his sister, and provides therein that if she should die without issue and leave any of the property, it shall go to another, the sister takes an absolute fee simple, with full power to sell and convey a perfect title: Galloway v. Durham, 118 Ky. 544, 111 Am. St. Rep. 300, and see cases cited in the cross-reference note thereto.

LANCASTER v. AMES.

[103 Me. 87, 68 Atl. 533.]

EVIDENCE—Typewritten Letters.—A reply letter received by due course of mail is admissible in evidence without specific proof of the genuineness of the signature attached thereto, although the whole body of the letter, including the name of the one purporting to be the writer, is typewritten. (p. 288.)

EVIDENCE—Typewritten Letters.—Presumption of Genuineness of a reply letter wholly typewritten, including the signature, received in due course of mail may be strengthened by the contents of the letter itself. (p. 289.)

GAMING.—Buying Stock on Margins is a gambling transaction, and void. (p. 289.)

GAMING—Buying Stock on Margins—Enforcement of Contract.—If money is advanced to another for the express purpose of buying stock on margins, the promise of the person to whom it is advanced to repay it or be accountable for it, is void for want of consideration, and cannot be enforced. (pp. 289, 290.)

C. E. Sawyer, for the plaintiff.

Seiders, Marshall & Sturgis, for the defendant.

SAVAGE, J. The plaintiff in his declaration alleged, among other things, that he let the defendant have one hundred dollars to invest, and that the defendant promised to account for or return the same at the end of one year, if

so requested. Also, under the money counts in his writ, the plaintiff made the following specifications: "The plaintiff will prove the defendant accepted 100 on July 13th, 1903, for use of the plaintiff; and that he agreed to repay on (or) account for said sum at the end of one year, but has neglected so to do upon request, and that said money was accepted by the defendant to invest." We can discover no substantial difference between the special count and the specification under the money counts. Although other promises are set out in the special count, [89] the amount of the verdict for the plaintiff, considered in the light of the evidence, makes it certain that the jury based their verdict upon the allegations which we have already stated. The plaintiff's testimony, or at least some portions of it, tended to support these allegations.

The defendant, on the other hand, denied making the alleged promise, but claimed that the plaintiff let him have the money to be sent to a concern in Boston, known as the Financial Indicator Company, to be used by that company in buying on the plaintiff's account stock in the American Sugar Refining Company on margins. He also claimed that the sole responsibility assumed by him was the forwarding of the money to the Boston concern, and that he forwarded the money as agreed. Either one of the defendant's claims, if sustained by proof, would constitute a defense. The defendant, therefore, as a part of his defense, had a right to show that he forwarded the money to the Financial Indicator Company.

It seems to be undisputed that when the plaintiff paid his money to the defendant, the latter gave him a receipt of the following tenor:

"Portland, July 13, 1903.

"Received of Charles E. Lancaster one hundred dollars to be invested in the Financial Indicator Co., 31 State St., Boston, Mass. This receipt to be void when he receives receipt from said Co."

The defendant testified, without objection, that he sent a check for the money to the Financial Indicator Company by mail, the night of the 13th of July; that the check came back to him in the ordinary course of banking as paid, and bearing the indorsement of W. H. Gilman, the treasurer and manager of the Indicator Company; and that on the 15th of July he received the letter which he offered, as a reply to his remittance of the plaintiff's money. This letter bore date "Boston, July 14, 1903." Upon it was printed what ap-

peared to be the letter-head of the Financial Indicator Company at 31 State St., Boston, together with the names of the president, and of W. H. Gilman as treasurer. The whole body of the letter, including the name of the one purporting to be the writer, was typewritten. There was no written signature.

[90] The defendant further testified that he had before that time received letters from Gilman or the Indicator Company, having a letter-head like the one in question, that usually they had been signed on the typewriter only, that he had replied to Gilman, taking up matters presented in such letters, and had received replies back from him covering the same subjects.

The letter was addressed to the defendant, and omitting the letter-head and immaterial matters, was as follows:

"Dear Sir: Your letter of yesterday's date enclosing checks for $150. received, ... I have an appointment with some prominent parties at 3.30, and I trust you will excuse the delay about sending receipts until tomorrow.

"I shall send one direct to Dr. Charles E. Lancaster, Brunswick, Me. and the other directly to you for Elizabeth, W. V———. Yours truly,

"W. H. GILMAN."

This letter when offered was excluded by the court, and exceptions were taken by the defendant, the verdict being against him. The correctness of this ruling we have now to consider.

The letter was excluded, not because a genuine acknowledgment of the defendant's remittance to Gilman or the Indicator Company would not have been admissible, as indeed it would be, but solely because, being wholly typewritten, it was not "authenticated in the usual way," and because "the letter itself, in the judgment of the court did not seem to possess sufficient internal evidence of its authenticity to allow it to go to the jury."

It is true, as a general rule, that documentary evidence, to be admissible, must be authenticated, and in case of a letter this is ordinarily done by proof of the genuineness of the signature of the writer. When the signature is typewritten, this method of authentication may be difficult, if not impossible. At any rate, it was not tried in this case. But there is a relaxation of this rule in the case of what are called reply letters. The rule does not apply to a letter which is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been duly ad-

dressed [91] and mailed. Proof of these facts is sufficient evidence of the genuineness of the reply to go to the jury, without specific proof of the genuineness of the signature. The genuineness is assumed, at least, until the contrary is shown: Connecticut v. Bradish, 14 Mass. 296; 3 Wigmore on Evidence, sec. 2153. The rule is recognized in Abbott v. McAloon, 70 Me. 98. This is true when the signature is in the handwriting of some person. Logically, it must be equally true when the signature is typewritten.

We think the letter before us bears internal evidence of being an answer to a prior one written by the defendant to Gilman, the treasurer of the Indicator Company. The succession of dates, the reference to checks received and to receipts to be sent to the plaintiff and one other person, taken in connection with the testimony respecting the letter written by the defendant to the Indicator Company, leave no real doubt that the letter over the name Gilman was an answer to one written the day before by the defendant in which he says he inclosed the plaintiff's money. That is certainly the purport of it. Accordingly, we think that the letter should have been admitted. The defendant's exceptions must be sustained.

We think that the motion for a new trial should be sustained.

The plaintiff denies that he knew that the money was to be sent to the Boston concern for investment, or that he understood it was to be used for stock gambling either in Boston or by the defendant at Portland. The effect of the receipt taken by him and of some of his admissions render it extremely improbable that his present version relating to the defendant's position in the matter is the true one. But assuming that it was as he now claims, and that he thought he was dealing with the defendant alone as a principal, we think, after a careful consideration of all the evidence, that the plaintiff, notwithstanding his denials, intended that his money should be used in stock gambling. To say in the light of the evidence that he did not understand that the money was to be used in buying "sugar" stock on margins is not creditable to the intelligence of an educated professional man such as he is. We are convinced that he so understood, and that he intended the money to be so used. If so, the whole transaction was illegal: Rumsey v. [92] Berry, 65 Me. 570; O'Brien v. Luques, 81 Me. 46, 16 Atl. 304. The defendant's promise to repay or to be accountable for the money, if he made such a

promise, was a part of the illegal transaction, which the court will not enforce: Tyler v. Carlisle, 79 Me. 210, 1 Am. St. Rep. 301, 9 Atl. 356. We think the verdict was clearly wrong, and that it should be set aside.

Motion and exceptions sustained.

The Admissibility in Evidence of typewritten letters is discussed in State v. Freshwater, 30 Utah, 442, 116 Am. St. Rep. 853; and the admissibility of carbon or letter-press copies of instruments are discussed in International Harvester Co. of America v. Elfstrom, 101 Minn. 263, 118 Am. St. Rep. 626, and Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469. As to the effect of a printed or stenciled signature to an instrument, see Loughren v. Bonniwell, 125 Iowa, 518, 106 Am. St. Rep. 319; Herrick v. Morrill, 37 Minn. 250, 5 Am. St. Rep. 841; Hamilton v. State, 103 Ind. 96, 53 Am. Rep. 491.

CARL v. YOUNG.

[103 Me. 100, 68 Atl. 593.]

NEGLIGENCE—Injury by Article Falling from Building.—The tenant of a building is not liable for injuries suffered by a passer-by from anything thrown from a window of the building, when neither the tenant nor any of his servants is in fault. (pp. 290, 291.)

The plaintiff, while rightfully passing along the street, in the rear of the store and place of business of the defendants, which they occupied as tenants, was struck by a spittoon filled with blazing benzine and other filth thrown from a window of such premises by some person unknown to plaintiff, causing him great fright and damage to his person and clothing. A general demurrer to the complaint was sustained and plaintiff excepted thereto.

G. C. Wing and G. C. Wing, Jr., for the plaintiff.

T. Atwood, for the defendant.

[100] EMERY, C. J. It is evident that the declaration in this case can be sustained only upon the assumption that the tenant of a building [101] is liable for injuries suffered by a passer-by from anything thrown by any person from a window of the building, though neither such tenant nor any of his servants were in fault. There is no allegation in the declaration that the article inflicting the injury was thrown by either of the defendants or any of their servants, nor is it stated wherein they were in fault in not preventing the injury.

We think the assumption is without foundation, and that in this state such tenant is not bound at his peril to prevent such injuries, but only to exercise due care to prevent them. The decisions in the cases cited by the plaintiff were based upon the negligence of the defendant duly alleged and proved. In this case no negligence is even alleged, and hence the declaration must be adjudged insufficient.

Exceptions overruled.

The Liability of the Owner or Occupant of a Building for articles falling therefrom to the injury of people below through the negligence of third persons is discussed in the note to Weitzmann v. Barber Asphalt Co., 123 Am. St. Rep. 567. The liability of a property owner for a nuisance which he has not created is the subject of a note to Leahan v. Cochran, 86 Am. St. Rep. 508; and the liability to third persons of lessors of property is the subject of a note to Griffin v. Jackson Light etc. Co., 92 Am. St. Rep. 499.

WOODCOCK'S APPEAL.

[103 Me. 214, 68 Atl. 821.]

WILLS—Right of Adopted Child to Inherit.—A testator who by will makes provision for his own "child or children" by that designation includes thereby an adopted child. (p. 292.)

WILLS—Right of Adopted Child to Inherit.—If a will makes provision for a "child or children" of some other person than the testator, the adopted child of such person is not included, unless other language of the will makes it clear that it was so intended. (p. 293.)

W. P. Thompson, for the plaintiff.

Dunton & Morse, for the defendants.

216 EMERY, C. J. Ann F. Johnson, in February, 1890, made her will, which contained, among others, the following provision, viz.:

"3d. Upon the decease of my said daughter Mary without a child or children, I give and devise the balance of my estate then remaining unto my following named three children, Arbella Hersey, Horatio H. Johnson and Charles E. Johnson equally, and in case of either of my said three children shall die before said Mary, leaving a child or children, then it is my will and desire and I do hereby devise and bequeath that the child or children of said deceased child shall receive the same share as its or their parent would have received if living."

The testatrix died in 1891. Horatio H. Johnson, her son named in the will, died in 1896 before the daughter Mary, who died in 1906. Horatio left no child of his blood, but did leave a child by adoption, the appellant Ella, who was adopted under a decree of the probate court in 1882, previous to the making of the will. For the purpose of this opinion that decree is assumed to be valid.

The question is whether the appellant Ella takes the share Horatio H. Johnson would have taken had he survived his sister Mary. In other words, the question is whether the words "child or children," as used by the testatrix in the clause of her will above quoted, includes a child by adoption and not of the blood.

Where one makes provision for his own "child or children" by that designation, he should be held to have included an adopted child, since he is under obligation in morals if not in law to make provision for such child. Thus in Virgin v. Marwick, 97 Me. 578, 55 Atl. 520, where the proceeds of a life insurance policy were made payable to the insured's "surviving children," an adopted child, though adopted after the date of the policy, was held to be within its provisions: See, also, Martin v. Aetna Life Ins. Co., 73 Me. 25. On the other hand, in statutes exempting children from an inheritance tax, an adopted child is not included in the term "child": In re Miller's Estate, 110 N. Y. 216, 18 N. E. 139; Commonwealth [217] v. Nancrede, 32 Pa. 389. In the latter case the court said: "Giving an adopted son a right to inherit does not make him a son in fact."

When in a will provision is made for "a child or children" of some other person than the testator, an adopted child is not included unless other language in the will makes it clear that he was intended to be included, which is not the case here. In making a devise over from his own children to their "child or children" there is a presumption that the testator intended "child or children" of his own blood, and did not intend his estate to go to a stranger to his blood. Blood relationship has always been recognized by the common law as a potent factor in testacy. In this case, Ella, the adopted child of Horatio, however fully his child in law, was not the grandchild of Horatio's mother, the testatrix, was not in any way related to her, was a stranger to her blood. The testatrix was under no sort of obligation, moral or family, to make any provision for her. We do not think it clear from the terms of her will that she intended Horatio's share to go out of the blood to a child by adoption only, hence we hold that

Ella, who was only a child by adoption, does not take anything under the will: Russell v. Russell, 84 Ala. 48, 3 South. 900; Schafer v. Eneu, 54 Pa. 304.

The appellant cites Warren v. Prescott, 84 Me. 483, 30 Am. St. Rep. 370, 24 Atl. 948, 17 L. R. A. 435, where it was held that an adopted child was within the meaning of the words "lineal descendants" in the statute (Revised Statutes 1883, chapter 74, section 10), and as such would prevent a legacy lapsing, where a legacy was bequeathed to his adopted parent by a relative and the legatee died before the testator. That case, however, was one of the construction of the words "lineal descendants" in a statute. It is not applicable to this case which is one of the construction of the words "child or children" in a will. In this case, too, the legatee, Horatio, did not die before his mother, the testatrix, and there is no question of lapsing of legacy, but simply one of who takes the legacy.

Decree of probate court affirmed with costs. Case remitted to the probate court.

An Adopted Child takes a legacy given to one of its adopted parents who dies before the testator, where the adoption statute declares that the child becomes to all intents and purposes the child of its adopters, the same as if born to them in lawful wedlock. And if a child is adopted after the making of a will by its adopted parent, in which it is not mentioned, it takes the same share in his estate as would a child born to him after the execution of his will; and the will of a testator is revoked by his subsequent adoption of a child, where the birth of a child would have had that effect: See the note to Van Derlyn v. Mack, 109 Am. St. Rep. 678. Consult, also, Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 116 Am. St. Rep. 536; Hockaday v. Lynn, 200 Mo. 456, 118 Am. St. Rep. 672.

MILTON v. BANGOR RAILWAY AND ELECTRIC COMPANY.

[103 Me. 218, 68 Atl. 826.]

NEGLIGENCE—Abuse of Franchise.—If a right or franchise is conferred and a corresponding duty imposed upon a person or corporation, it is answerable to a third person who sustains damage by the negligent discharge of that duty. (p. 295.)

NEGLIGENCE—Abuse of Franchise.—If a city railway company accepts a franchise coupled with the duty to keep streets used in repair, a third person injured by the neglect of such duty is entitled to recover. (p. 295.)

CONSTITUTIONAL LAW—Limitation of Legislative Power.—It is beyond the power of the legislature to exempt any person or corporation from the operation of the general law of the state, or to

impose special conditions or limitations upon rights of action against persons or corporations. (p. 296.)

Waterhouse & Crawford, for the plaintiff.

E. C. Ryder, for the defendant.

[221] EMERY, C. J. The Old Town, Orono and Veazie Railroad Company incorporated in 1891 by chapter 116 of the special laws of that year, received authority to occupy portions of the streets of Old Town with its railroad tracks, etc., but coupled with the duty of keeping and maintaining in repair all such portions and of making all other repairs of such streets which should be rendered necessary by the occupation of them by its railroad: Charter, secs. 1, 2. Under this charter that company constructed its tracks and operated its railroad through various of the streets of Old Town. Its property, franchise and duty subsequently passed by various conveyances and legislative acts to the defendant company, which since 1905 has maintained the tracks and operated the railroad through the same and other streets of Old Town.

The plaintiff, while traveling in 1906 with his horse and carriage through the streets of Old Town, suffered an injury to his horse and harness through a defect in a crossing over the defendant company's tracks at a junction of two streets, which defect was due to the defendant company's neglect of its duty under its charter. The plaintiff was without fault and has not been compensated.

For defense the defendant company relies solely upon the following provision in section 3 of the original charter of 1891, viz.: "Said corporation shall be liable for any loss or damage which any person may sustain by reason of any carelessness, neglect or misconduct of its agents or servants, or by reason of any defect in so much of said streets or roads as is occupied by said railroad, if such defect arises from neglect or misconduct of the corporation, [222] its agents or servants; and in actions brought against the company to recover damages by reason of such defects, the plaintiff shall have the rights and be subject to the burdens of proof and limitations and conditions provided by the general statutes applicable to suits for such causes against towns as now existing, the directors of said company standing in this respect in place of town officers."

To maintain a suit for such a cause of action against a town it must be made to appear that one or more of certain specified town officers had actual notice of the defect twenty-

four hours before the injury was received from it, and within fourteen days after the injury received notice thereof from the plaintiff. There being no evidence to the contrary, it must be assumed that no director of the defendant company had any such notice of the defect or of the injury. The defendant contends that the right of action against it for damages thus caused by it is a creature of the statute cited, and is limited to cases stated in that statute, viz., to cases where a director had the twenty-four hours' previous notice and the subsequent fourteen days' notice.

This contention cannot be sustained. The plaintiff has a common-law right of action independent of the statute. There was granted by the state to the defendant company a right, a franchise, to occupy portions of the streets, but coupled with the corresponding duty of keeping them in repair. The duty was prescribed for the protection of the traveling public. It was voluntarily assumed along with the right, and, with it, was assumed the necessary concomitant of a common-law liability to any of the traveling public suffering injury through its breach. The assumption of the duty creates the liability, and the consequent right of action in favor of those persons for whose protection the duty was prescribed: Veazie v. Penobscot R. R. Co., 49 Me. 119; Tobin v. Portland etc. R. R. Co., 59 Me. 183, 8 Am. Rep. 415; Gillett v. Western R. R. Corp., 8 Allen, 560; Gates v. Pennsylvania R. R. Co., 150 Pa. 50, 24 Atl. 638, 16 L. R. A. 554. "At common law, whenever a right is conferred and a corresponding duty imposed upon a person or corporation, it is answerable to a third person who sustains damage by the negligent discharge of that duty": Mann v. Central Vermont R. R. Co., 55 Vt. 484, 45 Am. Rep. 628.

223 This principle is affirmed in the case of street railroads, ex majore cautela, by our general statutes (Revised Statutes, chapter 53, section 27), viz.:

"All street railroad corporations shall be liable for any loss or damage which any person may sustain, by reason of any negligence or misconduct of any such corporation, its agents or servants, or by reason of any obstructions or defects in any street or road of any city or town, caused by the negligence of such corporation, its agents or servants."

Of course, municipal corporations which act in the care of the streets, as governmental agencies, as trustees for the public, are not within this common-law rule. The distinction and the reasons for it are familiar and need no new

statement: Riddle v. Proprietors, etc., 7 Mass. 169, 5 Am. Dec. 35.

The defendant further contends, however, that if the legislature did not create the plaintiff's right of action, it has by the words of the charter quoted above exempted the defendant company from liability for injuries caused by its negligent performance of its duty of keeping the streets in repair, unless some one of its directors had twenty-four hours' previous notice of the defect and received notice of the injury within fourteen days afterward. To this claim of exemption the answer should be apparent. The people have not conferred upon the legislature the power to exempt any particular person or corporation from the operation of the general law, statutory or common: Holden v. James, 11 Mass. 396; 6 Am. Dec. 174; Simonds v. Simonds, 103 Mass. 572, 4 Am. Rep. 576; Lewis v. Webb, 3 Me. 326; Durham v. Lewiston, 4 Me. 140. In Lewis v. Webb, 3 Me. 326, the court, per Mellen, C. J., said, "On principle, then, it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man by way of exemption from the general law, leaving all other persons under its operation."

We have no occasion to consider whether the attempted statutory exemption is forbidden by the fourteenth amendment to the United States constitution, or by section 19 of the Maine Declaration of Rights, which declares that "every person for an injury done him in person, [224] reputation, property or immunities shall have remedy by due course of law: Preston v. Drew, 33 Me. 558, 54 Am. Dec. 639; Bennett v. Davis, 90 Me. 102, 37 Atl. 864. It sufficiently appears, without reference to those constitutional provisions, that despite the provisions of its charter the defendant company is not exempt from liability for the consequences of its negligence in the performance of the duty it assumed, and that the plaintiff is entitled to judgment according to the stipulations in the report, to wit, for fifty dollars.

The Liability of a Street Railway for failing to keep in repair those parts of the street occupied by its tracks is considered in the note to Western Paving etc. Co. v. Citizens' St. Ry. Co., 25 Am. St. Rep. 480-482; Cline v. Crescent City R. R. Co., 43 La. Ann. 327, 26 Am. St. Rep. 187. If some burden is imposed by a municipality upon a street railway company as a condition to the grant of its franchise, the acceptance of the condition constitutes a contract between the company and the city. But it has been affirmed that an ordinance requiring street railway companies to pave and keep in repair, under the direction of

the municipal authorities, the part of the street adjacent to and between their tracks and rails, and providing that if they fail to do so the city may do the work and they shall pay the cost, gives no right of action against a company by a traveler injured through a defective payment: Fielders v. North Jersey St. Ry. Co., 68 N. J. L. 343, 96 Am. St. Rep. 553.

HEBERT v. PORTLAND RAILROAD COMPANY.

[103 Me. 315, 69 Atl. 266.]

CARRIERS OF PASSENGERS—Employé as Passenger—Liability for Negligence.—If a carrier of passengers employs a person and assigns him to a place of labor some distance from his home, giving him in addition to his wages tickets which entitle him to ride to and from his work, he is, while riding upon such a ticket to or from his employment, a passenger, and the railroad company employing him is liable to him for an injury received without his fault and caused by its negligence. (p. 298.)

CARRIERS OF PASSENGERS—Negligence—Pleading.—In an action to recover for negligence, where the relation between the parties is that of passenger and carrier, a general allegation against the latter of negligence is sufficient, without particular specification. (p. 299.)

F. P. Pride and J. O. Winship, for the plaintiff.

Libby, Robinson & Ives, for the defendant.

320 EMERY, C. J. On exceptions to the overruling a demurrer to the declaration. The case stated in the declaration is substantially 321 this: The defendant company was a common carrier of passengers, and as such was owning and operating a street railroad in Westbrook and Portland and between the two cities. The plaintiff was in the employ of the company as a "greaser." He lived in Westbrook but his assigned place of work was at a point in Portland. In addition to his cash wages the company gave him tickets good for passage upon its railroad between his residence in Westbrook and his place of labor in Portland. One day the plaintiff boarded a regular street-car of the defendant company at Westbrook for passage to his place of work in Portland, and for such passage gave up to the conductor one of the tickets given him by the company as above stated. While thus upon the car, and himself in the exercise of due care, and before reaching his destination, he was injured by the sudden derailment of the car through the fault of the company in not maintaining its track, way, works and machinery in safe condition.

The defendant company claims that the declaration is insufficient, in that it does not contain enough to show what was the relation between the parties and the consequent duty of the one to the other at the time of the injury. We think it clear, however, that upon the statements in the declaration, the plaintiff at the time of his injury was a passenger, with the rights of a passenger against a common carrier.

In a sense, of course, in the popular sense of the term, the plaintiff was in the defendant's employ. There was between them a then existing contract, implied at least, by which he was to render certain services to the company from day to day; but his work, his then assigned post of duty, was in Portland and not in Westbrook, where he boarded the car, nor upon the line of the road between his residence and his place of work. It is to be assumed that he was to report each working day at a given hour at his assigned post of duty in Portland, and that during the working hours of each such day he was under the company's orders within the line of his employment. It is also to be assumed that outside those hours and while going to and from his work he was under his own direction. It is not a case where the railroad company directs a servant to proceed on its cars [322] from one place to another in the prosecution of his work, nor is it a case where a servant of a railroad company is riding on its cars in the prosecution of his work during hours of work. In the case stated the plaintiff selected his own means of transportation. It was no concern of the company how he got to his work, if he got there. In availing himself of the company's railroad to get to his work he was acting in his own interest and of his own volition. He was not working for the company in thus riding on its railroads. The company did not pay him for so riding; he paid the company for his ride.

True, the plaintiff paid his fare by a ticket given him by the company for that ride, but he paid for the ticket by his services. It was a part of his wages and delivered to him as such. It could make no difference in his status as a passenger whether he paid his fare in cash or in tickets thus earned.

We find that several courts in other jurisdictions have held the contrary of our decision of this question. Some of these contrary decisions seem to be based upon the circumstance that the plaintiff was riding on his way to his work, and not riding home, or to his luncheon or elsewhere. We cannot see any difference in principle. He was as much his own man

while riding to his work as in riding from it. So far as we can learn, however, the precise question here has never been decided by this court, and hence we are free to follow what we think the better reason. Moreover, our contention is supported by respectable authority: Doyle v. Fitchburg R. R. Co., 162 Mass. 66, 47 Am. St. Rep. 335, 37 N. E. 770, 25 L. R. A. 157, 166 Mass. 492, 55 Am. St. Rep. 417, 44 N. E. 611, 33 L. R. A. 844; Dickinson v. West End St. Ry. Co., 177 Mass. 365, 83 Am. St. Rep. 284, 59 N. E. 60, 52 L. R. A. 326; Louisville etc. R. R. Co. v. Weaver, 22 Ky. Law Rep. 30, 56 S. W. 674, 50 L. R. A. 381; Gillenwater v. Madison etc. R. R. Co., 5 Ind. 339, 61 Am. Dec. 101; New York etc. R. R. Co. v. Burns, 51 N. J. L. 340, 17 Atl. 630; O'Donnel v. Alleghany Valley R. R. Co., 59 Pa. 239, 98 Am. Dec. 336; McNulty v. Pennsylvania R. R. Co., 182 Pa. 479, 61 Am. St. Rep. 721, 38 Atl. 524, 38 L. R. A. 376.

But the defendant further claims that, even if the declaration does state a case of injury to a passenger, it does not set out with sufficient particularity wherein the defendant company was negligent, though it does charge that the injury resulted from a derailment of the car [323] through the defendant company's negligence. In actions of this kind, where the relation between the parties is that of passenger and carrier, a general allegation of negligence on the part of the company is sufficient without particular specification: Ware v. Gay, 11 Pick. 106; Clark v. Chicago etc. R. R. Co., 4 McCrary, 360, 15 Fed. 588; Lavis v. Wisconsin Cent. R. R. Co., 54 Ill. App. 636; Breese v. Trenton R. R. Co., 52 N. J. L. 250, 19 Atl. 204; Gulf etc. R. R. Co. v. Smith, 74 Tex. 276, 11 S. W. 1104. It is not ordinarily within the power of the passenger to specify in what particular the carrier was negligent. Again, while the plaintiff passenger must allege and prove negligence of the carrier as the cause of his injury, he does allege and prove it in this case by alleging and proving (if he does prove it) the derailment of the car and his consequent hurt. The negligence of the company is to be presumed from that circumstance alone, and it will be for the company to rebut that presumption by showing that the derailment of the car did not result from any negligence on its part. "Cars can ordinarily be run with safety, and when they are not, that fact itself is evidence of fault or defect somewhere, requiring an explanation. The maxim, 'Res ipsa loquitur' applies in such a case": Stevens v. E. & N. A. R., 66 Me. 74. The general allegation of negligence in this declaration is sufficient.

It follows that the exceptions should be overruled. We have of course examined every case cited by the defendant, but those cited from our own reports will be found not applicable to a case like this, an action for an injury caused by the derailment of a street-car to one riding on the car.

An Employé of a Railroad Company who is carried to and from his work on a train in consideration of a reduction in his wages is a passenger while being thus transported: McNulty v. Pennsylvania R. R. Co., 182 Pa. 479, 61 Am. St. Rep. 721. See, too, Williams v. Oregon Short Line R. R. Co., 18 Utah, 210, 72 Am. St. Rep. 777; Bowles v. Indiana Ry. Co., 27 Ind. App. 672, 87 Am. St. Rep. 279; Dickinson v. West End St. Ry. Co., 177 Mass. 365, 83 Am. St. Rep. 284; Ionnone v. New York etc. R. R. Co., 21 R. I. 452, 79 Am. St. Rep. 812; Doyle v. Fitchburg R. R. Co., 162 Mass. 66, 44 Am. St. Rep. 335.

HORNBLOWER v. BANTON.

[103 Me. 375, 69 Atl. 568.]

ADVERSE POSSESSION—Under Colorable Title.—If one occupies a portion of a parcel of land under colorable title acquired by deed delivered and recorded, his occupancy extends to the whole of the land included in the deed. (p. 301.)

ADVERSE POSSESSION—Colorable Title—Presumption.—One in possession of land under a paper title, containing a specific description by metes and bounds, and notoriously exercising control and dominion over the premises, is presumed to be doing so to the extent of his claim, but such presumption must be limited to circumstances which would reasonably create it, and cannot, without evidence to support it, be extended to distinct lots held under different deeds, though the colorable title may be in the same person, nor even to separate contiguous tracts of land described in the same deed. (pp. 301, 302.)

ADVERSE POSSESSION — Constructive Possession.—Unless lots claimed under adverse possession are inclosed by a common fence and embraced under one general description in the deed, or in some such way merged in one parcel so that the occupation of a portion thereof could not be reasonably referred to anything less than the whole tract, the rule of constructive possession is not applicable. (p. 302.)

F. E. Guernsey, for the plaintiff.

T. P. Wormwood, T. D. Bailey and G. T. Sewall, for the defendants.

376 PEABODY, J. This was a real action to recover lot 21 in the town of La Grange, Penobscot county. The case comes before the law court on exceptions by one of the defendants to the ruling of the presiding justice excluding evidence.

The plaintiff introduced evidence establishing a record title to the lot in question. The defendants then presented a chain of record title to the same lot but originating later than that of the plaintiff, and they offered further to prove such acts of occupation for a period of more than twenty years of a part of lot No. 1, as would constitute adverse possession, proposing to show in that connection that lot No. 1 adjoined lot No. 21, and that both lots had been held by one ownership but under separate deeds for a period, and under the same deed for nearly twenty years, claiming that this evidence would prove constructive possession of lot No. 21.

This was excluded by the presiding justice on the ground that the constructive possession did not extend to lot No. 21. As no further evidence was offered, a verdict for the plaintiff was directed.

The presiding justice in charging the jury said: "I understand the law to be that where one enters upon a lot under color of title, under a deed good or bad if it is good it is no matter, but if it doesn't turn out to be a good deed, enters under a colorable title and actually occupies a portion of that lot under the deed, his occupancy extends as a matter of law to the limits of his deed, but not over onto land covered by some other deed although he may have a deed of the other lot; and as that is the only defense offered to the plaintiff's record title I instruct you to return a verdict for the plaintiff."

The defendant, Samuel L. Haskell, excepted to this ruling and these instructions.

[377] The rule as stated by the presiding justice is well established in this state. Where one occupies a portion of a lot under a colorable title acquired by deed delivered and recorded, his occupancy extends to the whole of the land included in the deed: Banton v. Herrick, 101 Me. 134, 63 Atl. 671, and cases cited.

The ground upon which the doctrine of constructive possession is based is that one in possession of land under a paper title containing a specific description by metes and bounds, claiming the whole and openly and notoriously exercising control and dominion over the premises, is presumed to be doing so to the extent of his claim: 1 Cyc. 1126; Humphries v. Huffman, 33 Ohio St. 395; Barber v. Robinson, 78 Minn. 193, 80 N. W. 968.

Such a presumption must be limited, therefore, to circumstances which would reasonably create it; it cannot, without evidence to support it, be extended to distinct lots held under

different deeds though the colorable title may be in the same person (Broom v. Pearson, 98 Tex. 469, 85 S. W. 790, 86 S. W. 733), nor even to separate contiguous tracts of land described in the same deed: Morris v. McClary, 43 Minn. 346, 46 N. W. 238; Alston v. McDowall, 1 McMull. 444; 1 Cyc. 1128.

Unless the lots are inclosed by a common fence (Kerr v. Nicholas, 88 Ala. 346, 6 South. 698), embraced under one general description in the deed (Bacon v. Chase, 83 Iowa, 521, 50 N. W. 23), or in some such way merged in one parcel so that the occupation of a portion thereof could not be reasonably referred to anything less than the tract, the rule of constructive possession would be inapplicable.

Nothing of the sort is suggested by the defendants in this case beyond the circumstance that the two lots were held by the same person and were held under the same title for nearly twenty years. This alone was not sufficient to bring the case under any exception to the general rule. The evidence of colorable title and occupation of lot No. 1 was therefore properly excluded, and in the absence of further evidence of title on the part of the defendants, the instruction of the presiding justice and directing a verdict for the plaintiff were correct.

Exceptions overruled.

POSSESSION OF PART AS POSSESSION OF THE WHOLE.

I. Classification, 302.

II. When the Possessor has No Writing Purporting to Give Him Title or the Right of Possession, 302.

III. Where the Possession is Taken and Held Under Some Writing.
- a. The General Rule, 304.
- b. Limitation of the Rule Where There is an Adverse Possession of Another Part, 306.
- c. Distinct Tracts, 306.
- d. Adjoining Parcels, 307.

I. Classification.

For the purposes of this note, the cases involving its consideration may be classified, first, as those which have been determined when the party in possession of a part of premises did not acquire possession under any deed or writing purporting to give him title or right of possession; and second, those cases in which such party, though his possession includes a part only of the property, yet takes and claims to hold such possession under some deed or other writing purporting to give him title or right of possession to the whole tract.

II. When the Possessor has No Writing Purporting to Give Him Title or the Right of Possession.

With respect to cases of this class, the authorities are nearly, if not quite, uniform in affirming that if a trespasser or other person

having no writing or other muniment of title enters upon the possession of a tract of land, his constructive possession is limited by his actual possession, and hence, though that which he occupies is a parcel of a well-defined larger tract, he cannot be regarded as a possessor of anything beyond the part which he reduces to his actual possession. Among the great number of cases to this point may be cited: Ryan v. Kilpatrick, 66 Ala. 332; Burks v. Mitchell, 78 Ala. 61; Chastang v. Chastang, 141 Ala. 451, 109 Am. St. Rep. 45, 37 South. 799; Garrison v. Sampson, 15 Cal. 93; Hall v. Gay, 68 Ga. 442; Webb v. Sturtevant, 1 Scam. 181; Turney v. Chamberlain, 15 Ill. 271; Foster v. Letz, 86 Ill. 412; Jeffersonville etc. R. R. Co. v. Oyler, 60 Ind. 383; Brooks v. Clay, 3 A. K. Marsh. 545; Banton v. Herrick, 101 Me. 134, 63 Atl. 671; Hackett v. Webster, 97 Md. 404, 55 Atl. 480; Kennebec Purchase v. Springer, 4 Mass. 416, 3 Am. Dec. 227; Poignard v. Smith, 8 Pick. 272; Barber v. Robinson, 78 Minn. 193, 80 N. W. 968; Welborn v. Anderson, 37 Miss. 155; City of St. Louis v. Gorman, 29 Mo. 593, 77 Am. Dec. 586; De Graw v. Taylor, 37 Mo. 310; Rannels v. Rannels, 52 Mo. 108; Pharis v. Jones, 122 Mo. 125, 26 S. W. 1032; Kennedy v. Prueitt, 24 Mo. App. 414; Haywood v. Thomas, 17 Neb. 237, 22 N. W. 460; Gatling v. Lane, 17 Neb. 80, 22 N. W. 453; City of South Omaha v. Meehan, 71 Neb. 230, 98 N. W. 691; Riley v. Jameson, 3 N. H. 23, 14 Am. Dec. 325; Hoag v. Wallace, 28 N. H. 547; Boynton v. Hodgdon, 59 N. H. 247; Saxton v. Hunt, 20 N. J. L. 487; Jackson v. Camp, 1 Cow. 605; Becker v. Van Valkenburgh, 29 Barb. 319; Bynum v. Thompson, 25 N. C. (3 Ired.) 578; Hall v. Powel, 4 Serg. & R. 456, 8 Am. Dec. 772; Hoey v. Furman, 1 Pa. 295, 44 Am. Dec. 129; Barnhart v. Pettit, 22 Pa. 135; Eqe v. Medlar, 82 Pa. 86; Collins v. Hipshire, 2 Swan. 109; Pettyjohn v. Akers, 6 Yerg. 448; Bracken v. Jones, 63 Tex. 184; Doom v. Taylor, 35 Tex. Civ. App. 251, 79 S. W. 1086; Langdon v. Templeton, 66 Vt. 173, 28 Atl. 866; Core v. Marple, 24 W. Va. 238; Jarrett v. Stevens, 36 W. Va. 445, 15 S. E. 177; Parkersburg I. Co. v. Schultz, 43 W. Va. 470, 27 S. E. 255; Wilcox v. Smith, 38 Wash. 585, 80 Pac. 803; Pepper v. O'Dowd, 39 Wis. 538; Barr v. Gratz, 4 Wheat. 213, 4 L. ed. 553; Jackson v. Porter, 1 Paine, 457; Fed. Cas. No. 7143; Potts v. Gilbert, 3 Wash. C. C. 475; Fed. Cas. No. 11,347; Fraser v. Hunter, 5 Cranch, C. C. 470; Fed. Cas. No. 5063.

With the above rule there are some authorities which we are not able to reconcile. They involve cases in which, though there was no conveyance or other writing, still the party entered into possession not only under a claim of right, but also under a gift or contract which was intended to embrace a larger tract, which gift or contract was in itself undoubtedly void under the statute of frauds. The courts of Mississippi and Pennsylvania appear to have regarded a possession obtained under such invalid gift or contract as effective for the purpose of giving the possessor constructive possession of the tract beyond the actual boundaries of his possession to the same extent as if he had entered under a writing: Niles v. Davis, 60 Miss. 750; Davis v. Davis, 68 Miss. 478, 10 South. 70; Craig v. Craig (Pa.),

11 Atl. 60. Though, as we understand, and we think with the better reason, precisely the contrary was maintained in South Carolina: Golson v. Hook, 4 Strob. 23.

III. Where the Possession is Taken and Held Under Some Writing.

a. The General Rule.—If a person enters upon possession of any part of a tract of land under a conveyance or other writing purporting to give him title or right of possession thereunder of the whole tract, his actual possession operates as a constructive possession of the whole, and is as effective for the purpose of creating a prescriptive title in his favor. The cases sustaining this rule are so numerous that no attempt will be made to cite them all. Among the great number may be noted: Anniston City Land Co. v. Edmondson, 127 Ala. 445, 30 South. 61; Barrett v. Kelly, 131 Ala. 378, 30 South. 824; Campbell v. Bates, 143 Ala. 338, 39 South. 144; Barry v. Madaris (Ala.), 47 South. 152; Crill v. Hudson, 71 Ark. 390, 74 S. W. 299; Haggart v. Ranney, 73 Ark. 344, 84 S. W. 703; Rucker v. Dixon, 78 Ark. 99, 93 S. W. 750; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Ayres v. Bensley, 32 Cal. 620; Donahue v. Gallavan, 43 Cal. 573; Doyle v. Wade, 23 Fla. 90, 11 Am. St. Rep. 334, 1 South. 516; Wiley v. Warmock, 30 Ga. 701; Parker v. Jones, 57 Ga. 204; Hammond v. Crosby, 68 Ga. 767; Furgerson v. Bagley, 95 Ga. 516, 20 S. E. 241; Baxter & Co. v. Wetherington, 128 Ga. 801, 58 S. E. 467; Turney v. Chamberlain, 15 Ill. 271; Bowman v. Wettig, 39 Ill. 416; Barger v. Hobbs, 67 Ill. 592; Keith v. Keith, 104 Ill. 397; Bell v. Longworth, 6 Ind. 273; Worthley v. Burbanks, 146 Ind. 534, 45 N. E. 779; Moore v. Hinkle, 151 Ind. 343, 50 N. E. 822; Watters v. Connelly, 59 Iowa, 217, 13 N. W. 82; Daniel v. Ellis, 1 A. K. Marsh. 60, 70 Am. Dec. 707; Moss v. Currie, 1 Dana, 266; Harrison v. McDaniel, 2 Dana, 348; Taylor & Crate v. Burt & B. L. Co. (Ky.), 109 S. W. 348; George v. Cole, 109 La. 816, 33 South. 784; Mott v. Hopper, 116 La. 629, 40 South. 921; Railsback v. Leonard, 118 La. 919, 43 South. 548; Banton v. Herrick, 101 Me. 134, 63 Atl. 671; Clark v. Campair, 92 Mich. 573, 52 N. W. 1026; Fuller v. Swensberg, 106 Mich. 305, 58 Am. St. Rep. 481, 64 N. W. 463; Hanna v. Renfro, 32 Miss. 125; Sessions v. Reynolds, 7 Smedes & M. 130; Welborn v. Anderson, 37 Miss. 155; Johnson v. Prewitt, 32 Mo. 553; Chapman v. Templeton, 53 Mo. 463; Powell v. Davis, 54 Mo. 315; Lynde v. Williams, 68 Mo. 360; Kennedy v. Prueitt, 24 Mo. App. 414; Hoag v. Wallace, 28 N. H. 547; Farrar v. Fessenden, 39 N. H. 268; Jackson v. Olitz, 8 Wend. 440; Bennett v. Kovarick, 23 Misc. Rep. 73, 51 N. Y. Supp. 752; Bynum v. Thompson, 25 N. C. (3 Ired.) 578; Lewis v. Roper Lumber Co., 113 N. C. 55, 18 S. E. 52; Gourdin v. Theus, 3 Brev. 153; Darby v. Anderson, 1 Nott. & McC. 369; Stanley v. Shoolbred, 25 S. C. 181; Rutherford v. Franklin's Lessee, 1 Swan. 321; Evetts v. Roth, 61 Tex. 81; Porter v. Miller, 84 Tex. 204, 19 S. W. 467; Crowell v. Bebee, 10 Vt. 33, 33 Am. Dec. 172; Aldrich v. Griffith, 66 Vt. 390, 29 Atl. 376; Stull v. Rich Patch Iron Co., 92 Va. 253, 23 S. E. 293; Green

v. Pennington, 105 Va. 801, 54 S. E. 877; Core v. Marple, 24 W. Va. 238; Oney v. Clendenin, 28 W. Va. 34; Ellicott v. Pearl, 10 Pet. 412, 9 L. ed. 475, 1 McLean, 206; Fed. Cas. No. 4386; Kingman v. Holthous, 59 Fed. 305.

If, under the deed or other paper title under which the party enters and holds exclusive possession, such possession will be regarded as coextensive with the boundaries contained in such deed or paper, and it makes no difference whether his color of title is good or bad, legal or equitable: Bell v. Longworth, 6 Ind. 273; Core v. Marple, 24 W. Va. 238; Oney v. Clendenin, 28 W. Va. 34.

A limitation to the general rule exists in New York, where it is maintained that the rule applies only when the land claimed is of proper size to be managed and used in a body according to the business of the country, and that it does not apply to a large tract of land which can never be so used: Jackson v. Woodruff, 1 Cow. 276, 13 Am. Dec. 525; Thompson v. Burhans, 61 N. Y. 52.

Another limitation which we find to this rule arises in those cases where it is conceded or established that he who thus entered upon a part, though under a conveyance for the whole, did so without any intention of claiming possession beyond the parcel which he reduced to actual occupation and control. In such a case there is no room for the claim that he has constructive possession of any other part, for possession, and especially adverse possession, always involves a question of intention, and he cannot be assumed to have possessed that which he neither occupied nor enjoyed, or intended to occupy or enjoy: Langworthy v. Myers, 4 Iowa, 18; Taylor v. Buckner, 2 A. K. Marsh. 18, 12 Am. Dec. 354; Bowman v. Bartlet, 3 A. K. Marsh. 86; Bodley v. Coghill's Heirs, 3 A. K. Marsh. 614; Allen v. Holton, 20 Pick. 458; Ivey v. Petty, 70 Tex. 178, 7 S. W. 798; Pope v. Riggs (Tex. Civ. App.), 43 S. W. 306; Shedd v. Powers, 28 Vt. 652; Fussell v. Hughes, 8 Fed. 384.

As in other cases where the question of possession is involved, it is not material whether the possession is asserted or maintained by the claimant in person or by his agent or tenant. What is done for him, with his consent by another, must be deemed the act of the landlord or principal, and hence the possession of a part maintained by the agent or tenant extends to the whole as effectively as if maintained by the principal or landlord: Zundel v. Baldwin, 114 Ala. 328, 21 South. 420; Wheeler v. Foote, 80 Ark. 435, 97 S. W. 447; Knorr v. Raymond, 73 Ga. 749; Wickliffe v. Ensor, 9 B. Mon. 253; Krauth v. Hahn, 23 Ky. Law Rep. 1261, 65 S. W. 18; Jackson v. Vermilyea, 6 Cow. 677; Murphy v. Commonwealth, 187 Mass. 361, 73 N. E. 524; Cochran v. Linville Imp. Co., 127 N. C. 386, 37 S. E. 496; Cowan v. Hatcher (Tenn. Ch. App.), 59 S. W. 689; Cantagrel v. Von Lupin, 58 Tex. 570; Tarlton v. Kirkpatrick, 1 Tex. Civ. App. 107, 21 S. W. 405; Puryear v. Friery, 16 Tex. Civ. App. 316, 40 S. W. 446; Hill v. Harris, 26 Tex. Civ. App. 408, 64 S. W. 820; Harris v. Iglehart (Tex. Civ. App.), 113 S. W. 170; Ellicott v. Pearl, 1 McLean,

206; Fed. Cas. No. 4386; Treece v. American Assn., 122 Fed. 598; 58 C. C. A. 266.

b. Limitation of the Rule Where There is an Adverse Possession of Another Part.—Two persons cannot at the same time hold possession of the same parcel of property adversely to each other, nor can a constructive possession be regarded as existing in opposition to an actual possession. Therefore, he who enters upon a part of a tract of land under a writing purporting to give him possession of the whole cannot be regarded as having or being in possession of any part which is in the adverse possession of another: Ryan v. Kilpatrick, 66 Ala. 332; McCormack v. Sutton, 97 Cal. 373, 32 Pac. 444; Labory v. Los Angeles Orphan Asylum, 99 Cal. 270, 32 Pac. 231; Wilkins v. Pensacola City Co., 36 Fla. 36, 18 South. 20; Whitford v. Drexel, 118 Ill. 600, 9 N. E. 268; Rogers v. Moore's Heirs, 9 B. Mon. 401; Phillips v. Beartyville etc. Co., 28 Ky. Law Rep. 12, 88 S. W. 1058; Courtney v. Ashcraft, 31 Ky. Law Rep. 1324, 105 S. W. 106; Putnam Free School v. Fisher, 34 Me. 172; Louisville etc. Ry. Co. v. Buford, 73 Miss. 494, 19 South. 584; McDonald v. Schneider, 27 Mo. 405; Bradley v. West, 60 Mo. 33; Goltermann v. Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161; Ozark Plateau L. Co. v. Hayes, 105 Mo. 143, 16 S. W. 957; Jackson v. Vermilyea, 6 Cow. 677; Finlay v. Cook, 54 Barb. 9; Scott v. Elkins, 83 N. C. 424; Staton v. Mullis, 92 N. C. 623; Stanley v. Shoolbred, 25 S. C. 181; Hebard v. Scott, 95 Tenn. 467, 32 S. W. 390; Hays v. Barrera, 26 Tex. 78; Overton's Heirs v. Davisson, 1 Gratt. 211, 42 Am. Dec. 544; Breeden v. Haney, 95 Va. 622, 29 S. E. 328; Adams v. Alkire, 20 W. Va. 480; Vintroux v. Simms, 45 W. Va. 548, 31 S. E. 941; Smith v. Gale, 144 U. S. 509, 12 Sup. Ct. Rep. 674, 36 L. ed. 521.

c. District Tracts.—Actual possession of one tract of land, not contiguous to others, is not constructive possession of such other tracts, though conveyed by the same deed or held under the same color of title: Brown v. Bocquin, 57 Ark. 97, 20 S. W. 813; Haggart v. Ranney, 73 Ark. 344, 84 S. W. 703; Georgia Pine etc. Co. v. Holton, 94 Ga. 551, 20 S. E. 434; Goff v. Lowe (Ky.), 107 S. W. 794; Richardson v. Watts, 94 Me. 476, 48 Atl. 180; Hornblower v. Banton, 103 Me. 375, ante, p. 300, 69 Atl. 568; McRoberts v. McArthur, 62 Minn. 310, 64 N. W. 903; Bailey v. Carleton, 12 N. H. 9, 37 Am. Dec. 190; Herbst v. Merrifield, 133 Mo. 267, 34 S. W. 571; Basnight v. Meekins, 121 N. C. 23, 27 S. E. 992; Wilson v. McEwan, 7 Or. 87; Broom v. Pearson, 98 Tex. 469, 85 S. W. 790, 86 S. W. 733; Cook v. Lister, 15 Tex. Civ. App. 31, 38 S. W. 380; Sparks v. Hall, 29 Tex. Civ. App. 177, 67 S. W. 916; McSpadden v. Starrs Mountain Iron Co. (Tenn. Ch. App.), 42 S. W. 497; McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562; Pepper v. O'Dowd, 39 Wis. 538.

Prima facie, the plotting of lots from a tract of land held under one deed separates and makes them distinct tracts of land, so that adverse occupancy of one will not constitute occupancy as to the others: Missouri etc. Ry. Co. v. Allen, 67 Kan. 838, 73 Pac. 98.

d. Adjoining Parcels.—If several contiguous tracts of land are conveyed by one deed and as one body of land under one general description embracing them all, possession of one by the grantee will generally give him constructive possession of them all: Barry v. Madaris (Ala.), 47 South. 152; Parker v. Jones, 57 Ga. 204; Harrison v. Augusta Factory, 73 Ga. 447; Johnson v. Simerly, 90 Ga. 612, 16 S. E. 951; Dills v. Hubbard, 21 Ill. 328; First Nat. Bank v. Wright, 84 Iowa, 728, 48 N. W. 91, 50 N. W. 23; Hopkins v. Robinson, 3 Watts, 205; Allen v. Boggess, 94 Tex. 83, 58 S. W. 833. This rule is, in the principal case, limited to parcels inclosed by a common fence or in some way merged in one parcel so that the occupation of a portion thereof could not reasonably be referred to anything less than the whole: Hornblower v. Banton, 103 Me. 375, ante, p. 300, 69 Atl. 568.

GETCHELL v. PAGE.

[103 Me. 387, 69 Atl. 624.]

ARREST—Right of Officer to Take Property—Return.—An officer making an arrest and taking articles of property to be used as evidence of the crime is not required to make return upon such taking upon his warrant. (p. 308.)

ARREST—Right to Take Property in Possession.—An officer making an arrest upon a warrant upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The title to the property remains in the owner, but the lawful possession is temporarily in the officer for evidentiary purposes. (p. 308.)

ARREST—Right to Take Property in Possession.—If an officer having authority to execute a warrant issued for the search and seizure of intoxicating liquors, finds such liquors and arrests the owners, he may also take and keep such property therewith and all articles reasonably connected as may be reasonably used as evidence of the guilt of the person arrested. (p. 310.)

A. M. Goddard, for the plaintiff.

C. F. Johnson, for the defendants.

[389] SAVAGE, J. This is an action of trespass de bonis asportatis. The defendants admit the taking of the articles described, and seek to justify as deputy enforcement commissioners appointed under the provisions of chapter 92 of the Public Laws of 1905, relating to the better enforcement of the laws against the manufacture and sale [390] of intoxicating liquors. They claim that they were acting under and by virtue of a warrant properly issued for the search and seizure of intoxicating liquors under the statutes of this state prohibiting the unlawful sale or keeping of such liquors, and

were authorized to take and detain the articles as evidence. The case comes before this court on report.

The case shows that the defendants, armed with a warrant for search and seizure issued by the judge of the municipal court for the city of Augusta, under the provisions of Revised Statutes, chapter 29, section 49, searched the plaintiff's drug-store in Augusta, found and seized a large quantity of intoxicating liquors and the vessels in which they were contained, and took them away. At the same time they carried away the articles named in the plaintiff's writ. They arrested the plaintiff and took him before the municipal court. One of them made return upon the warrant, of the arrest and of the seizure of the liquors, but not of the taking of the other articles. These articles were taken by the defendants to be used as evidence against the plaintiff, and were carried to their storehouse. At the hearing on the search and seizure process, these articles were not brought before the court, but the defendants asked the judge of the court for directions as to the further retention and custody of these articles, which the judge declined to give, because no return of their taking had been made on the warrant. However, they retained them in their storehouse and carried them before the grand jury at the next criminal term of the superior court in Kennebec county, in September, 1906, as evidence that the plaintiff was guilty of violations of the liquor law. In the meantime, after demand, this suit was brought August 10, 1906.

The plaintiff contends that the justification offered by the defendants fails for two reasons: First, because no return was made on the warrant of the taking of these articles; and, secondly, because, as he claims, the defendants were not authorized by law to take the articles, or at the most, not all of them.

It is well settled that an officer making an arrest upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence [391] upon the trial. The officer not only has the lawful power to do so, but he would be blameworthy if he failed to do so. The maintenance of public order and the protection of society by efficient prosecution of criminals require it. The title to the property remains in the owner, but the lawful possession is temporarily in the officer for evidentiary purposes, subject to the order of court: Thatcher v. Weeks, 79 Me. 547, 11 Atl. 599; Spalding v. Preston, 21 Vt. 10, 50 Am. Dec. 68; Bishop's Criminal Procedure, 211.

The plaintiff does not seek to controvert this principle of the common law. But he contends that in prosecutions for the violation of the prohibitory liquor law of this state the common-law principle has been superseded by the express provisions of statute. He relies upon that part of section 55 of chapter 29 of the Revised Statutes which reads as follows: "All dumps or appliances for concealing, disguising or destroying liquors, so that the same cannot be seized or identified, found in the possession or under the control of any person or persons, shall be taken by the officer making such search or seizure, so far as the same is practicable, together with all bottles and drinking glasses or vessels found in the possession or under the control of any such person or persons, and carried before the next grand jury sitting in said county, where said seizure and search is made, and the same, together with all evidences of such dumps or appliances for concealing, disguising or destroying liquors, shall be presented to said grand jury for their consideration, and the same shall thereafter be subject to the order of the court issuing the warrant for said search and seizure." The plaintiff claims that this statutory provision is both mandatory and exclusive, that it was intended to cover and does cover the whole ground, and that the right of an officer to take articles of personal property to be used as evidence is limited by the statute to the various kinds of articles named therein. We are unable to agree with this interpretation. The statute certainly does not say so, and we do not think it was meant so. We think, on the contrary, that the statutory provisions referred to are in affirmation of the common-law duty of officers, and are not exclusive. When we consider the history of legislation in this state for the prohibition of the liquor traffic, the frequent legislative efforts [392] to make the law more effective, and the increasingly stringent mandates laid upon officers to enforce the law, we are persuaded that the purpose of the legislature in enacting the statute in question was to emphasize sharply the duty of officers in this respect, by express statutory command. And if this is so, it would be singular, indeed, if the legislature at the same time intended to narrow the common-law power of officers, and impliedly forbid them to take articles of evidence not expressly named in the statute. We do not think such a construction of the statute is permissible.

It is accordingly the opinion of the court that the defendants, who were vested by law with all the common law and statutory powers of sheriffs in the enforcement of the law

against the manufacture and sale of intoxicating liquors (Public Laws of 1905, chapter 92, sections 2 and 3), were acting within their lawful authority when they took and carried away to be used as evidence such of the articles described in the writ as were reasonably evidentiary. We think they were authorized not only to hold them to be used as evidence at the hearing before the municipal court, if necessary, in the search and seizure process, but to detain them to be presented to the grand jury at its next sitting as evidence that the plaintiff was maintaining a liquor nuisance, or keeping a drinking-house and tippling-shop, or was a common seller of intoxicating liquors. They were evidence of crime—of the plaintiff's crime. And the right of the officers who took them to detain them as evidence accords both with common law and common sense.

Nevertheless, the plaintiff contends that the defendants are not protected by their attempted justification, because no return of the taking of these articles was made on the warrant. We think it was not required. It is true beyond question that an officer who acts under a warrant and arrests a person or seizes property must make return of all the things which he does, and which he is commanded to do, by the warrant. If he fails to make such a return, the warrant is no protection to him.

In this case the warrant was issued under section 49 of chapter 29, of the Revised Statutes. The officer holding it was commanded therein to search for the liquors complained of, and if found, "to seize and safely keep [393] the same, with the vessels in which they are contained, until final action and decision be had thereon, and to apprehend the said Bernard E. Getchell forthwith," etc. These things were all that the officer executing the warrant was commanded by the warrant to do, and of the doing of these things due return was made. He was not commanded by the warrant to take evidentiary articles. He was commanded by the law to take these. He did not take them by virtue of the warrant, but by virtue of the law, prescribing his general duties. We think he was no more required to make return on his warrant of articles so taken than is an officer required to make return upon a warrant of the taking of the bloody knife or empty revolver of the murderer whom he has arrested.

From these considerations it follows that an action of trespass will not lie against the defendants under the circumstances of this case, for the taking of articles of an evidentiary character for the purpose of using them as evidence be-

fore the municipal court, and later before the grand jury. It only remains to inquire whether any of the articles named in the writ are of such a character as might not reasonably be used as evidence against the defendant of violations of the liquor law. The articles consisted of cork stoppers in bags and boxes, pint and half pint copper funnels, a straining funnel, copper measures, quart, pint and half pint bottles, glass mugs and two baskets. All of these articles, except the baskets, we think might reasonably have been regarded and used as evidence against the plaintiff. While it is true that they were appropriate of use in the plaintiff's drug business, they were also susceptible for use in the illicit traffic in intoxicating liquors. Such articles, even in a drug-store, might from their quantity and situation, taken in connection with other circumstances, be of significant weight in tending to fasten guilt upon the proprietor. But the question does not go to the weight or force of the evidence, but to its relevancy.

We think the baskets, however, stand upon a different footing. There might be circumstances which would make their possession evidence of the unlawful character of the plaintiff's business, but [394] none are disclosed in the record. And accordingly the plaintiff is entitled to recover their value, which is one dollar.

Judgment for the plaintiff for one dollar damages.

An Arresting Officer ordinarily has authority to take property from the person of the prisoner which may serve as evidence of his criminality: Rusher v. State, 94 Ga. 363, 47 Am. St. Rep. 175; Ex parte Hurn, 92 Ala. 102, 25 Am. St. Rep. 23. For limitations upon the right of an officer to search a prisoner and appropriate property found on his person, see Cunningham v. Baker, 104 Ala. 160, 53 Am. St. Rep. 27; Holker v. Hennessey, 141 Mo. 527, 64 Am. St. Rep. 524; Hubbard v. Garner, 115 Mich. 406, 69 Am. St. Rep. 580; Hebrew v. Pulis, 73 N. J. L. 621, 118 Am. St. Rep. 716.

MANSON v. PEAKS.

[103 Me. 430, 69 Atl. 690.]

JUDGMENTS—Assignment by Administrator.—A judgment in favor of an intestate may be assigned by his administrator in writing, and the assignee may maintain an action thereon in his own name. (p. 312.)

JUDGMENTS—Assignment by Administrator—Collateral Attack.—If a judgment in favor of an intestate is assigned in writing by his administrator, and the assignee thereof obtains judgment thereon, the validity of the assignment cannot be collaterally attacked by the judgment debtor. (p. 312.)

DEEDS, QUITCLAIM—After-acquired Title.—If one not having title to land gives a mere quitclaim deed thereof, with only a covenant of nonclaim, such covenant does not operate to pass an after-acquired title. (pp. 313, 314.)

DEEDS, QUITCLAIM—Effect of Recital.—A recital in a quitclaim deed of the land sold as "being part of the land purchased by me of the town of Foxcroft," is not a covenant by the grantor that he was then the owner of the title to the land. (p. 314.)

Hudson & Hudson, for the plaintiffs.

J. B. and F. C. Peaks, for the defendants.

[431] EMERY, C. J. These are real actions. The plaintiffs' title is from the town of Foxcroft through the town's grantee, Seth Brawn, and through Henry Hudson, a judgment and levying creditor of Brawn. The defendants also claim title under Brawn.

The first question to be considered is whether the judgment, Hudson v. Brawn, is valid against collateral attack. In the declaration in the writ, Hudson v. Brawn, there was set forth the due recovery of a prior judgment (describing it) by one Thompson against Brawn and its want of satisfaction, the decease of Thompson, the assignment in writing of the unsatisfied judgment to Hudson by the duly appointed administrator of the estate of Thompson deceased, and the accruing of an action thereby to Hudson to have and recover of Brawn the amount of the judgment. The writ was duly served upon Brawn, who did not appear, and Hudson recovered judgment upon due default in 1887. The only argument urged that the judgment is void upon its face is that an administrator has no power to assign a judgment. It is settled, however, that a judgment is an assignable chose in action upon which an action can be sustained in the name of an assignee: Wood v. De Coster, 66 Me. 542; Ware v. Bucksport etc. R. R. Co., 69 Me. 97. We do not see why a judgment cannot be assigned by an administrator as well as any other chose in action belonging to the estate. It follows that the Hudson judgment is not void upon its face.

[432] It is claimed that the Thompson judgment had become subject to the right of Thompson's widow for an allowance before the assignment of it to Hudson by the administrator, and it is argued that as there was no effectual transfer of the judgment by that assignment, the Hudson judgment was void. That question, however, is not open in these actions. Brawn had his day in which to question the efficacy of the assignment. Neither he nor anyone claiming under him can now question it in collateral proceedings. As to the parties

to these actions, the question is wholly res inter alios, between the administrator and the widow or the heirs or creditors of Thompson or between Hudson and them.

In the absence of any evidence of collusion or other fraud on the part of Hudson or Brawn in obtaining the judgment, Hudson v. Brawn, it must be held valid until satisfied or reversed, and its effect was to make Hudson a judgment creditor of Brawn with all the rights against Brawn of a judgment creditor Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Treat v. Maxwell, 82 Me. 76, 19 Atl. 98.

Hudson, having obtained a valid judgment against Brawn, found upon the records in the registry of deeds a record of a deed of the demanded land from the town of Foxcroft to his judgment debtor Brawn, dated January 9, 1869, and recorded January 25, 1873. Not finding upon the records any record of a deed of the land from Brawn after the date of his deed from Foxcroft, Hudson levied his judgment upon the land as the land of Brawn. No defect in the proceedings of levy and sale is shown, and hence Hudson acquired at least a prima facie title to the land, which title admittedly has come to these plaintiffs.

The defendants also claim title under Brawn, but only under a deed from him dated September 22, 1868, and recorded October 1, 1868, both some months before he received any deed from Foxcroft and before any legal title had vested in him. The defendants urge, however, that the title which afterward accrued to him under his deed from Foxcroft January 9, 1869, inured to his grantee under his prior deed of September 22, 1868, so that no title remained in Brawn to be acquired by anyone. That deed was a deed of release and quitclaim, in which the only express covenant was that of nonclaim, [433] as follows: "So that neither I, the said grantor, nor my heirs, nor any other person or persons claiming from or under me or them, or in the name, right or stead of me or them, shall or will by any way or means have, claim or demand any right or title to the aforesaid premises or their appurtenances or to any part or parcel thereof forever." It is the settled law of this state that such a deed with only that covenant operates to pass the grantor's then existing title only, and does not operate to pass an after-acquired title: See Bennett v. Davis, 90 Me. 457, 38 Atl. 372, where the reasons and the authorities are stated at length.

The defendants claim, however, that there are implied covenants in the deed which do operate to pass the after acquired title. It appears that the town of Foxcroft at its annual

March meeting of 1868 "Voted to authorize the treasurer to deed to Seth Brawn by release deeds Lots 13, 14 and 15 in the 11th Range and Lot No. 15 in the 10th Range for the sum of eighty dollars"; but, as already stated, no deed was given till January 9, 1869, and it does not appear that he had paid the eighty dollars till then. In his deed given September 22, 1868, after the vote of the town but before he received the deed authorized by that vote, Brawn described the land he was quitclaiming as follows: "Lots numbered fifteen in the 10th range and fifteen in the 11th range of lots in said Foxcroft, and being a part of the land purchased by me of the town of Foxcroft." The defendants urge that these words, in view of the facts above stated, constitute in effect a covenant that he then had, and was conveying, an actual title and estate in the land described, and a covenant to make that title good.

Even if such a covenant would operate to pass an after-acquired title, we do not think it can be reasonably implied. The words "and being part of the land purchased by me of the town of Foxcroft" are not in their connection words of covenant, but merely words of description or identification. They no more imply a covenant of title than did similar words in the deed under consideration in Bennett v. Davis, 90 Me. 457, 38 Atl. 372.

It follows that the record title to the demanded land is in the plaintiffs. Though Brawn had not occupied the land, it does not [434] appear that Hudson had any actual notice of any deed from him, nor is any title by adverse possession set up by the defendants, and hence the plaintiffs are entitled to judgment.

Judgment for plaintiffs in each case.

Judgments are Assignable under the law of most of the states: See the note to Chilstrom v. Eppinger, 78 Am. St. Rep. 47.

The Powers of Executors at the common law are discussed in the note to Fletcher v. American Trust etc. Co., 78 Am. St. Rep. 171.

CAMERON v. LEWISTON, BRUNSWICK AND BATH STREET RAILWAY COMPANY.

[103 Me. 482, 70 Atl. 534.]

STREET RAILROADS—Contributory Negligence in Coming in Contact with a Pole.—It is not negligence per se, on the part of a passenger on a street-car, not to anticipate that a pole may be permitted to stand so near the railroad track that he cannot, in an erect position and careful manner, pass from one seat in the car to another over the running-board without danger of injury from collision with such pole. (p. 319.)

STREET RAILROADS—Duty to Anticipate the Customs of Passengers.—A street railway is a public corporation and its great experience makes it familiar with the habits of people riding on its cars, and with their natural tendency, with or without reason, to move from seat to seat, and with such special means of knowledge, it should be held to anticipate that a passenger riding upon one of its cars may, at any place along the line, and while the car is in motion, undertake to change his seat. (p. 319.)

STREET RAILROADS—Negligence—Duty to Passengers.—It establishes a safer rule of law to require street railroads to exercise a degree of care sufficient for the protection of their passengers with respect to poles and other obstacles along their right of way when such protection involves only a question of pecuniary outlay, than to hold that such railroad company may be permitted, for the mere purpose of saving expenditure, to continue the maintenance of a structure which may be calculated, sooner or later, to result in the injury or death of a passenger. (p. 319.)

STREET RAILROADS—Negligence in not Removing Pole.—The exercise of due care of a railroad to its passenger requires that the latter should have moved a pole along its right of way to such a distance from the tracks as would have enabled the passenger to have moved from seat to seat along the running-board of the car without injury; and it has no right to continue the pole in such close proximity to the car as to injure such passenger and subject future passengers to constant menace of injury or death. (p. 320.)

STREET RAILROADS—Negligence—Duty of Passengers to Anticipate Danger.—A passenger standing upon the running-board of a street-car for the purpose of changing his seat is no more bound to anticipate the dangerous proximity of a pole to the car than a passenger riding on the running-board because the seats are full. (p. 321.)

STREET RAILROADS — Negligence — Proximity of Obstructions.—It is negligence for a street railway company to permit permanent obstructions to stand so near its tracks that passengers getting on or off its cars or riding thereon are in danger of coming in contact therewith, and it is for the jury to determine whether a given obstruction is so situated. (p. 321.)

STREET RAILROADS—Negligence—Chartered Rights as Defense.—The chartered rights of a street railroad company, and the location of its tracks and poles give it the right to exist but not to destroy. They can under no circumstances exempt it from the consequence of its negligent acts. (p. 322.)

STREET RAILROADS—Passengers—Contributory Negligence. Whether or not it constitutes contributory negligence for a passenger on a street-car to ride on the running-board thereof while it is in motion is a question for the jury to determine. (pp. 323, 324.)

STREET RAILWAYS—Passengers—Contributory Negligence. Unless a passenger riding on the running-board of a moving street-car had knowledge that poles on the right of way were in such close proximity to the track as to be dangerous to one thus riding, he cannot be charged with contributory negligence. (p. 324.)

STREET RAILROADS—Negligence—Notice as Defense.—A notice upon the back of the seat of a street-car reading, "Avoid accidents; wait until the car stops," refers to passengers attempting to alight from moving cars and not to passengers riding on the running-board of such car. (p. 325.)

B. Potter and A. N. Williams, for the plaintiff.

W. H. Newell, for the defendant.

[484] SPEAR, J. This case involves an action for damages by the plaintiff, as administratrix, for injuries received by her husband while riding as a passenger upon the defendant's car on lower Washington street, in the city of Bath, alleged to have been caused by the defendant's negligence.

The facts show that the plaintiff's intestate boarded an open car [485] going northerly toward Bath in the early evening. At first he sat upon one of the rear seats. He sat for a minute or so, then, while the car was in motion, stepped to the running-board on the pole side of the car, for the apparent purpose of taking a seat nearer the front. In so doing he was struck by a trolley-pole and was so injured by the impact that he died in eleven days. The seating capacity of the car was seventy-two. There were upon it from sixteen to twenty passengers. The side of the pole toward the track was thirty and three-fourths inches from the east rail at the ground. It leaned toward the track so that six feet up it was twenty-eight and three-fourths inches to a point vertically above the east side of the east rail—that is, the pole leaned two inches in six feet. The car was seven feet nine inches wide, the running-board eight and one-half inches wide, sixteen and one-half inches from the ground and sixteen inches below the floor of the car. It was three and one-half inches from the running-board to the pole. At a distance of five and one-half feet above the running-board it was eight and one-half inches from the grab-handle to the pole. As the handle projected outward from the side of the car three and one-half inches, it was exactly one foot from the side of the car between the grab-handles and the pole, five and one-half feet above the running-board. The decedent was about five and one-half feet in height and weighed about one hundred and sixty pounds. The car was going at a reasonable rate of speed. The track is laid on the easterly side of the street, the highway travel being westerly of the track.

The deceased was a spar manufacturer, with his place of business on the same side of the street as the track. His residence where he had lived four or five years prior to the accident was on the same side of the street, and both were a short distance only from the trolley-pole by which he was injured. He frequently rode past it on the car to the city.

There is so little conflict between the testimony of the plaintiff and the defendant with respect to the above statement of facts that, for the purposes of consideration in this case, they may be regarded as undisputed. In favor of a verdict the court will sustain every inference of fact that can be deduced from the evidence, considered in the light most favorable to the contention of the winning party.

Therefore, in addition to the conceded facts, the jury were also authorized to find from the evidence that the plaintiff's intestate, in [486] attempting to move from one seat in the car to another, was standing erect upon the running-board when struck by the pole, and, in all other respects, in the exercise of due care, if the act itself, however, carefully performed, was not negligence per se; that at the height of a man's head and shoulders above the running-board, the distance was only eight and one-half inches between the grab-handles and the pole, or one foot between the side of the car and the pole; that while the car was passing that pole a man of ordinary size, or even less, standing on the running-board and facing the direction in which the car was going, could not, however closely he clung to the side of the car, avoid a collision with the pole; that the defendant at the time did not give any notice to the occupants of the car, and that it had never given any notice of the proximity of the pole to the car, and that it appeared to have been the only pole in that vicinity that was dangerous to a man standing on the running-board of an ordinary car; that while the plaintiff had general knowledge that there was a line of poles along the east side of the track, he had no specific knowledge of the proximity of the particular pole by which he was injured.

It also appeared that upon the back of each seat, in legible letters plainly to be seen, were the words: "Avoid accidents; wait until the car stops."

The defendant also put in evidence, as a part of its case, the charter of the railroad company and the records of the city of Bath, tending to show a legal location of the railroad, and particularly, the legal location of the track and poles, including the pole upon which the plaintiff was injured, on the east side of Washington street, where the accident oc-

curred. For the purposes of this case a legal location may be conceded.

Under this evidence three questions were submitted to the jury: 1. Was the defendant negligent? 2. Was the plaintiff's intestate guilty of contributory negligence? 3. The assessment of damages. It is admitted that the amount of damages, if maintainable, is reasonable. No further allusion, therefore, will be made to this question. The jury found upon the other questions that the [487] defendant was guilty of negligence, and that the decedent was not guilty of contributory negligence, or, affirmatively stated, was in the exercise of due care.

1. Was the defendant negligent? The ground upon which the defendant claims exemption, as we understand it, is that it had a right to maintain a pole as near to its track or car as it pleased, provided it did not come in contact with passengers occupying seats in the car, or with those riding elsewhere with the permission of the company. In other words, that the plaintiff had no right to move from seat to seat as he was attempting to do, and that consequently the defendant owed no duty to him while so doing. This must necessarily be the defendant's position, as it requires no argument to demonstrate that it was not authorized to maintain a pole in such a position as to injure a passenger in any situation upon the car where had a right to be. If the plaintiff had no right to be upon the running-board, the defendant was not negligent; if he did have a right to be there, then it is a question of fact for the jury to say whether he exercised that right in a prudent or negligent manner. As the negligence of the defendant depends upon the duty owed to the plaintiff, it is evident that these two questions must become more or less blended, even in an endeavor to discuss them separately.

We do not understand that the defendant seriously questions the propriety of the verdict if the facts conceded and inferred by the jury were sufficient to constitute the basis of a legal cause of action, but emphatically urges that the controlling fact in the case, that the decedent was voluntarily moving by way of the running-board from one seat in the car to another, was evidence per se of negligence; an act which the defendant could not be reasonably held to have anticipated; while the location and use of the pole upon which he was injured were facts which the decedent should be held to have anticipated, and that, consequently, the verdict of the jury, admitting all the facts to be true, was erroneous in law.

Of course it follows, if the defendant owed no duty to a passenger upon one of its cars, who attempted to move while the car was in motion from one seat to another by way of the running-board, it [488] was not guilty of negligence in setting or using a pole erected at any distance from the running-board, however near. On the other hand, if the defendant did owe to a passenger upon its cars the duty of using poles, erected at such a distance from the running-board that a passenger, standing erect and otherwise in the exercise of due care, could pass from one seat in the car to another without danger of collision with the pole, then, whether the defendant should be held to be negligent in using a pole thus located was a question of fact to be submitted to the jury.

It is too narrow a construction, and against good public policy, to hold that it is negligence per se, on the part of a passenger riding on a trolley-car, not to anticipate that a pole may be permitted to stand so near the railroad track that he cannot, in an erect position and careful manner, pass from one seat in the car to another over the running-board without danger of injury from collision with such pole.

The defendant is a public corporation. It receives all its privileges from the public. It depends upon the public for its income. It invites and induces the public to ride upon its cars. Great experience makes it familiar with the habits of people so riding and with their natural tendency, with or without reason, to move from seat to seat. With its special means of knowledge, it should be held to anticipate, what is even a matter of common knowledge, that a passenger riding upon one of its cars may, at any place along the line and while the car is in motion, undertake to change his seat. Who has not done it? It establishes a safer rule of law to require street railroads to exercise a degree of care sufficient for the protection of their passengers with respect to poles and other obstacles along their rights of way, when such protection involves only a question of pecuniary outlay, than to hold that such railroad may be permitted, for the mere purpose of saving expenditure, to continue the maintenance of a structure which may be calculated sooner or later to result in the injury or death of a passenger.

When the facts disclose a situation dangerous to life or limb into which, from its very nature, it is practically certain even prudent men may be induced to enter, and it is practicable to [489] remove such danger, without injuriously interfering with other rights or privileges, then the court should

curred. For the purposes of this case a legal location may be conceded.

Under this evidence three questions were submitted to the jury: 1. Was the defendant negligent? 2. Was the plaintiff's intestate guilty of contributory negligence? 3. The assessment of damages. It is admitted that the amount of damages, if maintainable, is reasonable. No further allusion, therefore, will be made to this question. The jury found upon the other questions that the [487] defendant was guilty of negligence, and that the decedent was not guilty of contributory negligence, or, affirmatively stated, was in the exercise of due care.

1. Was the defendant negligent? The ground upon which the defendant claims exemption, as we understand it, is that it had a right to maintain a pole as near to its track or car as it pleased, provided it did not come in contact with passengers occupying seats in the car, or with those riding elsewhere with the permission of the company. In other words, that the plaintiff had no right to move from seat to seat as he was attempting to do, and that consequently the defendant owed no duty to him while so doing. This must necessarily be the defendant's position, as it requires no argument to demonstrate that it was not authorized to maintain a pole in such a position as to injure a passenger in any situation upon the car where had a right to be. If the plaintiff had no right to be upon the running-board, the defendant was not negligent; if he did have a right to be there, then it is a question of fact for the jury to say whether he exercised that right in a prudent or negligent manner. As the negligence of the defendant depends upon the duty owed to the plaintiff, it is evident that these two questions must become more or less blended, even in an endeavor to discuss them separately.

We do not understand that the defendant seriously questions the propriety of the verdict if the facts conceded and inferred by the jury were sufficient to constitute the basis of a legal cause of action, but emphatically urges that the controlling fact in the case, that the decedent was voluntarily moving by way of the running-board from one seat in the car to another, was evidence per se of negligence; an act which the defendant could not be reasonably held to have anticipated; while the location and use of the pole upon which he was injured were facts which the decedent should be held to have anticipated, and that, consequently, the verdict of the jury, admitting all the facts to be true, was erroneous in law.

Of course it follows, if the defendant owed no duty to a passenger upon one of its cars, who attempted to move while the car was in motion from one seat to another by way of the running-board, it [488] was not guilty of negligence in setting or using a pole erected at any distance from the running-board, however near. On the other hand, if the defendant did owe to a passenger upon its cars the duty of using poles, erected at such a distance from the running-board that a passenger, standing erect and otherwise in the exercise of due care, could pass from one seat in the car to another without danger of collision with the pole, then, whether the defendant should be held to be negligent in using a pole thus located was a question of fact to be submitted to the jury.

It is too narrow a construction, and against good public policy, to hold that it is negligence per se, on the part of a passenger riding on a trolley-car, not to anticipate that a pole may be permitted to stand so near the railroad track that he cannot, in an erect position and careful manner, pass from one seat in the car to another over the running-board without danger of injury from collision with such pole.

The defendant is a public corporation. It receives all its privileges from the public. It depends upon the public for its income. It invites and induces the public to ride upon its cars. Great experience makes it familiar with the habits of people so riding and with their natural tendency, with or without reason, to move from seat to seat. With its special means of knowledge, it should be held to anticipate, what is even a matter of common knowledge, that a passenger riding upon one of its cars may, at any place along the line and while the car is in motion, undertake to change his seat. Who has not done it? It establishes a safer rule of law to require street railroads to exercise a degree of care sufficient for the protection of their passengers with respect to poles and other obstacles along their rights of way, when such protection involves only a question of pecuniary outlay, than to hold that such railroad may be permitted, for the mere purpose of saving expenditure, to continue the maintenance of a structure which may be calculated sooner or later to result in the injury or death of a passenger.

When the facts disclose a situation dangerous to life or limb into which, from its very nature, it is practically certain even prudent men may be induced to enter, and it is practicable to [489] remove such danger, without injuriously interfering with other rights or privileges, then the court should

establish, as the law, the rule which prevents injury or loss of life, rather than that which invites or even permits it.

We believe it to be a better and safer rule in the case at bar to hold that the exercise of due care required that the defendant company should have moved the fatal pole in question such a distance from its track as would have enabled the decedent to have done just what he did do, without injury, than to say that the defendant has a right to continue the pole as it was then located, and thereby subject its future passengers to the constant menace of injury or death.

Not only is this rule based upon reason and good public policy, but it is the well settled law.

In San Antonio Traction Co. v. Bryant, 30 Tex. Civ. App. 437, 70 S. W. 1015, the plaintiff was on the running-board moving toward a vacant seat. While crossing a bridge, the space between the bridge and the car not being sufficient to allow his body to pass, he was struck by the bridge and injured. This was held to constitute negligence on the part of the road.

In Elliott v. Newport Street Ry. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208, the court held: "A passenger who rides on the foot-board of a car necessarily takes on himself the duty of looking out for and protecting himself against the usual and obvious perils of riding there; such, for instance, as injury from passing vehicles, or of being thrown off by the swaying or jolting of the car; assuming, of course, proper management of the car and proper construction and condition of the road. We do not think, however, that the danger of being hit by a trolley-pole is such a peril as a passenger whom the railroad company has undertaken to carry on the foot-board of its car is bound to anticipate and be on the lookout for; unless, indeed, it appears that the passenger had knowledge of the close proximity of the track to the trolley-pole. He has a right to assume that the railway company has performed its duty in so constructing its road that its passengers, even on the foot-boards of its [490] cars, riding there by its permission, shall not be exposed to injury by the unsafe construction of its road."

The facts in this case show that the plaintiff was riding on the foot-board with the acquiescence of the company, the car being filled with passengers, but this fact does not distinguish it in principle from the case at bar. It is as much a matter of common knowledge that passengers, with the permission of the company, move from seat to seat while the cars are in motion, as that they ride upon the running-

board when the seats are full. A person standing upon the running-board for the purpose of changing his seat is no more bound to anticipate the dangerous proximity of a pole to the car than a person riding on the running-board because the seats are full. While different motives may prompt them to occupy the running-board, the fact of occupancy, and all the dangers surrounding it, are precisely the same. Every reason which can be urged for anticipating danger in the one case obtains with equal force in the other.

In North Chicago Street R. R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672, the court say: "When a railroad company places its track so near an obstruction which it is necessary for its cars to pass that its passengers, in getting on and off its cars and while riding upon them, are in danger of being injured by contact with such obstruction, it is a fair question for the jury whether the company is or is not guilty of negligence."

In Anderson v. City Ry. Co., 42 Or. 505, 71 Pac. 659, the court say: "The authorities all agree that it is negligence for a street railway company to permit permanent obstructions to stand so near its tracks that passengers getting on and off its cars, or riding thereon, are in danger of coming in contact therewith, and it is generally considered a question for the jury as to whether a given obstruction is so situated." This opinion cites numerous cases. To the same effect are West Chicago St. R. R. Co. v. Marks, 182 Ill. 15, 55 N. E. 67; Mason v. Boston & N. St. Ry., 190 Mass. 255, 76 N. E. 717; Nugent v. Boston etc. R. R., 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797; Withee v. Somerset Traction Co., 98 Me. 61, 56 Atl. 204, and Stone v. Lewiston etc. St. Ry., 99 Me. 243, 59 Atl. 56, while not in point, have some bearing upon the principle here involved. Our [491] conclusion upon this point is, that street railways do owe their passengers a duty with respect to the proximity to the track of poles and other permanent structures, and that whether, in case of an injury to one of their passengers by coming in contact with a pole or other structure, the defendant was negligent in the location and maintenance thereof, is a question of fact for the jury.

While the defendant put in evidence all the records pertaining to its chartered rights, the location of its tracks and poles by the city, and approval of the same by the railroad commissioners, as an element of defense, it has laid but little stress upon these features in the argument, yet perhaps all they would bear. All these proceedings, assuming them

to be in all respects legal, were intended to bestow upon the defendant the right to exist, not to destroy. They were calculated to confer upon it the right to exercise all the privileges of its franchise, but not immunity from its negligence. They do not, therefore, exempt it from the consequences of its negligent acts.

The verdict of the jury upon the question of the defendant's negligence was fully warranted by the evidence and clearly right.

2. Was the plaintiff's intestate guilty of contributory negligence? We have already stated the facts and inferences from the facts authorized to be found by the jury, and held as a matter of law that it was not negligence per se for the decedent to have attempted to move from one seat to another as he did when he was injured. The only question of fact, therefore, left for discussion is whether the evidence warranted the finding that the decedent while in the attempted act of moving was in the exercise of due care. We have already suggested that the jury were authorized to infer from the evidence "that the plaintiff's intestate in attempting to move from one seat in the car to another was standing erect upon the running-board when struck by the pole and in all other respects in the exercise of due care." The only explanation which need be here added is that the phrase "and in all other respects in the exercise of due care" is intended to mean that the accident producing the decedent's injuries was not due to any of the ordinary risks assumed by a passenger who undertakes to ride upon the running-board of a trolley-car, such as the meeting of other vehicles, the jolting and jostling of the car, or the sudden rounding of a curve, [492] and that he was not swinging himself out from the car in such a manner that the unnecessary swerving of his head and body, to accomplish his purpose, contributed to the accident.

The defendant, however, contends that, admitting all the facts and inferences found by the jury to be true, yet the decedent was guilty in law of negligence per se in standing upon the running-board as the evidence shows he did. As to what constitutes contributory negligence, there are two broad classes of cases promulgated by the courts of this country—one holding that electric railroads should be governed by the rules of law applied to the operation of horse railroads; the other that they should come within the analogy of steam railroads. In the latter class, it is held to be negligence per se to ride upon the platform or running-board of a moving

car, but in the former class it is otherwise, and the question of negligence is regarded as a question of fact. Several states in the Union hold electric roads to the analogy of the steam roads, but a large majority of the states, including Maine, have established the other rule. This question was specifically raised in Watson v. Portland & Cape Elizabeth Ry. Co., 91 Me. 584, 64 Am. St. Rep. 268, 40 Atl. 699, 44 L. R. A. 157. In this case the passenger was voluntarily riding upon the front platform of the car. The car was rounding a sharp curve approaching a switch with such speed that the motorman was unable to see whether it was properly set or not, and, the switch being open, the car was propelled so rapidly on the siding as to cause violent jarring and jolting. The justice in ordering a nonsuit said to the jury: "It is settled as a legal question that one who rides upon the platform of a car, and is injured by being thrown from it as the car rounds a curve, is guilty of contributory negligence." In other words, that the mere fact of voluntarily riding upon the front platform of a car constituted negligence per se. But the court held otherwise, saying: "In our opinion this was not a correct statement of law when applied to a street railroad car, whether propelled by horses, electricity or otherwise. Riding upon the platform of such cars is too much encouraged by transportation companies and too much indulged in by the public for the court to say, as a matter of law, that the mere riding upon the platform of such a car is conclusive [493] evidence of negligence, or is negligence per se, or is negligence in law. It depends upon too many other circumstances and conditions for a court to lay down any hard-and-fast rule in regard to it; but it is a fact which should ordinarily be submitted to the jury in connection with all of the other circumstances of the case."

The principle enunciated in this case, and the reasons therefor, are as clearly applicable to the situation of a passenger riding upon the running-board as to one riding upon the platform.

In San Antonio Traction Co. v. Bryant, 30 Tex. Civ. App. 437, 70 S. W. 1015, the Maine rule is applied to the running-board, and the court say: "It is not negligence per se to stand upon the platform, steps or running-board of an electric street-car which is crowded; and the weight of authority supports the rule that it is not contributory negligence as a matter of law for a passenger to stand upon the platform of a car or running-board, whether there be vacant seats or not in the inside of the car, and whether the passenger be standing on the

platform, running-board or steps, the question of contributory negligence is held to be in a majority of cases for the jury to determine": See, also, Fort Wayne Traction Co. v. Hardendrof, 164 Ind. 403, 72 N. E. 593; Joyce on Electric Law, sec. 540; 3 Thompson on Negligence, secs. 3572-3577. The last two authorities are precisely in point.

It is not the result of the Maine rule that a passenger assumes no risk by riding on the platform or running-board of a moving car, for it is well-settled law that he must assume all the usual and obvious perils attendant upon his position. It simply declares that the question of a passenger's negligence and assumption of risks, while riding upon the platform or running-board of a street-car, shall be submitted to the jury as a question of fact.

Another defense suggested is, that the plaintiff's intestate must have had knowledge of the proximity to the track of the pole upon which he was injured, or by the exercise of due care ought to have known it. This would undoubtedly afford a good defense if established, but it was a question for the jury (Withee v. Somerset Traction Co., 98 Me. 61, 56 Atl. 204), and upon this proposition the jury found in favor of the plaintiff. Upon this contention we find no adequate reason for disturbing [494] the verdict. It may be conceded that the decedent had a general knowledge that the poles in the vicinity where he was injured were near the track, but such knowledge, unless he knew they were near enough to be dangerous to one standing on the running-board with due care, would not charge him with contributory negligence: Withee v. Somerset Traction Co., 98 Me. 61, 56 Atl. 204; Nugent v. Boston etc. R. R., 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797; Powers v. Boston, 154 Mass. 60, 27 N. E. 995; Ferren v. Old Colony R. R. Co., 143 Mass. 197, 9 Atl. 608; Wheeler v. South Orange & M. T. Co., 70 N. J. L. 725, 58 Atl. 927; 3 Street Railway Reports, 631; Hesse v. Meriden S. & C. T. Co., 75 Conn. 571, 54 Atl. 299.

The only other defense interposed is that upon the back of each seat was plainly and legibly written the words, "Avoid accidents; wait until the car stops," which the defendant claims the plaintiff must have seen, and was, therefore, direct notice to him not to occupy the running-board while the car was in motion, and that, if he did so, he assumed the risk of whatever might happen, and was also guilty of contributory negligence in doing a forbidden act. While the evidence in the case might have justified the jury in finding a waiver of the notice, if construed as the defend-

ant contends, yet it is unnecessary to consider this question, as the notice will not bear the construction urged. This notice must be construed to have been intended by the defendant as a caution to passengers against alighting from a car in motion, and not as an exemption from its own negligence. If not so intended, it was calculated to so impress the mind of the ordinary passenger.

An allusion to the reason for the notice seems to determine its purpose. One can move about upon the surface of a moving body, subject only to those dangers incident to the motion. But it is a universal law that, if a person alights from a moving vehicle, he is subject to the inevitable tendency of being hurled to the ground in the direction of the motion. Jumping from moving cars, with frequent injury, always has been, and is now, a practice of such common occurrence, that the notice upon the back of seats was undoubtedly intended to operate as a check upon the natural inclination of passengers to alight from a car before it stops when approaching a stopping-place.

Motion overruled.

The Negligence of a Railroad Company in Allowing Structures so near its track as to come in contact with passengers on its cars is discussed in Kird v. New Orleans etc. Ry. Co., 109 La. 525, 94 Am. St. Rep. 452; Clerc v. Morgan's etc. Steamship Co., 107 La. 370, 90 Am. St. Rep. 319.

CASES

IN THE

SUPREME COURT

OF

MASSACHUSETTS.

PRICE v. PARKER.

[197 Mass. 1, 83 N. E. 323.]

PARTNERSHIP, Agreement to Pay All Liabilities of.—If, on the dissolution of a partnership, one of the partners agrees to take up, pay and discharge all its debts and liabilities as the same shall fall due, he is liable to reimburse his copartners for moneys paid by the latter to satisfy a judgment recovered against the firm after its dissolution for damages sustained by the judgment creditor by false representations made by the partnership in the sale of certain securities. (p. 328.)

PARTNERSHIP, Agreement to Pay Debts and Liabilities of, When not Illegal.—A judgment against a dissolved partnership for damages sustained by the judgment creditor by false representations made by the firm is within the provisions of an agreement by one of the partners with the other to pay all liabilities of the firm, and, so construed, the agreement is not illegal as an attempt by one wrongdoer to enforce contribution against another. (p. 328.)

Action against the principal and sureties on a bond given to a retiring partner to the one continuing in business. The defendants asked the trial judge to rule that the plaintiff could not recover because the demand or contract on which the recovery was sought was not a legal debt or liability, and that if both the partners were guilty of false representations, they were in pari delicto. The judge, refusing to so rule, found for the plaintiff, and the defendants alleged exceptions.

T. Parker, for the plaintiff.

G. A. Perkins, for the defendants.

[2] MORTON, J. The plaintiff and the defendant, Arthur T. Parker, whom we shall speak of as the defendant, were formerly copartners engaged in the brokerage and insurance

business. In June, 1893, the firm was dissolved by an agreement in writing under seal. The business was taken over by Parker, and one of [3] the provisions of the agreement of dissolution was that he should "take up, pay and discharge all the debts and liabilities of the said copartnership as the same shall fall due." The bond in suit was given to insure the performance of this and other covenants contained in the agreement. One of the recitals in the bond is, "Whereas the said A. T. Parker also agrees to assume and pay all the debts and liabilities of the said copartnership, as the same shall fall due"; and this is followed by the condition, amongst others, that "if the said A. T. Parker shall also assume and pay all the debts and liabilities of said A. T. Parker & Co., then this obligation shall be void, otherwise it shall be and remain in full force and virtue." After the dissolution of the firm one Whiting brought an action against the former copartners to recover damages caused by alleged false representations made to him in the sale by the firm of certain securities. Whiting recovered judgment, and the plaintiff, in order to prevent his property from being levied on, paid the amount due on the execution. This is an action to recover the amount so paid.

The defendant contends that the amount paid by the plaintiff did not constitute a debt or liability within the meaning of those words as used in the bond and agreement of dissolution. It is not necessary to consider whether Whiting's claim constituted a debt before it was reduced to judgment, or whether after it was reduced to judgment it came within the scope of the obligations assumed by the defendant as a debt. It is clear, we think, that it was at all events a liability, and as such came within the terms of the bond and agreement. The words "liable" and "liability" are terms of large significance, and in the absence of anything limiting their scope include obligations arising out of torts as well as out of contracts. In the present case the parties were contracting, the one with reference to the purchase of the business and the assumption of the debts and liabilities, and the other in reference to a sale of the business and a release from the debts and liabilities, and we see no reason why the word "liabilities" should be given a restricted meaning. There is no enumeration of the debts and liabilities to be assumed by the defendant, and the natural inference would be that he was to assume all of them. The words "as the same shall [4] fall due" do not indicate that the "liabilities" were those arising ex contractu, but rather that the parties

intended to guard against indefinite delay in the settlement by the defendant of the debts and liabilities of the firm.

The defendant further contends that the agreement is illegal. But we see nothing illegal in an agreement by the continuing partner to indemnify the retiring partner against liabilities which do or may include an action for alleged false representations against the firm. Such an agreement is not an attempt by one wrongdoer to enforce contribution against another. Nor is it a case where two parties have conspired to commit an actionable wrong in consideration of the agreement by one of them to indemnify and hold harmless the other against the consequences thereof. The case before us relates to a tort for which the firm was liable and not to a crime which had been committed. As already observed, we see nothing illegal in the agreement.

Exceptions overruled.

The Rights, Liabilities and Remedies of Partners after the dissolution of the firm are discussed in the note to Gilmore v. Ham, 40 Am. St. Rep. 561.

COMMONWEALTH v. ACKER.

[197 Mass. 91, 83 N. E. 312.]

PARENT AND CHILD—Refusal to Support a Child Who has Never been Within the State.—Under a statute making criminal the unreasonable neglect to provide for the support of one's minor child, a father may be convicted for failure to support his child, though he and the mother, being domiciled within the state, are aliens, and the child has never been therein. (pp. 329, 330.)

Prosecution for failure to support a minor child. The defendant asked the trial judge to rule that he could not be convicted, if the child had never been a resident of the state or of this country. The judge refused to so rule. The jury returned a verdict of guilty, and the defendant alleged exceptions.

F. Keezer and E. M. Shanley, for the defendant.

W. S. Peters, district attorney, and H. C. Attwill, assistant district attorney, for the commonwealth.

92 KNOWLTON, C. J. The complaint on which the defendant was convicted charged that at Lynn, in the county of Essex, he, "being of sufficient ability, did unreasonably

neglect to provide for the support of his minor child, Percy W. Acker." The defendant was then living in Lynn, and his wife was living apart from him in this commonwealth. They were both subjects of Great Britain, having formerly lived in Nova Scotia, where they separated more than seven years ago. Their child, Percy W. Acker, was born there, and has never been in this commonwealth. The defendant was neglecting to provide for the support of this child when the complaint was made, and he has made no provision for him at any time within the last seven years, since the abandonment of him in Nova Scotia. The defense relied upon grows out of the foregoing facts as to resident and citizenship.

The case comes within the express terms of the Statutes of 1906, chapter 501. That statute prescribes punishment for the offense of unreasonably neglecting to provide for the support of one's wife or minor child, as well as for the abandonment of either of them without adequate support, and it expressly provides that the complaint may be made to the court of the district in which the husband and wife, or either of them, are living, or in which they last lived together.

The defendant's contention is, in substance, that the nature of the offense is such that it cannot be committed if the minor child is an alien whose place of abode is not in the commonwealth.

While one of the objects of the statute is doubtless to prevent [93] wives and children from becoming a charge upon the public for their support, this is not its chief object. The higher and more important purpose of the legislature in passing the law was to provide directly for neglected wives and children, and to punish the infliction of this kind of wrong upon them, and, by the fear of punishment, to deter husbands and fathers from leaving their families to endure privation. There is nothing either in the words or the object of the statute that should limit its application to cases where the neglected person happens to be in this commonwealth at the time of the neglect or at the time of the prosecution for it. A person domiciled in this commonwealth is amenable to the statute, whether his minor child is here when the wrong upon him is committed, or has been carried out of the commonwealth by his father, or has been left by him in another state or country, if, while residing and having his domicile here, he unreasonably neglects to provide for the child. The offender is here, within our jurisdiction. While residing here he ought to make provision for the support of his wife and minor children, whether they are here or else-

where. If he fails to do this, his neglect of duty occurs here, without reference to a place where the proper performance of his duty would confer benefits.

If the domicile of the defendant, as distinguished from a temporary residence, is important under section 5 of the statute, which we do not decide, the facts agreed well warranted a finding that his domicile was in Lynn, notwithstanding that he was an alien: Harvard College v. Gore, 5 Pick. 370; Olivieri v. Atkinson, 168 Mass. 28, 46 N. E. 422; Wilbraham v. Ludlow, 99 Mass. 587; Viles v. Waltham, 157 Mass. 542, 34 Am. St. Rep. 311, 32 N. E. 901; McConnell v. Kelley, 138 Mass. 372.

Exceptions overruled.

On the Liability of a Parent for the support of his minor children, see National Valley Bank v. Hancock, 100 Va. 101, 93 Am. St. Rep. 933, and cases cited in cross-reference note thereto; and on the liability of a child for the support of his parent, see Duffy v. Yordi, 149 Cal. 140, 117 Am. St. Rep. 125, and note.

DYER v. CITY OF MELROSE.

[197 Mass. 99, 83 N. E. 6.]

TAXATION—Salary of an Officer of the United States.—Money is not exempt from state taxation on the ground that it is the proceeds of the salary of an officer of the United States. (p. 331.)

Action to recover a sum paid under protest to satisfy a tax. The plaintiff claimed that the tax was illegal because levied upon money which he had received in payment of his salary as a rear-admiral of the United States navy. Verdict for the defendant, and the plaintiff appealed.

W. H. Hitchcock and C. M. Pratt, for the plaintiff.

C. L. Allen, for the defendant.

99 KNOWLTON, C. J. We do not find it necessary to consider whether the plaintiff has chosen a proper remedy, for, if we assume this in his favor, we are of opinion that he cannot recover. The property said to have been taxed illegally was money on deposit in two national banks. The ground on which the plaintiff claims for it an exemption from taxation is that it was derived from his salary as a rear-admiral in the navy of the United States. He was a resident of the city of Melrose, and was properly taxable there

on all his personal property that was not exempt from taxation. He relies upon the decision in Dobbins v. Commissioners of Erie County, 16 Pet. 435, 10 L. ed. 1022, in which it was held that a state cannot lay a tax upon an office under the government of the United States, nor upon any means or instruments used solely for the maintenance of the federal government or the performance of any of its functions. The principle on which the case was decided has been reaffirmed repeatedly and held to apply to taxation of state officers by the federal government: The Collector v. Day, 11 Wall. 113, 20 L. ed. 122. It [100] precludes taxation by either government of the salary or emoluments of an officer of the other; but it has never been held, under a general provision for the taxation of the property of individual owners, to prevent the taxation of money or other property merely because it was derived from an official salary that had been received and held for use by the officer. The reason of the decision does not go far enough to warrant following the money after it has become a part of the general estate of the owner and has lost its distinctive character as a part of the governmental machinery, which it has up to the time when it passes into the general control of the officer. In Union Pacific R. R. v. Peniston, 18 Wall. 5, 21 L. ed. 787, the doctrine is stated as follows: "It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agencies, or upon the mode of their constitution, or upon the fact that they are agents; but upon the effect of the taxation—that is, upon the question whether the taxation does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform."

When the salary has been paid by the government to one of its officers and has come into his possession, it loses its identity as salary, and becomes money, effects or credits which are liable to taxation under the general law. It is within the principle which was applied, under the statute exempting pensions from a liability for debts, in Kellogg v. Waite, 12 Allen, 529, Spelman v. Aldrich, 126 Mass. 113, and Tully v. Tully, 159 Mass. 91. See, also, Hibernia Savings etc. Soc. v. San Francisco, 200 U. S. 310, 26 Sup. Ct. Rep. 265, 50 L. ed. 495; Blake v. Bolte, 10 Misc. Rep. 333, 31 N. Y. Supp. 124; Melcher v. Boston, 9 Met. 73.

Any other rule would enable one to hold property free from liability to contribution toward the support of the state government, merely because he obtained it as a compensation for services rendered to the federal government.

Judgment for the defendant.

Garnishment.—The Liability of the Salaries of Public Officers to subjection for the payment of their debts is discussed in the note to Dickinson v. Johnson, 96 Am. St. Rep. 443.

HATCH v. UNITED STATES CASUALTY COMPANY.

[197 Mass. 101, 83 N. E. 398.]

INSURANCE AGAINST ACCIDENT—Notice of Injury as a Condition Precedent.—Under a policy insuring against injury by accident, providing written notice of the injury is given within a time specified, such notice is a condition precedent, in the absence of which no liability arises. (pp. 334, 335.)

INSURANCE AGAINST ACCIDENT—Notice of Injury, What is and When must be Given.—Under a policy insuring against accident, providing written notice is given within ten days after the injury, the time for giving such notice begins to run on the happening of the accident, though the person is not aware until long afterward that a serious consequence will ensue. Hence, the time of giving such notice cannot be postponed until the death of the insured, on the ground that not till then had the injury occurred within the meaning of the policy. (p. 335.)

INSURANCE, ACCIDENT—Reasonableness of Condition Requiring Notice.—A condition in a policy insuring against injury by accident requiring a notice of the injury to be given within ten days of such accident is reasonable. (p. 336.)

A. J. Bailey and D. R. Smith, for the plaintiff.

R. Spring, for the defendant.

101 HAMMOND, J. This is an action brought by a beneficiary upon two insurance policies. The declaration contains two counts, one on each policy; and the question upon each count is whether upon the allegations therein contained it appears that the notice required by the policy was seasonably given to the defendant. So far as material to this question the language is 102 the same in each of the policies and the allegations are the same in each count; and therefore in discussion we shall speak only of the first count.

The allegations of this count as to notice are as follows: "Item 4. The insured, on July 7, 1906, met with an exclusively external and violent accident, namely, fell, but did not consider the accident of any account; from about August

7, 1906, he was confined to his bed, and on August 11, 1906, within ninety days after the fall, died, and immediately upon the death of the plaintiff, was informed and before that time had no knowledge or information that the death was effected exclusively by the fall; the death was not from any cause excepted in the policy. The plaintiff thereupon within four days after the death gave notice thereof to the defendant at its Home Office with the fullest information obtainable at the time, and this was the only notice given up to that time to the company by the insured or the beneficiary; all other things to be done or observed as provided in the policy were so done or observed."

The policy is a long document. It recites that the defendant company, in consideration of a certain premium and of the warranties and agreements in the application "which is made a part hereof," insures Cyrus J. Hatch "against loss as hereinafter provided, caused by bodily injury effected exclusively by external, violent and accidental means, provided written notice of the injury, whether fatal or nonfatal, together with the fullest information obtainable at the time be given by the insured or the beneficiary to the home office of the company within ten days of the event causing such injury, to wit, (a) loss of life occurring within ninety days of the event causing the injury five thousand dollars; (b) loss of both eyes, meaning total and permanent blindness for life occurring within ninety days of the event causing the injury, the amount stipulated for loss of life." And thus the policy proceeds to enumerate several other kinds of loss insured against, such as that of an arm, hand or foot, stipulating in each case that the loss shall occur within "ninety days from the event causing the injury." It also enumerates as among the things insured against, (k) "total loss of time, meaning that period immediately following the event causing the injury during which the insured is thereby rendered, independently of any and [103] all other causes, wholly and continuously unable to transact each and every part of the duties pertaining to his occupation," twenty-five dollars a week, "not to exceed one hundred and four consecutive weeks"; also "(l) partial loss of time," and "(m) total disability for life," occurring in each case "independently of any and all other causes" and "immediately following the event causing the injury." Then follows the statement that "if an injury, whether fatal or nonfatal, is caused or contributed to, primarily or secondarily, wholly or partly, directly or indirectly, by" any one of the many things or

under certain conditions there enumerated in great detail, the liability of the company for any of the losses shall be only one-half of the amount previously stipulated. These various causes or conditions of injury are not here set out, but upon reading them in detail it plainly appears that the word "injury" therein spoken of means injury to the person of the insured and nothing else. The same remark may be made of the word "injury" as used in the seventh paragraph of the policy. There are many other provisions in the policy, but, as they have no bearing on the question before us, they are not here set out.

What is the fair construction of this policy as to when the notice must be given? The defendant contends that the event causing the injury is the accident, and hence that the notice must be given within ten days of the accident. The plaintiff contends that there can be no event "causing the injury" until there is an injury, and that, the death of the insured being the injury, a notice given within ten days of the death is sufficient, and hence that there is no forfeiture.

It is to be premised that the giving of this notice is not a condition subsequent, as it has been sometimes called. It is not simply a part of the rule of procedure for the enforcement of the liability of the defendant, as are the provisions of the fifth paragraph in this same policy providing for proofs of loss. The promise to insure is not absolute, but conditional. The condition is that the notice, whatever it may be and by whomsoever or whenever given, shall be given. It is a condition precedent to the creation of liability or to the life of the promise; or, to put it perhaps in a better way, the giving of the notice is one of the essentials of the cause of action.

[104] It is further to be observed that we are not dealing with a case where it was impossible to give a notice, as where death is contemporaneous with the accident, and the fact of death is not known nor can be known until more than ten days after the accident. In the case before us the insured lived more than a month after the accident, apparently in his usual health, for "he did not consider the accident of any account."

The insurance is "against loss caused by bodily injury effected exclusively by external, violent and accidental means." It is perfectly plain that the injury here spoken of is injury to the person of the insured, and this construction is borne out by the subsequent provisions of the policy.

Hence, of course, it is an injury suffered by the insured and not by the beneficiary. Moreover, it is an injury caused by external, violent and accidental means. Any injury from other means or causes is not included. The injury is to be traceable exclusively to the accident to the person. If it is so traceable, then, no matter when the symptoms appeared or when they were recognized, it is covered by the policy; otherwise it is not. Every pain or result traceable to the accident, no matter how remote in time, is potentially caused at the time of the accident. Nothing is more familiar than this rule. It is constantly applied, especially in cases where damages are sought for injuries to the person. Within the contemplation of the law and by the construction of the contract the liability, when finally fixed, not only goes back to the accident, but also goes forward to the time, no matter how far in the future, when there is no longer any result traceable to it; and this is so, entirely irrespective of the question whether or not the insured knows or conjectures what the injury is or will finally develop to be. The event causing the injury is not the injury itself, but is the "external, violent and accidental means" by which the effect upon the body—the injury—is caused. We can see no other sensible construction of the language of the policy. We recognize the principle that in the case of an ambiguity in the meaning of an insurance policy complicated in its terms and drawn up by the insurer, every doubt is to be resolved in favor of the insured, to the end that the purpose of the contract, which is one of indemnity against loss, may be attained; but we must also recognize another principle equally imperative, [105] namely, that parties have the right to make their own contracts and, in the absence of fraud, or some other legal reason justifying a repudiation or breach, must be held bound by them. Hence where, as in the case before us, there is but one reasonable construction of the contract possible, no matter how hard that construction may seem to be in its result upon one or both of the parties, we are not at liberty to reject it, but must expound the writing as it was made and as it stands.

In the case before us the event causing the injury occurred on July 7, 1906. The insured did not think he was hurt, and upon the allegations of the declaration it must be assumed that he was apparently in his usual health until about August 7th of the same year, when he was confined to his bed, dying four days afterward. He knew of his fall and must

be taken to have been in full possession of his faculties, and capable of giving the notice of it to the defendant within ten days thereafter. He had voluntarily become a party to the contract and had made himself liable to its conditions, including the one with reference to notice. He could have taken either one of two courses. He could have given the defendant seasonable notice, and then it would have been bound by the results to him of the fall, or he could have acted upon his own idea of the fall and have taken the consequences himself. He could not take a third course, namely, give no notice and still hold the defendant. By failing to give notice under these circumstances, he in substance gave up his right to hold the defendant, so that at the time of his death the defendant was free from liability for its fall and its consequences.

After his death it was not in the power of the beneficiary to revive the right lost by the insured in his lifetime. While it is true that the contract provided that, in case of the death of the insured from any risk insured against, the indemnity was to be paid to her if surviving, still her rights as a beneficiary rest upon the contract, and the failure of the insured to fix the liability of the defendant by a notice was a failure to complete the contract, not only so far as concerned any benefit to him or his estate, but also so far as concerned any to her.

If it be said, as it sometimes is, that such a defense is purely technical, the answer (if one is needed) is that the provision for [106] notice is of the essence of the contract, that it is manifestly an important provision for the protection of the insurer against fraudulent claims, and also against those which, although made in good faith, are not valid. It is a provision which tends to the elucidation of the truth when a claim for indemnity is made. It was one to which the insured agreed, and it is not unreasonable: See for authorities bearing upon the question, Moore v. Wildey Casualty Co., 176 Mass. 418, 57 N. E. 673; Swain v. Security Livestock Ins. Co., 165 Mass. 321, 43 N. E. 105; Mandell v. Fidelity & Casualty Co., 170 Mass. 173, 64 Am. St. Rep. 291, 49 N. E. 110; Paul v. Fidelity & Casualty Co., 186 Mass. 413, 104 Am. St. Rep. 594, 71 N. E. 801; Gamble v. Accident Ins. Co., 4 Ir. Rep. 204; Patton v. Employers' Liability Assur. Corp., 20 L. R. Ir. 93; Whalen v. Equitable Accident Co., 99 Me. 231, 58 Atl. 1057; Heywood v. Marine Mut. Accident

Assn., 85 Me. 289, 27 Atl. 154; Travelers' Ins. Co. v. Nax, 142 Fed. 653 (an instructive case).

Our attention has been called by the plaintiff to several cases upon which she relies in support of her contention, among which are the following: McElroy v. John Hancock Ins. Co., 88 Md. 137, 71 Am. St. Rep. 400, 41 Atl. 112; Phillips v. United States Benevolent Society, 120 Mich. 142, 79 N. W. 1; United States Casualty Co. v. Hanson, 20 Colo. App. 393, 79 Pac. 176; Trippe v. Provident Fund Society, 140 N. Y. 23, 37 Am. St. Rep. 529, 35 N. E. 316, 22 L. R. A. 432; Rorick v. Railroad Officials' & Employés' Accident Assn., 119 Fed. 63, 55 C. C. A. 369 (a majority opinion, the errors of which are well shown in the dissenting opinion by Gilbert, J.); Hoffman v. Manufacturers' Accident Indemnity Co., 56 Mo. App. 301; Odd Fellows' Fraternal Accident Assn. v. Earl, 70 Fed. 16, 16 C. C. A. 596. We have examined them all. In many of them the language in the policy seems to differ materially from the language in the policy before us, and the result reached may have rested upon that difference. But, however that may be, so far as the decision in any of them is inconsistent with the decision in this case, we cannot follow them.

The result is that as to each count the demurrer is sustained.

Judgment for the defendant.

Conditions in Policies of Insurance as to the time of giving notice of loss, accident or death are construed reasonably and most strongly against the insured. If the condition is that the notice must be given immediately or forthwith, it is necessary only that due diligence be exercised and notice given within a reasonable time, regard being had to the circumstances surrounding the case: Aetna Life Ins. Co. v. Fitzgerald, 165 Ind. 317, 112 Am. St. Rep. 223; Woodmen Accident Assn. v. Pratt, 62 Neb. 673, 89 Am. St. Rep. 777, and cases cited in the cross-reference note thereto; Ward v. Maryland Casualty Co., 71 N. H. 262, 93 Am. St. Rep. 514; Horafal v. Pacific Mut. Life Ins. Co., 32 Wash. 132, 98 Am. St. Rep. 846. A condition requiring notice of death within ninety days does not defeat the claims of a beneficiary who does not know of the death until over a year thereafter, but who notifies the insurer at once upon acquiring the knowledge: McElroy v. Hancock etc. Ins. Co., 88 Md. 137, 71 Am. St. Rep. 400. To the same effect are Munz v. Standard Life etc. Ins. Co., 26 Utah, 69, 99 Am. St. Rep. 830; Trippe v. Provident Fund Society, 140 N. Y. 23, 37 Am. St. Rep. 529.

If an Accident Insurance Policy provides that no recovery can be had thereunder unless notice of the claim be given within ten days of the injury, it has been held that the insured who fails to comply with such provision cannot recover, when his only excuse for noncompliance is his ignorance of the existence of the policy: Johnson v. Maryland Casualty Co., 73 N. H. 259, 111 Am. St. Rep. 609. The

requirements in a policy that the insured shall give notice and make proof of loss within a certain time are conditions precedent to the right to sue, but failure to comply with such requirements within the time stipulated does not avoid the policy or work a forfeiture in the absence of a stipulation in the policy to that effect: Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 110 Am. St. Rep. 118.

COMMONWEALTH v. MORRISON.

[197 Mass. 199, 83 N. E. 415.]

PUBLIC STREETS, Rights of Hawkers and Peddlers Therein. A license to a peddler or hawker gives him no authority to set up a lunch wagon within the limits of a highway, or to commit any obstruction in the public streets. (p. 339.)

HAWKERS AND PEDDLERS are persons who travel about, either on foot or in wagons, and generally, though not necessarily, by outcry, sign or advertisement, attracting attention to their wares. (p. 339.)

HAWKERS AND PEDDLERS, Who are not.—One Who Conducts His Business at a Fixed Place and from a room which, though set upon wheels and removed at certain hours, has the characteristics of an eating-house, is not a hawker or peddler, as those terms are used in the law. (pp. 339, 341.)

PUBLIC STREETS.—The Easement Acquired by the Public Includes every reasonable means for the transportation of persons and of commodities and of transmission of intelligence which the advance of civilization may render suitable for a highway. (p. 341.)

PUBLIC STREETS—Portable Eating-house in.—An ordinance of a municipality cannot protect from prosecution one who maintains a room on wheels at the same place within a public street, during the hours of every night, for the sale of food and drinks usually sold at lunch counters. (p. 343.)

J. R. Murphy and W. A. Buie, for the defendant.

M. J. Dwyer, assistant district attorney, for the commonwealth.

200 RUGG, J. The defendant is complained of for obstructing a highway in the city of Boston. The facts are that the defendant kept a lunch wagon upon a public way, known as Adams Square, in the night-time. This wagon was a rectangular box-like structure, placed upon the four-wheel running gear of an ordinary wagon, and was drawn to Adams Square by a single horse harnessed into the wagon shafts in the usual way. The upper structure of the wagon had a door, or entrance, about midway on one side. There were six windows on one side and five on the other, and three on each end. The inside was fitted up with a counter at one end, behind which was a stove and an urn for 201 making coffee, and in front of which were six stools, on which people sat while eating. The rest of the interior was left empty for standing room. Every night, Sundays excepted, in the

month of December, 1905, at about 6:30 o'clock, the wagon was placed in the same spot in Adams Square, and the horse was taken out and led away. About 5 o'clock each morning the horse was brought back, harnessed to the wagon and driven off. During the night the wagon remained in the same place, and was resorted to by people for food. The defendant served various kinds of foods to customers, who entered and ate in the wagon, and to others in the street, who were waited on through the openings in the side.

The defendant attempted to justify his acts by a permit issued to him in 1894 by the board of aldermen of the city of Boston, to stand a wagon in Adams Square between the hours of 6 P. M. and 5 A. M., and under licenses as a hawker and peddler from the street department and the board of health of the city of Boston. We assume that the licenses or permits issued to the defendant as hawker and peddler by the health department and the street department were properly issued pursuant to a legal ordinance covering the subject, and that, notwithstanding considerations hereinafter discussed, it is within the jurisdiction of the city council of the city of Boston to enact limiting ordinances respecting hawkers and peddlers: Commonwealth v. Ellis, 158 Mass. 555, 33 N. E. 651; Commonwealth v. Reid, 175 Mass. 325, 56 N. E. 617. Standing alone, the licenses or permits as hawker and peddler gave the defendant no authority to set up a lunch wagon within the limits of the highway for hours at a time, nor to commit an obstruction in the public street. The character of the business conducted by the defendant, which was always at a fixed place and from a room, which, although set upon wheels, had characteristics of a shop or eating-house, does not come within the description of business done by hawkers and peddlers, who, as a matter of common understanding as well as of statutory definition (Rev. Laws, c. 65, sec. 13), are persons who travel about, either on foot or in wagons, carrying and exposing for sale goods, and generally, though not necessarily, by outcry, sign or advertisement, attracting attention to their wares: Commonwealth v. Ober, 12 Cush. 493; Commonwealth v. Hana, 195 Mass. 262, 122 Am. St. Rep. 251, 81 N. E. 149, 11 L. R. A., N. S., 799. The licenses as hawker and [202] peddler are no greater protection to the kind of business which the defendant carried on than they would be to a common victualer.

A short answer to the defendant's further contention, that he is protected by the permit from the board of aldermen, is that the board of aldermen had no jurisdiction to grant the

permit upon which he relies, even if we assume that the defendant's place of business can be properly comprehended within the generic phrase, carriage, vehicle, wagon, cart or coach. The first statutory provision respecting this subject appears to be in Statutes of 1799, chapter 31, section 7, although there were earlier acts respecting hackney carriages: Stats. 1795, c. 51; Stats. 1796, c. 32. This statute imposed a fine for permitting "any Cart, Waggon, Stage or Hack Coach, Stage Waggon or other Carriages, new or old, finished or unfinished" to remain more than one hour in any street, lane or alley in Boston without permission of the surveyors of highways, with a provision, manifestly intended for the protection of country folk, that no prosecution should be commenced "against any Driver of any Cart or Waggon coming from the country" unless specially directed. This section was repealed by Statutes of 1847, chapter 224, section 3, other sections of which chapter conferred upon the mayor and aldermen of cities general power for the regulation of all sorts of carriages and vehicles. Statutes of 1878, chapter 244, authorized the appointment of a board of police commissioners by the mayor for the city of Boston, and empowered the city council to confer upon such board all the powers possessed by the board of aldermen "in relation to licensing, regulating and restraining, ... hawkers and peddlers, carriages, wagons and other vehicles." Acting apparently upon the authority conferred by this section, chapter 24, section 3, of the Revised Ordinances of the city of Boston of 1882, being the eighth revision, provided that the board of police commissioners "shall have and exercise all the powers conferred by the statutes of the commonwealth and the ordinances of the city upon the board of aldermen or upon the mayor and aldermen, in relation to licensing, regulating, and restraining hawkers and peddlers, carriages, wagons and other vehicles." So far as this subject is concerned, substantially the same provision is contained in chapter 26, section 1, of the Revised Ordinances of 1885, being the ninth revision. By [203] Statutes of 1885, chapter 323, a board of police was created for the city of Boston to be appointed by the governor of the commonwealth. Section 2 of this act conferred upon the board of police "all the powers now vested in the board of police commissioners in said city of Boston by the statutes of the commonwealth or by the ordinances, by-laws, rules and regulations of said city," with exceptions not here material: See Stats. 1906, c. 291, secs. 4, 10. These provisions of the statutes and

ordinances were in force during the period covered by the complaint. It is clear that, if the defendant was either a hawker or a peddler, or operating a carriage, wagon or other vehicle, he could justify his actions only by showing a license from the board of police of Boston. This he did not have and his justification fails.

But the ruling of the court below was correct upon broader grounds. The device which the defendant maintained, although mounted upon wheels, was in fact a small room used for an eating-house and kept constantly at one place in the street for over ten consecutive hours. During this time no horse was attached and no use was at any time made of the wheels except to drag the cart to and from its place in the public way. The public secure by the location of a highway an easement of passage, with all the power and privileges which are necessarily implied as incidental to its exercise. The easement is coextensive with the limits of the highway. The fee of the land remains in the land owner, who may make any use of it not inconsistent with the paramount right of the public: Como v. Worcester, 177 Mass. 543, 59 N. E. 444. The easement acquired by the public includes every reasonable means of transportation for persons and commodities, and of transmission of intelligence, which the advance of civilization may render suitable for a highway. Under this description, gas and water pipes, sewers, telephone, telegraph, electric light and power poles, wires and conduits, electric and horse railways, the Boston subway and private railroads have been permitted within the limits of highways: Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; Howe v. West End St. Ry., 167 Mass. 46, 44 N. E. 386; Allen v. Boston, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; White v. Blanchard Bros. Granite Co., 178 Mass. 363, 59 N. E. 1025; New England Telephone etc. Co. v. Boston Terminal Co., 182 Mass. 397, 65 N. E. 835; Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N. E. 346; Lorain Steel Co. v. [204] Norfolk & Bristol St. Ry., 187 Mass. 500, 73 N. E. 646; Eustis v. Milton St. Ry., 183 Mass. 586, 67 N. E. 663; McDermott v. Warren etc. St. Ry., 172 Mass. 197, 51 N. E. 972; Sears v. Crocker, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 327; Natick Gas Light Co. v. Natick, 175 Mass. 246, 56 N. E. 292; Williams v. Old Colony St. Ry., 193 Mass. 305, 79 N. E. 484; Hyde v. Boston etc. St. Ry., 194 Mass. 80, 80 N. E. 517. But, notwithstanding these various instrumentalities, they are all manifestations in divers forms of the right of travel of persons, the transmission of intelligence and the transportation of com-

modities. The primary purpose of a highway is the passing and repassing of the public, which is entitled, so far as needed, to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose. Whenever the public does not have occasion to exercise its easement to its full extent, the owner of the fee may make any use not inconsistent therewith. Whatever interferes with the exercise of the easement is a nuisance: Commonwealth v. King, 13 Met. 115; Commonwealth v. Wilkinson, 16 Pick. 175, 26 Am. Dec. 654; Gifford v. Westport, 190 Mass. 323, 76 N. E. 1042; Tinker v. New York etc. R. R., 157 N. Y. 312, 51 N. E. 1031. The stands of hackney carriages may perhaps be justified as a phase of public travel (Commonwealth v. Matthews, 122 Mass. 60), and the use of streets in connection with markets, in view of long-continued customs in Boston and perhaps elsewhere in this commonwealth, as incidental to the transportation of merchandise (Commonwealth v. Brooks, 109 Mass. 355), and possibly also in connection with the establishment of a public market: Spaulding v. Lowell, 23 Pick. 71; Kinney v. Robison, 49 Mich. 247, 13 N. W. 610. Whether carriage and truck-wagon stands can be authorized against the protest of an abutting owner may be open to doubt: See Branahan v. Cincinnati Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457; Lippincott v. Lasher, 44 N. J. Eq. 120, 14 Atl. 103; McCaffrey v. Smith, 41 Hun, 117. Hawking and peddling is also an illustration of a legitimate use of the highway. It consists of transportation of merchandise, and the stops for sale are brief and ordinarily not of such character as to constitute any substantial obstruction to the rights of travelers. The business of the defendant does not come within any description of travel, nor does it have a necessary or reasonably natural connection with the passing of persons or the transportation of commodities. [205] The establishment in highways of drinking fountains (Rev. Laws, c. 25, sec. 15; Cushing v. Bedford, 125 Mass. 526), erection of guide-boards (Rev. Laws, c. 52, secs. 1-3; Stats. 1906, c. 234; Sharon v. Smith, 180 Mass. 539, 62 N. E. 981, and planting and protection of shade trees (Rev. Laws, c. 25, sec. 15; Washburn v. Easton, 172 Mass. 525, 52 N. E. 1070; Hall v. Wakefield, 184 Mass. 147, 68 N. E. 15), have all been expressly authorized by statute, and bear an obvious relation to the convenience, comfort and pleasure of travel. The obstruction they offer to the use of the entire way for passage is ordinarily trifling, and they have been regarded as legally incidental to the general purpose for which the public

easement of travel has been taken from the private owner by eminent domain. But eating, although necessary for human beings, is no more essential to their welfare than sleeping or clothing or cleanliness, nor does it bear any closer relation to travel upon highways than any of these other human functions. It could not be contended that the establishment on wheels of lodging-houses, provision or furnishing stores, or bathrooms, to be drawn and left for considerable periods of time at fixed places in the highway, was fairly comprehended within the description of travel upon the highway: Haberlil v. Boston, 190 Mass. 358, 76 N. E. 907, 4 L. R. A., N. S., 571. It may well be that the present instrumentalities or methods of travel do not necessarily exhaust the range of uses to which highways may be put, but the acts of the defendant do not belong to the class of purposes for which ways have been established. Moreover, the defendant is appropriating, for purely personal profit, a substantial portion of what has been procured from private owners at the public expense for a wholly public use. He is plying his vocation at a particular place within the limits of the highway for several hours at a time, night after night. In a limited way he is doing the same sort of service as innkeepers and common victualers. Therefore, no municipal ordinance can afford him a shield of protection against prosecution for an obstruction to travel upon a public way: Cohen v. Mayor of New York, 113 N. Y. 532, 10 Am. St. Rep. 506, 21 N. E. 700, 4 L. R. A. 406; Commonwealth v. Millinian, 13 Serg. & R. 403; Blodgett v. Boston, 8 Allen, 237; Commonwealth v. Wentworth, 4 Clark, 324. See Keith v. Easton, 2 Allen, 552.

Verdict to stand.

GRANT BY CITY OF RIGHT TO USE STREETS AND SIDEWALKS FOR A PRIVATE PURPOSE.*

I. General Rights of Public and Abutting Owners in Street.
 a. Rights Peculiar to Abutting Owner, 344.
 b. Right of Abutting Owner to Make Use of Street, 344.
 c. Grant of Street for Private Purposes, 345.
 d. Sidewalk as Part of Street, 345.

II. Erection of Structures and Buildings in Street.
 a. In General, 346.
 b. Railways, Wires, Poles and Pipes, 346.
 c. Bridges or Passageways Over Street, 347.
 d. Hydrants, Pumps and Tanks, 347.

*REFERENCES TO MONOGRAPHIC NOTES.

Rights of persons over whose land a public highway runs: 101 Am. St. Rep. 102.
Additional servitudes in streets and highways: 106 Am. St. Rep. 232.
Nuisances in public streets: 107 Am. St. Rep. 195.

e. Platforms, Stairways and Fences, 348.
f. Stepping-stones, Areaways and Coal-holes, 348.
III. Placing of Obstructions in Street.
a. In General, 348.
b. Loading, Unloading and Depositing Goods on Sidewalk, 349.
c. Standing Hacks in Street, 350.
d. Deposit of Building Materials in Street, 351.
e. Moving Buildings in Street, 351.
f. Shade Trees and Grass Plots, 351.
IV. Conducting Business in Street.
a. In General, 352.
b. Booths and Stands for the Sale of Commodities, 352.
c. Shops and Eating-houses on Wheels, 353.
d. Markets and Produce Stands, 353.
e. Scales for Weighing Commodities, 353.
V. Conducting Fairs, Races and Fireworks Exhibitions in Street.
a. Street Fairs and Carnivals, 354.
b. Automobile Racing, 354.
c. A Fireworks Exhibition, 354.

I. General Rights of Public and Abutting Owners in Street.

a. Rights Peculiar to Abutting Owner.—The owner of property abutting on a public street or highway, whether or not he owns the fee thereof, has rights therein not held in common with the public for purposes of travel. He has the right, with other citizens, to have the street open free of obstructions from end to end; but he has the further right, peculiar to himself as an abutting owner, of free and unobstructed access over the street to and from his property: Town of Longmont v. Parker, 14 Colo. 386, 20 Am. St. Rep. 277, 23 Pac. 445; Indiana etc. Ry. Co. v. Eberle, 110 Ind. 542, 59 Am. Rep. 225, 11 N. E. 467; O'Brien v. Central Iron etc. Co., 158 Ind. 218, 92 Am. St. Rep. 305, 57 N. E. 508, 63 N. E. 302; Bradley v. Pharr, 45 La. Ann. 426, 12 South. 618, 19 L. R. A. 647; De Geofroy v. Merchants' Bridge etc. Co., 179 Mo. 698, 101 Am. St. Rep. 524, 79 S. W. 386, 69 L. R. A. 959; Staton v. Atlantic Coast L. R. R. Co., 147 N. C. 428, 61 S. E. 455, 17 L. R. A., N. S., 949. But while this right exists independently of his ownership of the fee in the thoroughfare, it would nevertheless seem that his remedy for its enforcement might be more comprehensive and efficacious if he has such ownership: Buffalo v. Pratt, 131 N. Y. 293, 27 Am. St. Rep. 592, 30 N. E. 233, 15 L. R. A. 413.

b. Right of Abutting Owner to Make Use of Street.—Owners of property abutting on public street or highway possess an additional right in this that they may make use thereof, both above and below the surface, for their own convenience or private purposes, so long as they do not incommode the public or impair the usefulness of the way. The primary object, however, of public streets is to furnish a passageway for travelers; and while they may be put to other uses, these must be enjoyed in subordination to the public right and convenience. The owner of the soil cannot appropriate a highway for private purposes to the detriment of the public right of passage: See the note to Wright v. Austin, 101 Am. St. Rep. 107. But he is entitled to every right and advantage in that part of the street in

which he owns the fee, not required by the public. The easement of the public is the right to use and improve the street for the purpose of a highway only: White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 37 Am. St. Rep. 639, 22 S. E. 627.

c. **Grant of Street for Private Purposes.**—A city holds its streets in their entirety in trust for the benefit of the public, and as a passage open to all to pass and repass at pleasure. It has no power to grant a street or any portion thereof to an individual or a corporation for private purposes or convenience; it cannot appropriate any portion of a public street to a private use, so that the public is excluded from the thoroughfare or its enjoyment thereof interfered with, nor so that an abutting owner is interrupted in the enjoyment of those rights peculiar to his proprietorship: First Nat. Bank v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144, 59 L. R. A. 399; Florida Cent. etc. R. Co. v. Ocala etc. R. Co., 39 Fla. 306, 22 South. 692; Field v. Barling, 149 Ill. 556, 41 Am. St. Rep. 311, 37 N. E. 850, 24 L. R. A. 406; People v. Harris, 203 Ill. 272, 96 Am. St. Rep. 304, 67 N. E. 785; Labry v. Gilmour, 28 Ky. Law Rep. 311, 89 S. W. 231; Bennett v. Mt. Vernon, 124 Iowa, 537, 100 N. W. 349; Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441, 49 Atl. 629, 52 L. R. A. 409; Brauer v. Baltimore Refrigerating etc. Co., 99 Md. 367, 105 Am. St. Rep. 304, 58 Atl. 21, 66 L. R. A. 403; Dubach v. Hannibal & St. J. R. Co., 89 Mo. 483, 1 S. W. 86; Lockwood v. Wabash R. R. Co., 122 Mo. 86, 43 Am. St. Rep. 547, 26 S. W. 698, 24 L. R. A. 516; State v. Murphy, 134 Mo. 548, 56 Am. St. Rep. 515, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369; Van Duyne v. Knox Hat Mfg. Co. (N. J. Eq.), 64 Atl. 149; Tilly v. Mitchell & Lewis Co., 121 Wis. 1, 105 Am. St. Rep. 1007, 98 N. W. 969. The fact that a street, owing to its location and declivity, is seldon used, does not authorize the city to grant a part of it for a private use: Marine Ins. Co. v. St. Louis etc. Ry. Co., 41 Fed. 643. A public street may nevertheless be applied to all purposes which are not subversive of its reasonable enjoyment as a thoroughfare or which are not incompatible with the use to which it was dedicated, but this rule cannot be carried so far as substantially to impair the rights of abutting owners or to interrupt the public right of passage: Barrows v. City of Sycamore, 150 Ill. 588, 41 Am. St. Rep. 400, 37 N. E. 1096, 25 L. R. A. 535; Gaus & Sons Mfg. Co. v. St. Louis etc. R. R. Co., 113 Mo. 308, 35 Am. St. Rep. 706, 20 S. W. 658, 18 L. R. A. 339.

d. **Sidewalk as Part of Street.**—A sidewalk is simply a part of the public street, and an abutting owner has no more right therein than in the roadway. His rights are that the street, including the roadway and sidewalk, shall not be closed or obstructed so as to impair egress and ingress to his lot by himself and by those whom he invites there for trade or other purposes; and he also possesses the further right to make such private use of the same as he may in subordination to the superior rights of the public and consistently with the rights of other abutting owners: Perry v. Castner, 130 Iowa, 703,

107 N. W. 940; Hester v. Durham Traction Co., 138 N. C. 288, 50 S. E. 711, 1 L. R. A., N. S., 981.

II. Erection of Structures and Buildings in Street.

a. In General.—A city may permit certain kinds of private or semi-private structures to be placed in a street or on a sidewalk, which but slightly, if at all, interfere with travel or with the enjoyment of their property by abutting owners. But as a general rule, a city cannot authorize any structure or building in its streets or on its sidewalks which seriously obstructs public travel or substantially interferes with the free access of abutting owners to their property or materially interrupts their easement of light and air: Savannah v. Wilson, 49 Ga. 476; Morie v. St. Louis Transit Co., 116 Mo. App. 12, 91 S. W. 962; State v. City of Vandalia, 119 Mo. App. 406, 94 S. W. 1009; Attorney General v. Heishon, 18 N. J. Eq. 410; Northern Pac. Ry. Co. v. Lake, 10 N. D. 541, 88 N. W. 461. It has accordingly been held that a city cannot authorize the erection of a market in a public street: State v. Mobile, 5 Port. 279, 30 Am. Dec. 564; Lutterloh v. Cedar Keys, 15 Fla. 306; and that an ordinance permitting the construction of a bay window extending into the street, or any other encroachment thereon, for a purely private purpose or private use, is void: People v. Harris, 203 Ill. 272, 96 Am. St. Rep. 304, 67 N. E. 785; and that a city cannot license the construction of a building encroaching on the sidewalk to the detriment of an adjoining proprietor: First Nat. Bank v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144; Levy v. Murray, 56 Misc. Rep. 354, 106 N. Y. Supp. 689. But the legislature, by virtue of its general power over public streets and highways, has the power to authorize structures in streets for the convenience of business that, without such authority, and under the principles of the common law, would be considered encroachments and obstructions: Hoey v. Gilroy, 129 N. Y. 132, 29 N. E. 85; Turl v. New York Contracting Co., 46 Misc. Rep. 164, 93 N. Y. Supp. 1103. A village may authorize the erection of a soldier's monument in a street without the consent of the owner of the fee: Tompkins v. Hodgson, 4 Thomp. & C. 435.

b. Railways, Wires, Poles and Pipes.—The laying of railways, the stretching of electric wires, and the laying of gas and other pipes in a public street as the imposition of an additional servitude are discussed at length in the note to Mordhurst v. Fort Wayne etc. Co., 106 Am. St. Rep. 232. It has been affirmed in many cases that a city cannot grant to an individual or a corporation the right to construct a railway in a street for private purposes: Heath v. Des Moines etc. R. R. Co., 61 Iowa, 11, 15 N. W. 573; Mikesell v. Durkee, 34 Kan. 509, 9 Pac. 278, 36 Kan. 97, 12 Pac. 351; Commonwealth v. Frankfort, 92 Ky. 149, 17 S. W. 287; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; Glaessner v. Anheuser-Busch Brewing Assn., 100 Mo. 508, 13 S. W. 707; Montgomery v. Trenton, 36 N. J. L. 79; Swift v. Delaware etc. R. R. Co., 66 N. J. Eq. 34, 57 Atl. 456; Schwede v. Henrich, 29 Wash. 21, 69 Pac. 362. And a municipality should not

grant an exclusive privilege to use the street to an individual or corporation either for private or public purposes: American Telephone etc. Co. v. Morgan County Telephone Co., 138 Ala. 597, 100 Am. St. Rep. 53, 36 South. 178; Chicago, R. I. & P. Ry. Co. v. People, 222 Ill. 427, 78 N. E. 790; Pittsburgh etc. Ry. Co. v. Warrum (Ind. App.), 82 N. E. 934, 84 N. E. 356; Ruthland Electric Light Co. v. Marble City Electric Light Co., 65 Vt. 377, 36 Am. St. Rep. 868, 26 Atl. 635, 20 L. R. A. 821.

c. **Bridges or Passageways Over Street.**—The construction of bridges and viaducts in or over a street as imposing an additional servitude is discussed in the note to Mordhurst v. Ft. Wayne etc. Co., 106 Am. St. Rep. 265. A city has no power to authorize a bridge over or across a street to connect buildings on opposite sides of the thoroughfare and leaving a passageway underneath: Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441, 49 Atl. 629, 52 L. R. A. 409; Beecher v. Newark, 65 N. J. L. 307, 47 Atl. 466; Knox v. City of New York, 55 Barb. 404, 38 How. Pr. 67; Tilly v. Mitchell & Lewis Co., 121 Wis. 1, 105 Am. St. Rep. 1007, 98 N. W. 969. A bridge across a street, for private use, is an indictable nuisance, although it is so high above the surface as not to impede the passage of ordinary vehicles: Bybee v. State, 94 Ind. 443, 48 Am. Rep. 175. Alleys are not primarily designed as streets, but simply as a means of local convenience to a limited neighborhood, and a roof twelve or fifteen feet over and above an alley is not necessarily an obstruction: Beecher v. People, 38 Mich. 289, 31 Am. Rep. 316.

d. **Hydrants, Pumps and Tanks.**—The proper use of the street is not so exclusively confined to travel that the municipality cannot, to a reasonable extent, authorize hydrants, pumps, drinking fountains and the like to be placed therein: Lostutter v. Aurora, 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259; West v. Bancroft, 32 Vt. 367. Water-tanks erected and maintained in the public streets by a person for private gain, by the authority and permission of the city, at places designated by its agent and under its supervision, are not public nuisances per se if maintained for a public purpose such as street sprinkling, although they may become nuisances in fact by subsequent use: Savage v. Salem, 23 Or. 381, 37 Am. St. Rep. 688, 31 Pac. 832, 24 L. R. A. 787. But a city has no right to maintain a water-tank in the street which does not aid public travel and which injures abutting owners or interferes with their means of ingress and egress: Davis v. Appleton, 109 Wis. 580, 85 N. W. 515. While water and gas pipes, with hydrants, lamp-posts and other appliances, may legitimately be placed in a public street in furtherance of the distribution of water and light, still water or gas works themselves cannot lawfully be erected in a public street; and placing a standpipe in a street, near a building thereon, is an unlawul use of the street, and the dimensions of the structure and the manner of operating it affect only the question of damages: Barrows v. Sycamore, 150 Ill. 588, 41 Am. St. Rep. 400, 37 N. E. 1096, 25 L. R. A. 535.

e. **Platforms, Stairways and Fences.**—A city cannot authorize the occupation of a portion of a street by a large platform on which machinery is operated to the annoyance of the public: State v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009. A city has no power to authorize a railway company to occupy some twelve feet of the street with a freight platform and roof: State v. Jersey City, 52 N. J. L. 65, 18 Atl. 586, 696. However, a platform in an alley at the rear of a store for use in transferring goods is not a nuisance in itself: Bagley v. People, 43 Mich. 355, 38 Am. Rep. 192, 5 N. W. 415. An outside stairway to a building projecting over a street, when the entire width of the thoroughfare is likely to be required by travelers, is a nuisance: McCormick v. Weaver, 144 Mich. 6, 107 N. W. 314. A city cannot authorize the owner of property to obstruct an alley by erecting a stairway so as to interfere with public travel or the enjoyment by other proprietors of their premises: Pettis v. Johnson, 56 Ind. 139. And a stoop and fence in front of a lot which reduces the space for travel on the sidewalk from nineteen to eight feet is unlawful: Crooke v. Anderson, 23 Hun, 226. A fence cannot be lawfully maintained across a street: City of Demopolis v. Webb, 87 Ala. 659, 6 South. 408. But abutting owners on both sides of a cul-de-sac used only for their private purposes may build a fence across it without being liable to prosecution in a municipal court under an ordinance forbidding the obstruction of streets: People v. Wolverine Mfg. Co., 141 Mich. 455, 113 Am. St. Rep. 544, 104 N. W. 725. The right to maintain fences in a highway will be found discussed in the note to Wright v. Austin, 101 Am. St. Rep. 108.

f. **Stepping-stones, Areaways and Coal-holes.**—Abutting owners may place stepping-stones and carriage blocks on the sidewalk, or construct coal-holes and cellarways therein, which do not substantially interfere with the public easement: Louth v. Thompson, 1 Penne. (Del.) 149, 39 Atl. 1100; Teager v. City of Flemingsburg, 109 Ky. 746, 95 Am. St. Rep. 400, 60 S. W. 718, 53 L. R. A. 791; Robert v. Powell, 168 N. Y. 411, 85 Am. St. Rep. 673, 61 N. E. 699, 55 L. R. A. 755; Wolf v. District of Columbia, 21 App. Cas. (D. C.) 464, 196 U. S. 152, 25 Sup. Ct. Rep. 198, 49 L. ed. 426. They may also construct areas or areaways in front of their premises: Dell Rapids etc. Co. v. Dell Rapids, 11 S. D. 116, 74 Am. St. Rep. 783, 75 N. W. 898. And cities may grant to property owners the privilege of making such use of the street; but no power resides in a municipality to authorize them, in making such uses of the thoroughfare, to so encroach upon the sidewalk and street as to menace the public safety or materially interfere with public right of passage: Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; Devine v. National Wallpaper Co., 88 N. Y. Supp. 704, 95 App. Div. 194; City of New York v. Knickerbocker Trust Co., 52 Misc. Rep. 222, 102 N. Y. Supp. 900.

III. Placing of Obstructions in Street.

a. **In General.**—The streets and sidewalks of a village or city may lawfully be used for various private uses for which a country high-

way could not, and temporary or slight encroachments and obstructions therein may be permitted in furtherance of commerce and business operations: Haight v. City of Keokuk, 4 Iowa, 199; Hoey v. Gilroy, 129 N. Y. 132, 29 N. E. 25; Gassenheimer v. District of Columbia, 25 App. Cas. (D. C.) 179. But only such encroachments and obstructions can be authorized as are reasonable, and whether an obstruction is reasonable is usually a question of fact: City Council of Augusta v. Reynolds, 122 Ga. 754, 106 Am. St. Rep. 147, 50 S. E. 998, 69 L. R. A. 564; Callanan v. Gilman, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264; Savage v. Salem, 23 Or. 381, 37 Am. St. Rep. 688, 31 Pac. 832, 24 L. R. A. 787. A wrongful obstruction of a sidewalk cannot be justified by the fact that other persons than the particular wrongdoer are also creating obstructions: People v. Van Houten, 13 Misc. Rep. 603, 35 N. Y. Supp. 186; nor can it be justified by the fact that he leaves a possible means of passage for pedestrians: Callanan v. Gilman, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264; Savage v. Salem, 23 Or. 381, 37 Am. St. Rep. 688, 31 Pac. 832, 24 L. R. A. 787.

b. **Loading, Unloading and Depositing Goods on Sidewalk.**—Merchants, tradesmen and others may lawfully obstruct the sidewalk in front of their premises, temporarily and to a reasonable extent, in loading, unloading, or transferring their wares to and from their premises; and in receiving or sending out goods they may have vehicles standing in the street for a reasonable time: Kohlhof v. Chicago, 192 Ill. 249, 85 Am. St. Rep. 335, 61 N. E. 446; Brauer v. Baltimore etc. Co., 99 Md. 367, 105 Am. St. Rep. 304, 58 Atl. 21, 66 L. R. A. 403; State v. Edens, 85 N. C. 522; Attorney General v. Morris etc. R. Co., 19 N. J. Eq. 386; Stahle v. Poth, 220 Pa. 335, 69 Atl. 864. Merchants may place a skid temporarily across the sidewalk for the purpose of moving goods from their store to a truck or delivery wagon: Welsh v. Wilson, 101 N. Y. 254, 54 Am. Rep. 698, 4 N. E. 633; Gates & Son Co. v. City of Richmond, 103 Va. 702, 49 S. E. 965.

But the right to so obstruct streets and sidewalks must be exercised only when necessary, and then with a due regard to the rights of adjoining proprietors to enjoy their premises, and also with due regard to the right of the public to use the thoroughfare for purposes of travel: Brooks v. City of Atlanta, 1 Ga. App. 678, 57 S. E. 1081; McCormack v. Boston Elevated Ry. Co., 188 Mass. 342, 74 N. E. 599; Flynn v. Taylor, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556; People v. Cunningham, 1 Denio, 524, 43 Am. Dec. 709; Kurlanchick v. Sklamberg, 56 Misc. Rep. 473, 107 N. Y. Supp. 117; Vallo v. United States Express Co., 147 Pa. 404, 30 Am. St. Rep. 741, 23 Atl. 594, 11 L. R. A. 743; Hobart v. Milwaukee City R. Co., 27 Wis. 194, 9 Am. Rep. 461; Attorney General v. Brighton & H. Co-op. Supply Assn., [1900], 1 Ch. Div. 276. The maintenance of a bridge across a sidewalk for hours during each business day, over which goods are conveyed to and from a store, is a public nuisance: Callanan v. Gilman, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264. The maintenance of a platform three and a half feet in height, four feet wide and over fifty

feet long, on a sidewalk for the purpose of loading ice from a factory several hours each day on wagons standing at right angles to the platform and across the sidewalk, may be enjoined at the instance of the adjacent property owners: Brauer v. Baltimore etc. Heating Co., 99 Md. 367, 105 Am. St. Rep. 304, 58 Atl. 21, 66 L. R. A. 403. And keeping or storing a delivery wagon in a public street habitually or perpetually is a nuisance which the city cannot authorize: Cohen v. New York, 113 N. Y. 532, 10 Am. St. Rep. 506, 21 N. E. 700, 4 L. R. A. 406. Bales of cotton in a business center obstructing the street and liable to be fired by passing engines are a nuisance: Marine Ins. Co. v. St. Louis etc. Ry. Co., 41 Fed. 643.

The owners of lots abutting on streets are permitted to encroach to a limited extent for the necessary transaction of their business upon the primary right of passage of the public, provided they do not unreasonably interfere with its exercise, but the right of the public to employ the streets for the purpose of travel and transportation is the paramount one, and that of the abutter to occupy them for other purposes is a permissive and subordinate one. The extent of the right of an abutting owner to obstruct a sidewalk in front of his establishment is not to be determined by the necessity of his business, but by the public convenience and the reasonable enjoyment by adjacent owners of their property. "A merchant or manufacturer whose place of business abuts on the street of a populous city may temporarily obstruct the sidewalk in front of his building in the process of loading or unloading his merchandise or the product of his factory, provided he does not, in so doing, unreasonably encumber the footway or interfere with the reasonable use and enjoyment of the adjacent property. But if the adjacent owner suffers special or peculiar loss from an unlawful obstruction to a public sidewalk, he can maintain a suit for damages or file a bill for an injunction, if the nature of his damage be such as to make the latter form of action appropriate. The extent of the right of the abutting owner to obstruct the sidewalk in front of his establishment is not to be determined by the necessities of his business, but by the public convenience and the reasonable enjoyment by adjacent owners of their property": Brauer v. Baltimore Refrigerating etc. Co., 99 Md. 367, 105 Am. St. Rep. 304, 58 Atl. 21, 66 L. R. A. 403.

c. **Standing Hacks in Street.**—It is within the authority of a municipality to regulate the use of hacks and other public vehicles and prescribe places for their standing in the public streets: City Council of Montgomery v. Parker, 114 Ala. 118, 62 Am. St. Rep. 95, 21 South. 452; Veneman v. Jones, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644; Commonwealth v. Stodder, 2 Cush. 562, 48 Am. Dec. 679. But it would seem that a city cannot authorize the standing of hacks in front of private premises in such a manner and to such an extent as to deprive the owner of the premises, without his consent, of his right of free access to his property, or his enjoyment thereof: Commonwealth v. Matthews, 122 Mass. 60; McCaffrey v. Smith, 41 Hun, 117; Masterson v. Short, 33 How. Pr. 481, 3 Abb. Pr., N. S., 154, 30 N.

Y. Super. Ct. 299, 35 How. Pr. 169; Odell v. Bretney, 38 Misc. Rep. 603, 78 N. Y. Supp. 67. A hackney coach stand on a public street, interfering with access to the premises of an adjoining proprietor, has been held a nuisance, and not justified by a city ordinance permitting its establishment: Brannahan v. Cincinnati Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457.

d. Deposit of Building Materials in Street.—The owner of property abutting on a public street or highway may use a reasonable portion thereof temporarily for the deposit of lumber and other building materials when necessary in the course of constructing a building: Wood v. Mears, 12 Ind. 515, 74 Am. Dec. 222; Hesselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009; Culbertson v. Alexander, 17 Okl. 370, 87 Pac. 863; Raymond v. Kiseberg, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643; note to Wright v. Austin, 101 Am. St. Rep. 107. He is entitled to do this, however, only when it is reasonably necessary to facilitate the work of improvement which he is carrying on, and then only in a reasonable manner consistent with the rights of the public and of neighboring proprietors: Knapp v. New York etc. R. R. Co., 76 Conn. 311, 100 Am. St. Rep. 994, 56 Atl. 512; Friedman v. Snare & Triest Co., 71 N. J. L. 605, 108 Am. St. Rep. 764, 61 Atl. 401, 70 L. R. A. 147; Culbertson v. Alexander, 17 Okl. 370, 87 Pac. 863. And where a builder who has obtained a permit to place materials in a certain portion of the street deposits them in another place, he creates a nuisance: Mulvey v. New York, 114 App. Div. 526, 99 N. Y. Supp. 1114, affirmed in Mulvey v. Tide Water B. Co., 189 N. Y. 564, 82 N. E. 1129.

e. Moving Buildings in Street.—The owner of buildings has a common-law right to make a reasonable use of public streets for the purpose of moving buildings from one place to another. This right, however, is subject to municipal regulation: Hinman v. Clark, 51 Misc. Rep. 252, 100 N. Y. Supp. 1068, affirmed in 121 App. Div. 105, 105 N. Y. Supp. 725. And the use of a street for the purpose of moving a building is not an ordinary and usual use, but an extraordinary and unusual one; and while it may be permitted, it cannot be allowed in such a manner as to destroy the use of the street for the purpose of travel or other public purposes, nor can it be allowed so as to obstruct railway traffic or destroy the wires of telephone companies: Williams v. Citizens' Ry. Co., 130 Ind. 71, 30 Am. St. Rep. 201, 20 N. E. 408, 15 L. R. A. 64; Northwestern Tel. etc. Co. v. Anderson, 12 N. D. 585, 102 Am. St. Rep. 580, 98 N. W. 706, 65 L. R. A. 771; Millville Traction Co. v. Goodwin, 53 N. J. Eq. 448, 32 Atl. 263.

f. Shade Trees and Grass Plots.—Grass plots and shade trees along streets and sidewalks may be authorized by a city and maintained by abutting owners, for, while they are in some measure obstructions to travel, they serve a useful purpose, and are not inconsistent with the purpose to which streets are dedicated, when ample room is left to answer the demands of travel: Teague v. City of Bloomington, 42 Ind. App. 68, 81 N. E. 103; Dougherty v. Village of

Horsesteads, 159 N. Y. 154, 53 N. E. 799; note to Wright v. Austin, 101 Am. St. Rep. 112-117.

IV. Conducting Business in Street.

a. In General.—The primary right to the enjoyment of streets and sidewalks is in the general public for passage over and along them. In the exercise of this right, persons employing vehicles are primarily entitled to occupy the bed of the street, while pedestrians have a like priority upon the sidewalk. The owners of property abutting on the street are permitted to encroach to a limited extent, for the necessary transaction of their business, upon this primary right of the public, provided they do not unreasonably interfere with its exercise, and provided, further, that they do not unreasonably interfere with the right of other abutting proprietors to have free access to and from their premises. But it should always be borne in mind that the right of the public to employ the street and sidewalk for purposes of travel and transportation is paramount, and that the right of the abutter to occupy them for purposes of private business is permissive and subordinate: Pagames v. City of Chicago, 111 Ill. App. 590; Brauer v. Baltimore Refrigerating etc. Co., 99 Md. 367, 105 Am. St. Rep. 304, 58 Atl. 21, 66 L. R. A. 403; Hallock v. Scheyer, 33 Hun, 111; Philadelphia v. Sheppard, 158 Pa. 347, 27 Atl. 972. In case of doubt the right of an individual to carry on his business in or by means of a street must give way to the public right: Attorney General v. Brighton & H. Co-op. Supply Assn., [1900] 1 Ch. Div. 276. And the fact that an abutting owner consents to a business being carried on in front of his premises does not authorize the city to permit it when it interferes with the public right: City of Chicago v. Pooley, 112 Ill. App. 343; Commonwealth v. Wentworth, Brightly, 4 Clark, 324.

b. Booths and Stands for the Sale of Commodities.—Since the public is entitled, not only to free passage along streets and sidewalks, but to free passage along all portions thereof not in the actual use of other travelers, and abutting owners have a right of unobstructed passage to and from their premises, it follows that the municipality cannot ordinarily grant a privilege to vendors to occupy a portion of the street or sidewalk with a stand or booth from which to dispense their goods, which will unreasonably interfere with the superior right of the public and abutting owners. This rule has been applied in the cases of fruit, candy and lemonade stands, newspaper booths, etc.: Costello v. State, 108 Ala. 45, 18 South. 820, 35 L. R. A. 303; Pagames v. Chicago, 111 Ill. App. 590; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117; State v. St. Louis, 161 Mo. 371, 61 S. W. 658; Galloso v. City of Sikeston, 124 Mo. App. 380, 101 S. W. 715; People v. Willis, 9 App. Div. 214, 41 N. Y. Supp. 168. It would nevertheless seem that a privilege to use streets and sidewalks for such purposes may, to a limited and reasonable extent, be granted: People v. Keating, 62 App. Div. 348, 71 N. Y. Supp. 97, 168 N. Y. 390, 61 N. E. 637; Barling v. West, 29 Wis. 307, 9 Am. Rep. 576.

c. **Shops and Eating-houses on Wheels.**—A city cannot license vendors of goods to stand with their wagons and make sales on both sides of the street daily until late at night (In re Fiegle, 36 Misc. Rep. 27, 72 N. Y. Supp. 438), nor can it license a shop on wheels in which goods are sold, to stand at the same place in the street for months at a time (Spencer v. Mahon, 75 S. C. 232, 55 S. E. 321); neither can a city authorize a person to maintain a structure on wheels at the same place on the public street during the hours of every night for the sale of food and drinks usually sold at lunch counters (Commonwealth v. Morrison, 197 Mass. 199, ante, p. 338, 83 N. E. 415, 14 L. R. A., N. S., 194), for such uses are inconsistent with the right of the public to use the street as a thoroughfare. A license to carry on a trade as peddler or hawker does not authorize the maintenance of a stand on the sidewalk nor the setting up of a lunch wagon in the street: Commonwealth v. Morrison, 197 Mass. 199, ante, p. 338, 83 N. E. 415, 14 L. R. A., N. S., 194; Galloso v. City of Sikeston, 124 Mo. App. 380, 101 S. W. 715. It seems that a push-cart peddler may remain half an hour with his cart at one place in a busy thoroughfare for the purpose of selling his wares without being held to unlawfully obstruct the street: State v. Rayantis, 55 Minn. 126, 56 N. W. 586.

d. **Markets and Produce Stands.**—A city has no power to erect and maintain, or to authorize the erection and maintenance, of a market in a street so as to obstruct public travel or offend adjacent proprietors in the enjoyment of their premises: Lutterloh v. Town of Cedar Keys, 15 Fla. 306; City of Savannah v. Wilson, 49 Ga. 476; Schopp v. City of St. Louis, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783; McDonald v. City of Newark, 42 N. J. Eq. 136, 7 Atl. 855; Wartman v. Philadelphia, 33 Pa. 202; City of Harrisburg's Appeal (Pa.), 10 Atl. 787. As against abutting owner, a market or produce stand constitutes an additional servitude which cannot be authorized without compensation being made to him: State v. Laverack, 34 N. J. L. 201. But a city having established a public market in a portion of a public street duly condemned for that purpose, no action can be maintained by a citizen against the city for injury to his adjoining property by the incidental obstruction of the street by the collecting of wagons in the neighborhood and the selling of produce therefrom where the same is under police regulation: Henkel v. City of Detroit, 49 Mich. 249, 43 Am. Rep. 464, 13 N. W. 611.

e. **Scales for Weighing Commodities.**—A city may authorize dealers to maintain scales in a street in front of their places of business for the purpose of weighing hay, coal and other commodities (Town of Spencer v. Andrew, 82 Iowa, 14, 47 N. W. 1007, 12 L. R. A. 115), except where this use of the street materially interferes with public travel: Tell City v. Bielefeld, 20 Ind. App. 1, 49 N. E. 1090. But a municipality has no authority to grant one person the right to place and maintain scales in a public square or street in front of the premises of another and thereby interfere with his enjoyment of his prop-

erty: Gibson v. Black (Ky.), 9 S. W. 379; Berry-Horn Coal Co. v. Scruggs-McClure Coal Co., 62 Mo. App. 93. And the owner of a town lot may not maintain hay-scales in the street in front of his premises, when the fee of the streets is in the town: Emerson v. Babcock, 66 Iowa, 257, 55 Am. Rep. 273, 23 N. W. 656.

V. Conducting Fairs, Races and Fireworks Exhibitions in Street.

a. Street Fairs and Carnivals.—A city cannot authorize a corporation organized to give a street fair the right to erect a structure of such dimensions that it will seriously interfere with travel in the street: City of Richmond v. Smith, 101 Va. 161, 43 S. E. 345. The use of a large portion of a business street by private individuals for their own pecuniary benefit, for the purposes of a street fair, consisting of numerous tents, including shows and exhibitions, together with various stands, booths and structures for the amusement of the public and the private gain of the owners, and by which the public is deprived for several days of the right to use that portion of the street for traffic or travel, is an aggravated public nuisance, which cannot be authorized by the city authorities and may be enjoined: City Council of Augusta v. Reynolds, 122 Ga. 754, 106 Am. St. Rep. 147, 50 S. E. 998, 69 L. R. A. 564. But a city may grant a society the privilege of using its streets for a carnival or festival where the occupation is temporary and the ordinary use of the street is not substantially interfered with: State v. Stoner, 39 Ind. App. 104, 79 N. E. 399.

b. Automobile Racing.—A special ordinance purporting to authorize specified persons to use a highway as a racecourse for automobiles on a particular occasion is invalid as a regulation of the speed of automobiles, and also because it is a participation by a city in the commission of an unlawful act, and an attempt to appropriate a public highway to a private purpose. Yet it has been decided, one who goes to and remains in the vicinity of the highway solely for the purpose of witnessing the race cannot recover of the municipality enacting the ordinance for personal injuries resulting from an accident due to the high rate of speed of one of the participating automobiles: Johnson v. City of New York, 186 N. Y. 139, 116 Am. St. Rep. 535, 78 N. E. 715.

c. A Fireworks Exhibition on an extensive scale on a busy thoroughfare in a large city, if not a nuisance as a matter of law, may certainly be found such as a matter of fact. And it would seem that where a city assumes to permit such an exhibition, it may be held responsible to an individual who is injured by the fireworks: Landau v. New York, 180 N. Y. 48, 105 Am. St. Rep. 708, 72 N. E. 631. Other authorities discussing this and related questions are Wheeler v. Plymouth, 116 Ind. 158, 9 Am. St. Rep. 837, 18 N. E. 532; Lincoln v. Boston, 148 Mass. 578, 12 Am. St. Rep. 601, 20 N. E. 329, 3 L. R. A. 257; Dowell v. Guthrie, 99 Mo. 653, 17 Am. St. Rep. 598, 12 S. W. 900; Speir v. Brooklyn, 139 N. Y. 6, 36 Am. St. Rep. 664, 34 N. E. 727, 21 L. R. A. 641; Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

DOHERTY v. INHABITANTS OF AYER.

[197 Mass. 241, 83 N. E. 677.]

AUTOMOBILES are not Carriages within the meaning of a statute requiring cities and towns to keep public ways reasonably safe at all seasons for travelers with their horses, teams and carriages. (p. 358.)

AUTOMOBILES, Duty to Make Highways Safe for.—If a public way is reasonably safe and convenient for travel generally, a town or city is not liable for the failure to make special provisions required for the safety and convenience of persons using automobiles. (p. 358.)

HIGHWAYS, Condition of Land Adjacent to.—If an accident happens outside of the limits of a highway, the town is not liable, as there is no obligation to keep in repair land outside of the boundaries of a way, where there is no such dangerous condition as calls for the erection of a barrier to keep travelers from passing out of the road. (pp. 358, 359.)

AUTOMOBILES—Persons Traveling on a Public Highway Without Registration or License.—One who travels on the public streets without proper registration of the vehicle and without a license to operate it is without remedy for injury caused by defects in the way. (p. 360.)

AUTOMOBILES—Presumption in Favor of Registration and Licensing of.—One using a public highway with his automobile will be presumed to have been duly registered and licensed, and will not be denied the right to recover for injuries due to a defect in the highway, on the ground that he has not offered evidence of registration or licensing. (p. 360.)

W. A. Hogan, for the plaintiff.

J. M. Maloney, for the defendant.

243 KNOWLTON, C. J. This action was brought to recover for damage to the plaintiff's automobile, alleged to have been caused by a defect in a highway which the defendant was bound to keep in repair. The road at the place of the accident was being reconstructed by the Lowell and Fitchburg Street Railway Company, which was preparing to lay a track on a location partly within the highway on its southerly side and partly on private land outside of it. There was a fence on the north side of the road, but no fence or wall on the southerly side. The old traveled way, before the work of reconstruction began, was from sixteen to twenty feet wide. Between the traveled way and the fence on the north side there was a grass-covered space between three and four feet wide. On the south side there was a grass-covered space between three and four feet wide, and then the ground sloped upward, and was covered with a growth of birches

and other trees. In preparing the place for the railway, the grade of the highway and for a space from twenty to thirty feet south of it, was cut down a distance of between twenty-four and forty-two inches, leaving a surface of sand three hundred or four hundred feet in length through the entire width of the road, and for a distance of twenty or thirty feet south of the road. The road was in constant use, and the 244 workmen upon it had orders to assist heavy teams, if necessary, and sometimes they did so. The road was always left level, with no holes.

The plaintiff was familiar with the road and knew that work was going on there. He went over it with his automobile, on his way from Lowell to Ayer, early in the afternoon. On his return in the evening his machine ran upon the sand about twenty feet and then stopped. The road was level, and the only imperfection in it was its sandy condition. He made two unsuccessful attempts to get the machine out of the sand, but the wheels had sunk to a depth of eight to ten inches. He then got a horse, and with the help of laborers who shoveled sand from in front of the wheels, and with the use of his engine, and the pulling of the horse and the men, he got the machine out of the sandy place. In doing this he broke the automobile. The evidence was conflicting as to whether the place of the accident was within the traveled part of the old highway or entirely outside of the location of the way. The jury in returning their verdict answered "Yes" to the question, "Was the place of the accident reasonably safe for the travel of carriages other than automobiles?" The judge instructed the jury that an automobile was a carriage, within the meaning of the Revised Laws, chapter 51, section 1, and that it was the duty of the defendant, under that statute, to keep its roads reasonably safe and convenient for automobiles, so that they might be protected. To this instruction the defendant excepted.

The question presented by this exception has never been decided by this court. It was raised in Baker v. Fall River, 187 Mass. 53, 72 N. E. 336, but it was immaterial to the decision, and the court refrained from considering it. The opinion contains this language: "Therefore, we now have no occasion to consider whether roads must be kept in such a state of repair and smoothness that an automobile can go over them with assured safety." The dictum in Richardson v. Danvers, 176 Mass. 413, 79 Am. St. Rep. 320, 57 N. E. 688, 50 L. R. A. 127, referred to in the opinion in Baker v. Fall River, was made without any thought of such a ques-

tion as is now before us. This appears from the earlier statement in the same case, which is made the foundation of the decision that a bicycle is not a carriage within the meaning of the statute. Referring to the statute, which was first enacted in Statutes of 1786, chapter 81, section 1, and reenacted in the Revised [245] Statutes, chapter 25, section 1, General Statutes, chapter 44, section 1, and Public Statutes, chapter 52, section 1, Mr. Justice Lathrop said: "Although, of course, it is not to be confined to the same kind of vehicles then in use, we are of opinion that it should be confined to vehicles ejusdem generis, and that it does not extend to bicycles." It hardly can be contended that locomotive cars of many tons' weight, propelled by a gasoline engine or a steam or electrical engine with complicated machinery, capable of developing fifty or seventy-five horse-power, and sometimes even more, are vehicles ejusdem generis as the carriages known to the legislators of Massachusetts in 1786. It was shown in the opinion from which we have just quoted that, under many statutes, a bicycle is held to be a carriage. It is a vehicle that is used in carrying one or more persons. But it was also said that "it is more properly a machine than a carriage." This is equally true of an automobile. It is a carriage in a broad sense of the word. But its features as a piece of machinery are far more striking than those which it possesses as a carriage. It is commonly spoken of as a machine. In the bill of exceptions before us the plaintiff's vehicle is repeatedly called a machine. Cars on some railroads in England are called carriages, and some railroad cars are referred to in this country as coaches; but these are not such carriages as were intended by the framers of this statute. When towns were first required by law to keep their highways and town ways "reasonably safe and convenient for travelers, with their horses, teams and carriages at all seasons of the year," there was no thought of putting upon them such a burden as would be imposed if they were compelled to keep all of these ways in such a condition that automobiles could pass over them safely and conveniently at all seasons. Horses, teams and carriages are grouped together in the statute, and the carriages referred to are those drawn by animal power.

There are many highways and town ways that run into remote places and are but little traveled. In some parts of the state that are very sparsely settled there are vast stretches of sandy surface, traversed by roads that are but little used, where the small wheels of a heavy automobile might some-

times encounter as great an obstacle to progress as the plaintiff's vehicle encountered on the smooth, level sand at the place of this accident. To be obliged to harden all such roads would be a burden upon [246] towns heavier than could be borne. There are steep mountain roads laid out for the use of but a small part of the public, where, in a heavy rain, water flows down with much force. This must be turned off from the traveled part of the road by high and sharp water bars. It would be unreasonable to require all such roads to be made convenient for travel with automobiles at all seasons. There are also roads that are frozen to a great depth in winter, which sometimes present a surface of very deep, soft mud while the ground is thawing in the spring. No reasonable expenditure by towns would be enough to make all such roads convenient for the use of heavy automobiles, with their small wheels, at all seasons. Another difficulty sometimes appears upon such roads when they are suddenly frozen, after having been rutted in a time of deep mud. Such roads could not be made safe and convenient for use by automobiles at such times without entire reconstruction.

An automobile is not a carriage within the meaning of that word in the Revised Laws, chapter 51, section 1. Persons may lawfully ride in automobiles, as they may lawfully ride on bicycles, and cities and towns are bound to keep their ways reasonably safe and convenient for travel generally, including that properly undertaken upon such vehicles: Gregory v. Adams, 14 Gray, 242. But if their ways are reasonably safe and convenient for travel generally, they are not liable for a failure to make special provisions, required only for the safety and convenience of persons using automobiles or bicycles. The law applicable to the present case is that stated in Baker v. Fall River, 187 Mass. 53, 72 N. E. 336; Richardson v. Danvers, 176 Mass. 413, 79 Am. St. Rep. 320, 57 N. E. 688, 50 L. R. A. 127; Rust v. Essex, 182 Mass. 313, 65 N. E. 397, and Spring v. Williamstown, 186 Mass. 479, 71 N. E. 949.

There was error in the instruction that, the cutting down of the grade having obliterated the marks of travel, it was not of any great importance whether the accident "happened without the limits of the old road as above described, provided, in the opinion of the jury, the sand was a dangerous place, because the town would be obliged to properly protect travelers, by barriers or otherwise, against such a danger, even if it were outside the limits of the way." The jury should have been instructed that, if the accident happened

outside of the limits of the way, the town was not liable for it, as there was no obligation to keep in [247] repair land outside of the boundaries of the way, and that there was no such dangerous condition there as called for the erection of a barrier to keep travelers from passing out of the road. In Damon v. Boston, 149 Mass. 147, 21 N. E. 235, Mr. Justice Allen said: "The danger which requires a railing must be of an unusual character, such as bridges, declivities, excavations, steep banks, or deep water. Spaces adjoining roads, streets and sidewalks, and unsuitable for travel, are often left open in both country and city, and a town or city is not bound to fence against them unless their condition is such as to expose travelers to unusual hazard." The same doctrine is also applied and strongly stated in Adams v. Natick, 13 Allen, 429, and Marshall v. Ipswich, 110 Mass. 522. See, also, Stockwell v. Fitchburg, 110 Mass. 305, Stone v. Attleborough, 140 Mass. 328, 4 N. E. 570, and Macomber v. Taunton, 100 Mass. 255.

The defendant's contention that the plaintiff could not recover for want of proof that he was licensed to operate an automobile upon the public highways, and that his automobile was registered according to the requirements of the Statutes of 1903, chapter 473, as amended by the Statutes of 1905, chapter 311, is not well founded. If it appeared affirmatively that he was traveling without a proper registration of the vehicle, or without a license to operate it, it might well be held that he was not a traveler on the highway in a legal sense, and that the town owed him no duty under the statute. He would be within the principles stated in Richards v. Enfield, 13 Gray, 344, Higgins v. Boston, 148 Mass. 484, 20 N. E. 105, Blodgett v. Boston, 8 Allen, 237, and Tighe v. Lowell, 119 Mass. 472. Section 5 of the Statutes of 1903, chapter 473, declares that, "except as hereinafter provided, no person shall, on or after the first day of September in the year 1903, operate an automobile or motor cycle upon any public highway or private way laid out under authority of statute, unless licensed so to do under the provisions of this act." In section 3 there is a similar provision in regard to the operation of an automobile unless it is registered. Penalties are prescribed for a violation of these provisions.

Inasmuch as the plaintiff was upon the road only as one riding in and operating an automobile, if it was unregistered and if he was unlicensed, he had no relation to the highway, and he was in no sense a traveler except as a violator of the law in reference [248] to the use that might be made of the

way. In regard to the right of recovery, his violation of this law would not be treated as mere evidence of negligence that was not a direct and proximate cause of the accident, or as only a condition which was not fatal to his claims: See Newcomb v. Boston Protective Department, 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555; Steele v. Burkhardt, 104 Mass. 59, 6 Am. Rep. 191; Spofford v. Harlow, 3 Allen, 176; Kidder v. Dunstable, 11 Gray, 342. Without determining whether the court would now follow the decision of the majority of the justices in Smith v. Boston & Maine R. R., 120 Mass. 490, 21 Am. Rep. 538, and the doctrine stated in some of the cases therein cited, we are of opinion that a violation of the statute in this particular so affects the direct relation of the violator to the town, in regard to the way and the only use that he was making of it, as to leave him without remedy for an injury caused by a defect in the way.

So far as appears, the automobile was duly registered and the plaintiff was duly licensed. The evidence tends to show that the plaintiff was a traveler lawfully using the way. Presumptions both of law and fact are always in favor of innocence. In cases somewhat analogous, when one would avoid liability on the ground of a violation of law by the plaintiff, he must prove the violation: Goddard v. Rawson, 130 Mass. 97, and cases there cited. See, also, Temple v. Phelps, 193 Mass. 297, 79 N. E. 482.

In the present case the evidence introduced by the plaintiff made a prima facie case in his favor on this point.

Exceptions sustained.

The Law of the Automobile is the subject of a note to Christy v. Elliott, 108 Am. St. Rep. 212. The employment of an automobile on the public highway as a means of transportation is a lawful use of the road, but it is subject to reasonable legislative or municipal regulation: State v. Swagerty, 203 Mo. 517, 120 Am. St. Rep. 671; McIntyre v. Orner, 166 Ind. 57, 117 Am. St. Rep. 359; In re Berry, 147 Cal. 523, 109 Am. St. Rep. 160.

A Bicycle is not a Carriage Within the Meaning of a Statute requiring towns and cities to keep highways in repair, so that the same may be reasonably safe and convenient for travelers with their horses, teams and carriages. The rider of a bicycle, therefore, cannot recover for injuries received by him and due to a depression in the road: Richardson v. Danvers, 176 Mass. 413, 79 Am. St. Rep. 320.

GORDON v. LEVINE.

[197 Mass. 263, 83 N. E. 861.]

SUNDAY LAWS.—A Check Delivered on Sunday is invalid, and has no legal effect. The holder cannot recover thereon against the drawer, if, on due presentation, the bank fails to pay. (p. 361.)

SUNDAY LAWS.—Though Receiving Payment of a Debt on Sunday may be Illegal, the Payment cannot be Disregarded, and an action maintained to again enforce it. (p. 362.)

SUNDAY—Effect of Prohibited Acts Done upon.—A court will not aid a party to recover on a Sunday transaction, but it will not treat as a nullity that which was done on Sunday in the performance of a valid contract. It will give to the act done on a Sunday its legal effect as a defense. (p. 362.)

SUNDAY LAWS.—A Negotiable Instrument, Void Because Delivered on Sunday, is valid in the hands of a bona fide purchaser for value and without notice. (pp. 362, 363.)

SUNDAY LAWS—Check Delivered on Sunday, When not made Void by Returning the Money Received.—If one receives a check for money, which check is invalid because delivered on Sunday, and he negotiates it and thereby obtains from a bona fide purchaser the amount for which it calls, he is not entitled to return such money and then maintain an action against the drawer for money so loaned. (p. 363.)

BANKING—Check, Failure to Present Within a Reasonable Time.—A bona fide purchaser, without notice, of a check invalid because delivered on Sunday, loses the right to maintain an action thereon against the payee and indorser by failure to present it within a reasonable time for payment. (p. 363.)

SUNDAY LAWS—Check Invalid Because Delivered on Sunday, Failure to Present for Payment.—If one receives a check invalid because delivered on Sunday, but which would have been paid had it been presented in due time, and fails to so present it until the bank is insolvent and ceases business, he cannot maintain an action for the money lent against the person who drew the check and recover the amount thereof from him. (p. 363.)

E. P. Garland, for the plaintiff.

N. Bartnett, for the defendant.

[265] LORING, J. The only question before us in the case at bar is that raised by an exception to the refusal to give the following ruling asked for by the plaintiff: "If the check was delivered on Sunday it was invalid and had no legal effect, and the plaintiff is entitled to recover on his count for money" lent.

It is true that, "if the check was delivered on Sunday, it was invalid and had no legal effect," and that the plaintiff could not have recovered if he had brought suit on it against the defendant on nonpayment by the bank after a presentment within the proper time: Stevens v. Wood, 127 Mass. 123,

But it does not follow that "the plaintiff is entitled to recover on his count for money" lent.

A defense to the count for money lent would have been made out if the plaintiff had received the one hundred dollars from the bank on presenting the check to it for payment.

It was decided in Johnson v. Willis, 7 Gray, 164, that a payment made on Sunday is a defense to an action for the recovery of the debt so paid. To the same effect see Cranson v. Goss, 107 Mass. 439, 9 Am. Rep. 45; Leonard v. Travis, 6 Allen, 129; Clapp v. Hale, 112 Mass. 368, 17 Am. Rep. 111.

In the case we have supposed, where the plaintiff received his one hundred dollars from the bank on presenting the check for payment, it is true that the defendant could not make out his defense without showing an infraction of the Sunday law. But that is equally true where the debt is paid on Sunday in cash. As was said by Metcalf, J., in Leonard v. Travis, 6 Allen, 129: "A debtor violates the law by paying the debt on Sunday. So does the creditor by receiving it on that day; but he cannot enforce a second payment: Johnson v. Willis, 7 Gray, 164."

The distinction established by the cases in this commonwealth is this: The court will not aid a party to recover on a Sunday transaction on the one hand; but, on the other hand, it will not [266] treat as a nullity what was done on Sunday in performance of a valid contract; it will give to the act done on Sunday its legal effect when set up in defense.

This is made clear by the language of the opinions in Johnson v. Willis, 7 Gray, 164, Cranson v. Goss, 107 Mass. 439, 9 Am. Rep. 45, and Leonard v. Travis, 6 Allen, 120, and it is established by the decision in Clapp v. Hale, 112 Mass. 368, 17 Am. Rep. 111. In that case it was decided that while a part payment on Sunday was effectual as payment pro tanto, it did not take the note out of the operation of the statute of limitations.

To come to the case at bar the plaintiff in fact got his one hundred dollars by "negotiating" the check, and the result is the same as if he had received the money from the bank.

It appears from the bill of exceptions that when he "negotiated" the check on Monday he received from the indorsee the one hundred dollars called for by it. It is stated that when the check was returned to the plaintiff he "returned the $100 which he had received upon the negotiation of said check." But that fact is of no consequence.

The check was a valid check in the hands of the purchaser to whom it was negotiated on Monday. A negotiable instru-

ment void because delivered on Sunday is valid in the hands of a bona fide purchaser for value without notice: Cranson v. Goss, 107 Mass. 439, 9 Am. Rep. 45. The statute (as to the rights of a purchaser of a negotiable instrument payable on demand) in force when Stevens v. Wood, 127 Mass. 123, was decided, was repealed by the negotiable instruments act, now Revised Laws, chapter 73, section 70.

The purchaser of this check from the plaintiff lost his rights against the plaintiff (the payee who indorsed it to him) when he failed to present it within a reasonable time, for the same reason that he lost them against the drawer; as to which see Gordon v. Levine, 194 Mass. 418, 120 Am. St. Rep. 565, 80 N. E. 505, 10 L. R. A., N. S., 1153. It follows that the repayment of the one hundred dollars on the check being "returned in due course," was a voluntary payment which the plaintiff was not bound to make.

Further, if the plaintiff, in place of negotiating the check, had kept it until it was presented on Friday, when it was too late (see Gordon v. Levine, 194 Mass. 418, 120 Am. St. Rep. 565, 80 N. E. 505, 10 L. R. A., N. S., 1153) and (because it was presented too late) the check was not paid and the money was lost, the result would have been the same. In that case he [267] could have had his money had he presented the check within the proper time; and since in that case the money was lost through his neglect in not presenting the check within a reasonable time, he cannot stand in a better position than he would have stood in had he acted with due promptness.

The only apparent explanation for the plaintiff's returning the one hundred dollars on the return of the check was that in spite of the facts stated above the check was not "negotiated" to a bona fide purchaser, but was "negotiated" to his own agent. If it was, the neglect to present the check within a reasonable time was the plaintiff's own neglect.

Since the judge in the case at bar may have found (1) that the plaintiff received the one hundred dollars called for by the check, or (2) that he might have received it but for his own neglect, he was not bound to give the ruling asked for: See, in that connection, Swett v. Southworth, 125 Mass. 417; Whitney v. Esson, 99 Mass. 308, 96 Am. Dec. 762. The entry must be, exceptions overruled.

Sunday Contracts are discussed in the note to Henry Christian B. & L. Assn. v. Walton, 59 Am. St. Rep. 641. It has been held in Maryland that contracts made on Sunday, if executory, cannot be enforced; but if executed, cannot be avoided merely because entered

into on a dies non: Rickards v. Rickards, 98 Md. 136, 103 Am. St. Rep. 393, and see cases cited in the cross-reference note thereto.

Although a Note Executed on Sunday is Unenforceable, still a payment made on it on a secular day will be regarded as a ratification, and will make it valid from that day: Russell v. Murdock, 79 Iowa, 101, 18 Am. St. Rep. 348. And if a note is discounted on Sunday and a check given for the proceeds thereof and indorsed on the same day, but not drawn until a following and legal day, the transaction is thereby ratified and affirmed as a whole, and constitutes a legal and binding loan of the money: Cook v. Forker, 193 Pa. 461, 74 Am. St. Rep. 699.

NELSON v. BLINN.

[197 Mass. 279, 83 N. E. 889.]

CONSTITUTIONAL LAW—Absentees, Statutes Providing for the Distribution of Estates of.—A statute authorizing the taking possession of the property of an absentee and placing it in charge of a receiver, to be kept until fourteen years after the disappearance of such absentee, and its distribution after that time to the persons and in the proportions to and in which it would have been distributed if the absentee had died intestate on the day fourteen years after his disappearance, is not unconstitutional. (p. 367.)

G. R. Blinn, receiver pro se.

A. L. Taylor, for the appellee.

279 KNOWLTON, C. J. The appellant was appointed the receiver of the estate of an absentee from the commonwealth, under the Revised Laws, chapter 144, as amended by the Statutes of 1904, chapter 206. After due proceedings in the management and settlement of the estate of the absentee, more than fourteen years having elapsed since the time of her disappearance as found and recorded by the court, a petition for distribution of the estate was filed in the probate court, and after proper notice and regular proceedings a decree was made ordering a distribution in accordance with the prayer of the petition. The case is before us on an appeal, and the only question raised is whether the statute referred to is constitutional.

The appellant relies upon article 10 of the Declaration of Rights, which guarantees to every individual protection in the enjoyment of his life, liberty and property, and upon the fourteenth amendment to the constitution of the United States, which 280 declares that no state shall deprive any person of life, liberty or property without due process of law. As applied to a case like the present, the prohibition in the

amendment just referred to is as broad as the general provision in the constitution of Massachusetts.

The unanimous opinion of the justices of the supreme court of the United States upon a similar statute, in the case of Cunnius v. Reading School District, 198 U. S. 458, 25 Sup. Ct. Rep. 721, 49 L. ed. 1125, may be treated as a sufficient authority, except so far as the different provisions of the statutes modify the questions involved. That case arose upon a statute of Pennsylvania, whose constitutionality was sustained by a unanimous decision of the supreme court of that state, reported in 206 Pa. 469, 98 Am. St. Rep. 790, 56 Atl. 16. In each decision a distinction was pointed out between those statutes which authorize a settlement of the estate of a deceased person, under which the proceedings are void and the whole jurisdiction gone if the person is in fact alive, and statutes like the present, in which a state undertakes to deal with property within its jurisdiction when its owner has abandoned it, or for some other reason cannot be found. Said Mr. Justice Mitchell, speaking for the supreme court of Pennsylvania in the case just cited: "It is a wise and just statute of sequestration and conservation of property which is without a known owner, whether the late owner has abandoned it (as in the present case) or the title has devolved upon others by his death, not being presently ascertainable. The statute steps in to provide a care-taker and to vest present benefit in those who appear to be the owners, with as complete provision as is practicable for the re-establishment of the rights and possession of the absentee on his reappearance. That the state must have some power is manifest. The property is within its jurisdiction and under its protection. It is not in the interests of order or good government that property should lie ownerless or open to conflicting claims. If the absentee be really dead, it is conceded that the proceeding is unimpeachable. But if he is dead, so far as can be learned, though the death be not absolutely proved, yet the effect to the state is the same—there is property in its charge, without a recognized owner. It must have power to meet such a case, or one of its chief functions as a government must go unperformed." [281] The subject is very fully and ably considered by Mr. Justice White in giving the opinion of the supreme court of the United States in the same case, and the legality and propriety of the exercise of this governmental right is established historically as well as by sound reasoning. In view of these decisions the case of Carr v. Brown, 20 R. I. 215, 78 Am. St. Rep. 855, 38 Atl. 9, 38

L. R. A. 294, and Clapp v. Houg, 12 N. D. 600, 102 Am. St. Rep. 589, 98 N. W. 710, 65 L. R. A. 757, so far as they present a different view, should not be followed.

In the fundamental principles upon which the law rests there is no difference between the statute in Massachusetts and that in Pennsylvania. Each alike makes a reasonable provision for notice. As the proceeding is in its nature in rem, a personal notice to the absentee, which in most cases would be impossible, is not necessary to its validity. The constitutionality of our statute was assumed by the parties and the court in George v. Clark, 186 Mass. 426, 71 N. E. 809, and in Purdon v. Blinn, 192 Mass. 387, 78 N. E. 462.

The only part of our statute that is not covered by the decision of the supreme court of the United States is that which relates to the distribution of the property. As bearing upon that the language of Mr. Justice Mitchell in 206 Pa. 469, 98 Am. St. Rep. 790, 56 Atl. 16, is pertinent. He says: "But there must be a limit beyond which the state is not bound to have its laws set at defiance by the whim of an individual, and property kept in abeyance as to its ownership. If a child having title to property is taken out of the state and never heard of again, it would be nearly a century before it could be said with certainty that such owner was dead. The state is not bound to have the regular and lawful use and ownership of property subjected to such restrictions and uncertainty. If a fair and reasonable provision is made for the protection of the owner in case of his reappearance, the state has not exceeded its constitutional powers."

The statute in Pennsylvania provides that a distribution of the estate of the absentee may be made in proceedings commenced after he has been absent and his whereabouts have been unknown for seven years, and it would seem that the estate might be settled and the distribution ordered within a comparatively short time after the expiration of the seven years. Upon such distribution the distributees must give security, to be [282] approved by the court, that they will refund the amounts received with interest, should the absentee in fact be alive; but if they are not able to give such security, the money is to be put at interest, and the interest paid only to the distributees until security has been given, or until "the court on application shall order it to be paid to the person or persons entitled to it." Under this statute there is nothing to prevent the court from ordering the whole estate paid over to the distributees, without security, long before the expiration of fourteen years from the time of the ab-

sentee's disappearance. The principal difference between the two statutes is that, under this in Pennsylvania, the whole property might be distributed without security, if the court should order it, within a period that might not be more than nine or ten years from the disappearance of the absentee, while under our statute no distribution can be made before the expiration of fourteen years from his disappearance, at which time all his rights to the property are barred by the statute. This last is, of course, a statute of limitations. Viewed as such, if it is not unreasonable in the length of time which it gives an owner in which to recover his property within the jurisdiction of the state, it is not unconstitutional: Call v. Hagger, 8 Mass. 423; Mulvey v. Boston, 197 Mass. 178, 83 N. E. 402. One who wishes to preserve his right to property not in his possession must act with reasonable diligence in the assertion of his right. As to most kinds of personal property he is barred by our statutes at the expiration of six years from the time when he might have taken formal proceedings for his protection. A disseisin of him, continued for twenty years, deprives him of his real estate. As to property abandoned or left unclaimed or uncared for within the commonwealth, the legislature may well exercise the jurisdiction of the state to take it in charge and administer it, and may prescribe a reasonable time as a limitation of the right of the owner to reclaim it. The question how long a time must be allowed, in the interest of the owner, and in the interest of those claiming under him, as well as in that of the general public, is primarily for the legislature to decide. Something might depend upon the internal condition of the state, as to the nature and density of the population, the kinds of business which are most followed, and other local considerations with [383] which the legislature would be familiar. In regard to such a kind of jurisdiction as is exercised under this statute, and the effect of long delay and uncertainty as to the ownership of property in the hands of a receiver, we cannot say that the legislature might not properly enact that one's rights of property within our jurisdiction should be lost if he is absent for fourteen years without attempting to exercise them. In some respects this statute is more considerate of the rights of absentees than the statute of Pennsylvania which was held constitutional, while in other respects the other is more liberal. We cannot say that it was beyond the constitutional power of the legislature to enact.

Decree affirmed.

The Constitutionality of a Statute Providing for Administration upon the estates of absentees under the presumption that they are deceased is upheld in Cunnius v. Reading School District, 206 Pa. 469, 98 Am. St. Rep. 790; but is denied in Carr v. Brown, 20 R. I. 215, 78 Am. St. Rep. 855; Clapp v. Houg, 12 N. D. 600, 102 Am. St. Rep. 589; Selden's Exr. v. Kennedy, 104 Va. 826, 113 Am. St. Rep. 1076. In California a statute has recently been enacted providing for trustees to take charge of the property of persons whose whereabouts are unknown: Cal. Code Civ. Proc., 1822-1822b.

NORTH END SAVINGS BANK v. SNOW.

[197 Mass. 339, 83 N. E. 1099.]

MORTGAGE, Effect of a Sale and Conveyance of the Property Subject to.—On the conveyance by the mortgagor of property subject to the mortgage, he becomes, in effect, surety for the payment of the debt, and if he pays it, becomes entitled to subrogation and does not discharge it. (p. 369.)

MORTGAGE—Conveyance of Property Subject to Subsequent Agreement, Effect of on the Obligation of the Mortgagor.—On the conveyance of property subject to a mortgage, the mortgagor becomes entitled to have it applied on the payment of the mortgage debt, and any valid agreement affecting the right of foreclosure by extending the time of payment releases the mortgagor to the amount to which, by reason of such extension, the security falls short of the amount due. (p. 370.)

MORTGAGE, Agreement of Third Person to Pay, When Valid. If persons to whom premises are conveyed subject to a mortgage enter into an agreement with the mortgagee that the former will pay the interest accruing on the indebtedness, and that the latter will not foreclose as long as such payment is made, this is a valid and enforceable agreement, and one the original mortgagors are entitled to rely upon. (p. 370.)

J. H. Colby, for the plaintiff.

E. F. McClennen, for the defendants.

340 MORTON, J. This is an action on a mortgage note by the mortgagee against the mortgagors. Certain facts were agreed, reserving the question of their mutuality, and reserving also the right of the parties to introduce further evidence. The defendants offered to show certain other facts in addition to those agreed upon. The presiding judge ruled that the facts, if shown, would be immaterial, and excluded the evidence thus offered. No other evidence was introduced than that contained in the facts agreed upon, and the presiding judge directed a verdict for the plaintiff for the amount of the note and interest. The case is here on exceptions by the defendants to the rulings and direction thus made. Exceptions were also taken by the defendants to the refusal of the presiding judge to order the plaintiff's presi-

dent to answer certain interrogatories filed by the defendants, but they have not been argued, and we, therefore, treat them as waived.

The mortgage was dated March 2, 1897, and was payable in three years from date with interest payable semi-annually on the first days of June and December "at the rate of five per cent per annum during said term and for such further time as said principal sum or any part thereof shall remain unpaid." The title to the property was in the female defendant. In November, 1898, the defendants conveyed the equity, subject to the mortgage, to one Finkelstein and one Friedman. Thereafter, Finkelstein and Friedman paid the interest until June 10, [341] 1904. No demand for payment of the mortgage was made either upon Finkelstein and Friedman or the defendants until December 27, 1904. The defendants offered to show that, after the note came due, the plaintiff agreed with Finkelstein and Friedman that, if they would continue to pay interest on the note according to the terms thereof, it would not foreclose the mortgage so long as the interest was regularly paid, and that Finkelstein and Friedman agreed to this and paid the interest under this agreement down to and including June 10, 1904. The defendants also offered to show, in substance, that the property had greatly depreciated since the mortgage came due, and that it would not bring enough under foreclsoure proceedings to pay the note.

After the conveyance of the equity subject to the mortgage, the relation of the defendants to the plaintiff became, in a sense, that of sureties, and if they had paid the note they would have been entitled to be subrogated to the mortgage, notwithstanding they were the mortgagors. Payment of the note by them under such circumstances would not have operated to discharge and extinguish the debt as to them unless so intended: Pratt v. Buckley, 175 Mass. 115, 55 N. E. 889; Pearson v. Bailey, 180 Mass. 229, 62 N. E. 265; Franklin Savings Bank v. Cochrane, 182 Mass. 586, 66 N. E. 200, 61 L. R. A. 760; Rice v. Sanders, 152 Mass. 108, 23 Am. St. Rep. 804, 24 N. E. 1079, 8 L. R. A. 315; Murray v. Marshall, 94 N. Y. 611; Spencer v. Spencer, 95 N. Y. 353; Travers v. Dorr, 60 Minn. 173, 62 N. W. 269. The land constituted the primary fund, and they were entitled to have it applied in payment of the mortgage debt. Any valid and binding agreement, therefore, between the plaintiff and Finkelstein and Friedman, affecting the right of foreclosure by extending

the time for the payment of the mortgage debt, would operate to release the defendants to the amount to which by reason of such extension the security fell short of the amount due on the note. Ordinarily, a valid and binding agreement for extension between the principal and his creditor without the consent of the surety will discharge the latter entirely. But in a case like the present the mortgagors are not regarded as being, in the strict sense of the word, sureties, but as being such only in the sense that they are entitled to have the security regarded as the primary fund for the payment of the debt, and it is only so far as that is affected that they can complain. The point now presented did not arise in Shepherd [342] v. May, 115 U. S. 505, 6 Sup. Ct. Rep. 119, 29 L. ed. 456. The question then is, whether the agreement for extension, which the defendants offered to show was entered into between the plaintiff and Finkelstein and Friedman, was a valid and binding one. We do not see why upon the defendants' offer it was not. Finkelstein and Friedman were not personally liable for the mortgage debt. The offer was to show that, in consideration of the promise by Finkelstein and Friedman to pay the interest, the plaintiff agreed not to foreclose so long as the interest was paid. This constituted a valid and binding agreement between the plaintiff and Finkelstein and Friedman, and would have prevented the plaintiff from foreclosing the mortgage so long as the interest was paid. It is true, as the plaintiff contends, that a mortgagee may pursue concurrently his remedies on the note and mortgage. But this is subject, of course, to the provision that he has done nothing to disable him from doing so. It is true, also, that mere inaction or delay on the part of the creditor in the enforcement of his rights against the principal debtor will not discharge the surety. But here, according to the offer, there was a valid and binding agreement for delay. Still further it is true that if Finkelstein and Friedman had been the principals on the note, and the defendants had been sureties, the agreement would not have operated to discharge the defendants because it would have been invalid for want of consideration. But as already observed Finkelstein and Friedman were not personally liable for the mortgage debt, and the agreement for delay between them and the plaintiff was valid and binding. No such question as is here presented arose in Tucker v. Crowley, 127 Mass. 400, on which the plaintiff relies, and the result is that we think that the exceptions must be sustained.

So ordered.

When upon the Conveyance of the Mortgaged Premises, by the Mortgagor, the grantee assumes and agrees to pay the mortgage, he becomes, at least as to the mortgagor, the principal debtor, and the mortgagor occupies the position of surety. It follows that an extension of time of payment given by the holder of the mortgage to the grantee, even with the express understanding that the bond and mortgage shall remain in every other respect unaffected by the agreement of extension, when made without the consent of the mortgagor, discharges him from all liability upon the mortgage: See the note to Klapworth v. Dressler, 78 Am. Dec. 73.

The Right to Subrogation as between persons dealing with mortgaged property is discussed in the note to American Bonding Co. v. National etc. Bank, 99 Am. St. Rep. 512.

MASON v. INTERCOLONIAL RAILWAY OF CANADA.

[197 Mass. 349, 83 N. E. 876.]

JURISDICTION Over Sovereigns.—Courts have no jurisdiction to proceed with a suit against the sovereign of another state or to interfere with its property of a public nature. (pp. 373, 374.)

JURISDICTION Affecting the Property of a Sovereign—Duty of Court to Dismiss Action on Suggestion.—If an action is commenced against a foreign railway and attempts are made to garnish credits belonging to it, the court, on the suggestion by an attorney that the railway described is the property and operated by the British crown in right of the government, will dismiss the action. (p. 374.)

Action of tort to recover for injuries alleged to have been received by the plaintiff when a passenger on the Intercolonial Railway of Canada. One individual and several corporations were summoned as trustees, and admitted having in their possession credits and effects of the railway.

There was filed in the case a paper entitled "Appearance, Suggestion and Motion to Dismiss Action," which, so far as material, is as follows:

"And now comes Arthur H. Russell, counselor at law, and a member of the bar of this court, and in the above-entitled cause respectfully shows to the court that there exists no such body corporate as is described under the name and title of the Intercolonial Railway of Canada, as defendant in this action; and further, he respectfully suggests and shows to the court that the line of railway described in the writ and declaration in this action as the Intercolonial Railway of Canada is in fact the property of the British Crown and is owned and operated by His Britannic Majesty in the right of his government of Canada; wherefore the said Arthur H. Russell respectfully suggests to the court that it is in derogation of the sovereignty and independence of His Britannic Majesty and contrary to the law and comity of nations

that funds belonging to His Britannic Majesty should be withheld by a process of this court or that this court should take jurisdiction of this action, and he moves that the said action be forthwith dismissed."

The judge having ordered the action dismissed, the plaintiff appealed.

N. Wolfman, for the plaintiff.

A. H. Russell, appearing as amicus curiae.

[350] KNOWLTON, C. J. This is an action brought by a trustee process to recover damages for personal injuries. The defendant has not appeared, but a member of our bar, as a friend of the court, following the practice approved by Chief Justice Marshall in Osborn v. United States Bank, 9 Wheat. 738, 6 L. ed. 204, has brought before the court a suggestion that the action be dismissed, and [351] also an affidavit of the deputy of the minister of justice and attorney general of Canada, including a copy of the "Act respecting Government Railways," from which it appears that the so-called defendant, the Intercolonial Railway of Canada, is the property of His Majesty, Edward VII, King of the United Kingdom of Great Britain and Ireland, in the right of his Dominion of Canada, and is not a corporation. The truth of the matters thus shown to the court is not questioned. It appears that no subject, private individual or corporation has any interest or concern by way of property or direction in the ownership or working of the Intercolonial Railway, but that it is owned and operated by the king, through his government of Canada, for the public purposes of Canada. All income arising from the operation of it is, by the laws of Canada, appropriated to the consolidated revenue fund of Canada, upon which fund all the expenses of the government of Canada are chargeable. All moneys and income due by reason of the operation or business of the railway are chargeable as belonging to the King, and are collectible in his name. Such moneys, when collected, are deposited to the credit of the minister of finance and register general of Canada, and carried to the credit of the consolidated revenue fund, which fund is appropriated to the public debt and service of Canada. The cost of maintenance and operation of this railway is provided for by appropriation of the parliament of Canada out of the consolidated revenue fund, and all the receipts from the working of the railway are a part of the moneys of Canada, appropriated to the consolidated revenue fund, and are not used

for the maintenance or operation of the railway, except as the receipts from customs or excise duties or from any other branch of the public service are so used: See, also, Queen v. McLeod, 8 Can. Sup. Ct. 1.

Upon this suggestion the question at once arises whether the court has jurisdiction of a suit which is virtually against the king of a foreign country. An answer in the negative comes almost as quickly.

The general subject of the immunity of the sovereign power from the jurisdiction of its own court was considered and discussed at great length by Mr. Justice Gray, in Briggs v. Lightboats, 11 Allen, 157, and, after an exhaustive review of the [352] authorities, it was held that the action could not be maintained because the lightboats were the property of the United States, a sovereign power. Incidentally, the question whether the public property of a foreign sovereign is exempt from the jurisdiction of the courts was discussed, and the cases bearing upon the question were reviewed. In the opinion, on page 186, we find this sentence, which is pertinent to the present case: "The exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character." In Schooner Exchange v. M'Faddon, 7 Cranch, 116, 3 L. ed. 287, Chief Justice Marshall gives a very clearly reasoned statement of the principles which control the courts in their decisions that they have no jurisdiction over a sovereign of a foreign state who comes within their precincts. The decision was that the courts of the United States had no jurisdiction over a public armed vessel in the service of a sovereign of another country at peace with the United States. At page 137 we find this statement of a reason for the law that governs such cases: "One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."

The doctrine that the courts have no jurisdiction to proceed with a suit against the sovereign of another state is established in England in numerous decisions. It applies to all proceedings against the public property of such a sovereign. It was clearly laid down and applied in the cases of

Wadsworth v. Queen of Spain, 17 Q. B. 171, and De Haber v. Queen of Portugal, 17 Q. B. 171, 196. It was again applied in The Constitution, L. R. 4 P. D. 39, and also in The Parlement Belge, L. R. 5 P. D. 197, where an elaborate review of the decisions is given by Brett, L. J., who says on page 214: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence [353] and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

In Vavasseur v. Krupp, 9 Ch. D. 351, 361, Lord Justice Cotton sums up the law as follows: "This court has no jurisdiction, and in my opinion none of the courts in this country have any jurisdiction, to interfere with the property of a foreign sovereign, more especially what we call the public property of the state of which he is sovereign as distinguished from that which may be his own private property. The courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented, as all foreign countries having a sovereign are represented, by the individual who is the sovereign." In Young v. The Scotia, [1903] App. Cas. 501, there is an elaborate discussion of the exemption of public property from process of the courts of its own sovereignty. The doctrine was applied to a claim for salvage of a public vessel which was used by the Canadian government as a ferry-boat, in connection with a line of railway and as a part of the general means of transportation, just as cars are used on the Intercolonial Railway. See, also, the very recent case of The Jassy, 75 L. J. P. D. & A. 93, where the principle suggested for our guidance was applied to a vessel which was the property of the King of Roumania.

The principles which have long been recognized as applicable to the dealings of all nations with one another, as well as the formal decisions of the courts, make it plain that this action must be dismissed for want of jurisdiction. The plaintiff must seek her remedy in the courts of the country in

which she received her injury, where there is a statutory provision for such cases.

Action dismissed.

Neither the United States nor any State of the Union can be sued without its consent given by legislative authority; and this immunity cannot be waived by an officer of the government, nor can it be evaded by making him a party defendant: See the note to Sanders v. Saxtion, 108 Am. St. Rep. 831.

PALATINE INSURANCE COMPANY v. KEHOE.

[197 Mass. 354, 83 N. E. 866.]

INSURANCE Against Fire—Property Removed.—Though a policy insuring personal property against destruction by fire contains a rider granting permission to remove such property to another building, and that the policy shall attach to and cover all property in both locations during removal, if the property is removed and stored in another building, with a view to its subsequent removal to the building designated in the rider, such property is not covered by the policy, and no recovery can be had for its loss from the peril insured against. (p. 376.)

INSURANCE, Right to Recover Money Paid Under Policy Where the Payment was Induced by False Representations.—In an action to recover money paid under a policy of insurance, such payment cannot be regarded as a waiver of the right to recover, where it was induced by false representations of the insured regarding material matters. (p. 376.)

INSURANCE, Ratification of Invalid Policy, What Amounts to.—If, after a loss, the insurer requests the assured to make or procure an assignment, which is accordingly made, and payment is afterward made by the assured to the assignee, this is a ratification of the payment so made. (p. 377.)

Action to recover a sum paid on the loss of personal property insured against destruction by fire when it was in the house known as Irving Cottage, on Ocean avenue, in Revere. At the trial, the husband of the defendant testified that he executed his assignment of the policy to the defendant at the request of the plaintiff's agent about a week after the money had been paid to her, because investigation had shown that defendant was the person insured. The plaintiff excepted to the admission of this assignment in evidence. The defendant contended that the procuring by the plaintiff of the assignment and the indorsement of its assent thereon was evidence of the ratification by the plaintiff of the payment made to the defendant, and this view was sustained by the trial court. Verdict and judgment for the plaintiff, and defendant alleged exceptions.

R. D. Ware, for the plaintiff.

H. Dunham, for the defendant.

[355] KNOWLTON, C. J. The plaintiff contended that a part of the property included in the policy was not covered by it at the time of the fire, because it had been removed from the building in which it was insured to another building near by, which was burned in the same conflagration.

Upon the policy a rider had been attached, as follows: "Permission is hereby given the assured to remove the within insured property to frame dwelling building situate east side South Main Street, between Union and Maple Sts. in Randolph, Mass. This policy to attach and cover the same in both locations during removal in proportion as the value in each location shall bear to the value in both and after removal shall attach and cover in new location only." There was evidence tending to show that an important part of the property had been removed and stored temporarily in another building, with a view to the subsequent removal of it to Randolph. As to this the judge instructed the jury as follows: "Now as to any articles which were moved from the Irving Cottage, if any were, and temporarily placed in another building that being a part of the transmission of the property from the Irving Cottage to Randolph within any reasonable grounds, the policy of insurance might cover such property in its transmission from the one place to another. It must appear that if any portion of the property [356] was placed temporarily in another building while it was in process of being moved, the placing of that property there was for a very short period of time only; that it was temporarily there, and that it was not to remain there and did not remain there under the protection of that building." This was erroneous. In Goodhue v. Hartford Ins. Co., 184 Mass. 41, 67 N. E. 645, it was decided, under a contract in substantially the same terms as the one now before us, that goods which were burned in railroad cars while being removed were not covered by the policy. Other cases involving the same general principle are Bradbury v. Fire Ins. Assn., 80 Me. 396, 6 Am. St. Rep. 219, 15 Atl. 34; English v. Franklin Ins. Co., 55 Mich. 273, 54 Am. Rep. 377, 21 N. W. 340; Lycoming Ins. Co. v. Updegraff, 40 Pa. 311; Hartford Ins. Co. v. Farrish, 73 Ill. 166; Mawhinney v. Southern Ins. Co., 98 Cal. 184, 32 Pac. 945, 20 L. R. A. 87.

There was evidence tending to show a fraudulent representation by the defendant to the plaintiff that this property had

not been removed from the place where it was when the policy was issued, and that most of the property was in that place at the time of the fire, a small portion only having been removed to Randolph. The instruction just quoted was important as bearing upon the materiality of the fraudulent representation, if there was a fraudulent representation.

At the request of the defendant the judge also instructed the jury that "payment by the plaintiff to the defendant in this action is a waiver of all breaches of the insurance policy on the part of the defendant and every defense which might have been made to the policy on which said payment was made except for such waiver." This leaves out of consideration the fact, upon the evidence, the payment might have been procured by fraudulent representations of the defendant in regard to material matters. If it was so procured the plaintiff, on discovery, might avoid the effect of it, and it would not constitute a waiver. In Berkshire Ins. Co. v. Sturgis, 13 Gray, 177, relied on by the defendant, there is nothing that precludes one from avoiding a settlement procured by fraud. This instruction was erroneous.

As bearing upon one branch of the case the assignment of the policy to the defendant by her husband, after the payment to [357] her by the plaintiff, with the assent of the plaintiff's agents indorsed upon the policy, was rightly admitted.

The other questions of evidence presented by the bill of exceptions are not likely to arise in the same form at another trial, and we do not think it necessary to consider them.

Exceptions sustained.

A Condition that a Policy Insuring Against Loss by Fire is to become void if any change takes place in the location of the property does not, on its breach, render the policy absolutely void, so that no recovery can be had thereon if a loss subsequently occurs at another place to which the insurer had stipulated that removal might be made, though, when so stipulating, he had no knowledge of the previous removal: Ohio Farmers' Ins. Co. v. Burget, 65 Ohio St. 119, 87 Am. St. Rep. 596, and see the cases cited in the cross-reference note thereto.

SULLIVAN v. OLD COLONY STREET RAILWAY COMPANY.

[197 Mass. 512, 83 N. E. 1091.]

DAMAGES, Evidence of in Actions of Tort.—The connection between a tortious act, the person sought to be charged with the consequences of the injury, and the injury sustained must be established by a fair preponderance of the evidence before the plaintiff can be permitted to recover. Such casual connection cannot be left to conjecture, surmise or speculation, but must rest on a firm foundation of proof. (p. 380.)

DAMAGES—Mental Suffering, When too Remote.—A woman cannot be permitted to recover for sorrow and anguish endured as the result of the death of her child claimed to be due to injury received by her seven months before its conception and fourteen months before its birth. (pp. 381, 382.)

DAMAGES, Mental Suffering as an Element of.—The mental suffering for which damages can be recovered is limited to that which results to the person injured as the necessary or natural consequence of the physical injury, but sentiments of grief, sorrow and mourning which are aroused by extraneous causes, thoughts and reflections are excluded. (p. 381.)

Action by a married woman to recover for personal injuries sustained on April 17, 1905, when a passenger on defendant's car. The defendant conceded its liability, and the evidence at the trial related only to the question of damages. The plaintiff's physician testified that, on a physical examination on the day following the accident, no result was discovered except a single bruise over her right lower rib, but since the accident and up to the time of the trial, she had been suffering from a functional disturbance of the nervous system, known as hysteria, and that this was principally the result of the excitement and fright of the accident. About November, 1905, the plaintiff became pregnant, and on the 4th of July following, gave birth to a child, which survived only forty-eight hours. The physician further testified that it was commonly supposed that the condition of the mother while carrying a child affects its health and likelihood of life, but that he could only surmise whether the mother's health had any effect on the child; that it was perfectly possible for an apparently healthy mother to give birth to a diseased, deformed or dead child, and for a sickly mother to give birth to a well child.

The defendant asked the judge to instruct the jury to take great care not to allow the plaintiff any damages by reason of the death of the child; that such injury, if there were any evidence that it was attributable to the accident, was too

remote to be a ground for damages, and the judge so instructed. He refused, however, to instruct that there was no sufficient evidence that the death of the child was in any way attributable to the accident, and he told the jury, "There is a difference in the claim made by the plaintiff and that of the defendant as to whether the birth of this child and its subsequent death was in any way or manner attributable to this injury which Mrs. Sullivan sustained, and I instruct you that on account of the death of this child the plaintiff is not entitled to recover, that that is not a proper element of damage to be considered by you in the trial of this case and in estimating this plaintiff's damages, and you will bear that carefully in mind for the death of this child whether its death was due to this accident, as the result of this accident or not, that is a matter that you are not to consider but should leave entirely out of consideration in your estimate of damages. On the other hand, gentlemen, it is a question in dispute between the parties as to whether this child's birth and death was in any way affected by the injuries which Mrs. Sullivan received on April 7, 1905. If you should find as a matter of fact that the accident had nothing to do with the birth of the child at the time it was born and its subsequent death, why then any question on what I am about to say about it is entirely immaterial. If, on the other hand, you should find that this child the child's birth, the date of its birth, the day of its birth and its subsequent death was affected by reason of the injuries which Mrs. Sullivan received while she was a passenger in the car of the defendant as she claims, then that evidence would be important for your consideration in one particular only—not that she would be entitled to recover for the death of the child but if you found that the child's death was brought about on account of the injuries which the mother received, and you should further find that on account of the death of the child that the mother suffered mentally as the result of the death of the child, then you would be entitled—it would be your duty to take into account that mental suffering, if there was any, in connection with the damages which she has sustained. If she does not satisfy you that this child's death was attributable to the accident, or if you should find that she did not suffer mentally as the result of this child's death, then you would leave out of consideration that question in passing upon the question of damages."

Verdict for the plaintiff, and the defendant alleged exceptions.

E. Greenhood, for the plaintiff.

Asa P. French and J. S. Allen, Jr., for the defendant.

515 RUGG, J. The connection between the tortious act of a person sought to be charged for the consequences of an injury, as the cause, and the injury sustained, as the effect, must be established by a fair preponderance of the evidence before a plaintiff can be permitted to recover. Such causal connection cannot be left to conjecture, surmise or speculation, but must rest upon a firm foundation of proof: Williams v. Citizens' Electric St. Ry., 184 Mass. 437, 68 N. E. 840; McGarrahan v. New York etc. R. R., 171 Mass. 211, 50 N. E. 610. The evidence tending to connect the premature birth of the child, on July 5, 1906, and its subsequent death within forty-eight hours, with the injury received by the plaintiff on April 7, 1905, is extremely slender. If there were nothing beyond the testimony of the plaintiff and her attending physician, it would be insufficient, for the latter plainly said that he could only "surmise" as to the cause of the condition of the child. There was, however, testimony showing an extreme nervous condition on the part of the plaintiff as the result of the injury, and a physician called by the defendant testified that premature birth might result from a nervous condition of the mother, if she were profoundly affected by it. Upon the authority of Sullivan v. Boston Elevated Ry., 185 Mass. 602, 71 N. E. 90, this was enough. It has been argued, nevertheless, that the case rests on the ground stated in Daniels v. New York etc. R. R., 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751, namely, that the wrongful act of the defendant was not "the active efficient cause of the subsequent event," but "only the producer of the conditions which opened the door to another cause, which directly and actively produced the result," and that the death of the after-conceived child was a remote consequence of the injury to the mother, but not an effect actively produced by it, and that the plaintiff's voluntary act intervened as the real cause: See Snow v. New York etc. R. R., 185 Mass. 321, 70 N. E. 205. This principle has no application to a case like the present. The perpetuation of the human race cannot be termed a voluntary act, but it rests upon instincts and desires, which are fundamentally imperative.

Although careful instructions were given to exclude the death of the child as an element of damage, the jury were permitted to take into account the mental suffering of the

mother on this [516] account. She was thus permitted to recover money compensation for the sorrow and anguish endured as a result of the contemplation of the death of her child conceived nearly seven months and born fourteen months after the injury. This is extending the rule of damages beyond any limits heretofore recognized. It is an expansion which finds no support in any principle of law. Mental suffering connected with and growing out of physical injury is a legitimate element to be considered in determining damages against a person wrongfully causing an injury. Such suffering is to a greater or less extent inseparably connected with physical harm, and flows from it as a natural result: Canning v. Williamstown, 1 Cush. 451. The rule of damages is a practical instrumentality for the administration of justice. The principle on which it is founded is compensation. Its object is to afford the equivalent in money for the actual loss caused by the wrong of another. Recurrence to this fundamental conception tests the soundness of claims for the inclusion of new elements of damage. The land owner, whose home, rendered dear by ties of ancestry and personal attachment, is seized under the power of eminent domain, has a right to receive no larger sum, on account of the mental distress he endures in leaving it, than a mere stranger, holding it purely for speculative purposes. The parent, who sues for the loss of services of his minor child, cannot recover for his own sympathetic sorrow in witnessing the sufferings which cause his loss of service. In an action for deprivation of consortium, the anguish of mind of the husband, in observing the bodily pain of a sensitive wife, forms no element in the damages he may recover. These considerations apply peculiarly to a case like the present. Wealth brings no consolation to those who mourn. The grief occasioned by the death of loved ones touches chords in the human soul which lie outside the compass of pecuniary relief. The solace, which stills the voice of lamentation, comes from sources which cannot be found through the medium of money. The mental suffering, for which damages can be recovered, therefore, is limited to that which results to the person injured as the necessary or natural consequence of the physical injury. But sentiments of grief, sorrow and mourning, which are aroused by extraneous causes, thoughts or reflections, are excluded. The [517] contemplation of the suffering and death of a child, begotten long after the event complained of, is too remote from the original physical injury to the parent, and too intangible and ethereal to be connected with the

original wrong of the defendant as a result to be reasonably apprehended from such a cause. The law cannot enter the realm of pure sentiment in this class of case, and award pecuniary compensation for those injured feelings which spring from sympathy and the severance of ties of love and affection. It follows that there can be no recovery for the mental suffering which ensues from the contemplation of the pain, deformity, imperfections or characteristics of any other person or thing: See McDermott v. Severe, 202 U. S. 600, 26 Sup. Ct. Rep. 709, 50 L. ed. 1162.

The extent to which recovery may be had for mental suffering has been the subject of somewhat conflicting decisions in various jurisdictions. But so far as we have been able to discover, there is unanimity of decision that, for mental suffering of a class like that under discussion (except by express provision of statute, see Kelley v. Ohio River R. R. Co., 58 W. Va. 216, 52 S. E. 520, 2 L. R. A., N. S., 298), there can be no recovery: Maynard v. Oregon R. R. Co., 46 Or. 15, 78 Pac. 983; Bovee v. Danville, 53 Vt. 183; Western Union Tel. Co. v. Cooper, 71 Tex. 507, 10 Am. St. Rep. 772, 9 S. W. 598, 1 L. R. A. 728; Texas Mexican Ry. Co. v. Douglass, 69 Tex. 694, 7 S. W. 77; Atchison etc. R. R. v. Chance, 57 Kan. 40, 45 Pac. 60; Butler v. Manhattan Ry., 143 N. Y. 417, 42 Am. St. Rep. 738, 38 N. E. 454, 26 L. R. A. 46; Lennox v. Interurban St. Ry., 104 App. Div. 110, 93 N. Y. Supp. 230.

Exceptions sustained.

For Authorities bearing upon the principal case, see Prescott v. Robinson, 74 N. H. 460, 124 Am. St. Rep. 987, and cases cited in the cross-reference note thereto.

STIMSON v. BROOKLINE.

[197 Mass. 568, 83 N. E. 893.]

WATERCOURSE, Artificial, When Should be Treated as Natural.—A watercourse made by the hand of man may have been created under such conditions that, so far as the rules of law and the rights of individuals are concerned, it is to be treated as if it were of natural origin. (p. 386.)

WATERCOURSE, Artificial, Effect of Acquiescence in.—If a ditch constructed for the purpose and having the effect of draining a watercourse from or through land is permitted to remain for more than twenty years, with the acquiescence of the public authorities and of all persons interested, the same rules should be applied to it as to a natural watercourse. (p. 386.)

WATERCOURSE—Question of Fact.—When, from the evidence, it appears that a ditch was constructed many years ago for the drainage of meadows, it is a question of fact for the jury whether it was in any sense a watercourse of any kind or anything more than a ditch for drawing off water and draining the land through which it passed. (p. 387.)

WATERCOURSE, Artificial, Liability for Obstructing.—If a ditch or artificial watercourse is constructed under such circumstances that it should be treated as a natural watercourse, one who dams it up is answerable to a riparian proprietor for damages resulting to him therefrom. (p. 387.)

NUISANCE—Obstruction of a Ditch or Watercourse.—If a ditch which land owners have acquired the right to have treated as a natural watercourse is dammed up to the injury of one of the riparian proprietors, he may maintain an action, although similar damages may have been sustained by others of the riparian proprietors. (p. 387.)

RIPARIAN PROPRIETOR, Right of One to Recover for Injury Also Suffered by Others.—Every riparian proprietor may maintain an action of tort for damages to the property, though such damage is precisely like that suffered by every other riparian owner. (p. 387.)

DAMAGE, Action for, When Only Nominal can be Shown.—A land owner may maintain an action, without showing present actual damage to his land, if he proves that an injurious effect is produced upon the property by the act complained of, such as to diminish its value, if, by the lapse of time, the defendant might acquire the right to continue the act. (p. 388.)

Tort to recover for damages claimed by the plaintiff to have been sustained to his land situate on the bank of the Charles river, through the draining by the defendant of a ditch. Verdict and judgment for the defendant. The plaintiff alleged exceptions.

H. Livermore, for the plaintiff.

W. D. Turner and S. S. Fitzgerald, for the defendant.

569 KNOWLTON, C. J. The evidence in this case tends to show that, at a place in Dedham, called the Broad Meadows, there is a channel or depression along the surface of the ground, which is known as Long Ditch, in which there is more or less water. This ditch connects with the Charles river at each end. The river takes a very circuitous course, such that the distance between the ends of the ditch, measured by the curve and windings of the river, is six or eight miles, while the length of the ditch through the meadows is only about three-quarters of a mile. The plaintiff is a riparian proprietor on the river, about two miles down the stream from the upper end of the ditch. The defendant owns land through which the ditch runs in the upper part of its course, and it has built a dam there which the plaintiff contends sets back water so as to increase the flow in the river below,

to the damage of his real estate. It was undisputed that the ditch is ancient, and there was evidence tending to show that it was "cut across the Broad Meadows from river to river" in 1652 or 1653. There was evidence on the part of the plaintiff that at times it has a large flow, and he contended that it was a watercourse which, so long as it was unobstructed, carried a substantial part of the water of the Charles river. The defendant introduced evidence tending to show that it had become more or less obstructed by the growth of vegetation, trees and bushes, and by the construction of a road across the lower end of it, and by other natural or artificial causes, and that for more than twenty years it had ceased to be a natural watercourse, if it ever had been one, which the defendant denied. The defendant also contended, and introduced evidence tending to show, that the erection of the dam had no effect upon the amount of water which could pass through the ditch, because it was lower than the road above mentioned, and because of the other obstructions, and that it had no effect upon the height of the water on the plaintiff's land.

A fundamental question was whether Long Ditch was a watercourse, the water in which all persons who might be affected by [570] it were entitled to have flow without obstruction, as if it were a natural watercourse, or whether it was a mere drain, dug to carry off surface water and water percolating through the ground.

The evidence tended to show that, while very ancient, it was of artificial construction. A record of a town meeting of the town of Dedham, held in the year 1652, refers to it as a watercourse to be cut through the Broad Meadow, and indicates that, in a part or all of its course, it ran through common land. The jury might infer from the evidence that it was cut through at about that time from the river at its upper terminus to the river at its lower terminus, that water flowed through it, and that there has been water in it a part or all of the time in every year since. On the other hand, they might find that years ago it ceased to be a watercourse, if it was one formerly.

The plaintiff made numerous requests for ruling relating to the law applicable to watercourses, one of which was that, "on the evidence the jury should find that Long Ditch is an ancient watercourse." Another was: "The law is the same if the ditch was dug in 1652, or more than fifty years before the suit, as if it were originally a natural watercourse."

Most, if not all, of these could not be given in the form requested, some of them because they assumed the existence of facts which were for the jury to find, and some because, while generally correct, they involved some alternative element of law which was not accurately stated. But they plainly directed the attention of the judge to the proposition that the mere fact that a watercourse was artificially dug would not necessarily prevent the existence of rights in it, after a long time, like those pertaining to a natural watercourse. Exception was taken to the instructions given, so far as they were not in accordance with the plaintiff's requests.

The judge submitted to the jury the question whether this was a natural watercourse or an artificial watercourse, and said to them: "If you find that it was not a natural watercourse, then your verdict should be for the defendant." There are portions of the charge which leave us in doubt as to the precise distinction that he intended to make between a natural watercourse and an artificial watercourse. From some of his illustrations [571] one might infer that he meant by an artificial watercourse a drain to carry off surface water, and that he intended to include among natural watercourses watercourses artificially constructed, which were so maintained and used for many years that they ought to be treated by the courts as if they were natural watercourses. But he did not say this, nor anything like it. He said of a ditch dug for drainage, "that is not a natural watercourse; that is something made by man." In another part of the charge he said: "A course that is established by the hand of man by digging a ditch is not to be considered a natural watercourse." We think the jury understood him to mean that, if this was a flow of water, however large or continuous, which had its origin long ago in the artificial opening of a ditch to receive a part of the flow of the Charles River, especially in times of high water, it was not a natural watercourse, but was an artificial watercourse, and the plaintiff could not recover. If he meant that the term "natural watercourse" does not include any watercourse which was originally created by the directing hand of man, to determine the flow of water by works of construction, his instruction that unless this was a natural watercourse the plaintiff could not recover was erroneous.

In Freeman v. Weeks, 45 Mich. 335, 7 N. W. 905, Judge Cooley said: "If by common consent the ditch was dug as a neighborhood drain, and has remained open as a watercourse

for a series of years, it ought to be governed by the same rules that apply to other watercourses." It has often been decided both in England and America that watercourses made by the hand of man may have been created under such conditions that, so far as the rules of law and the rights of the public or of individuals are concerned, they are to be treated as if they were of natural origin. Baron Channell said of one of them, in Nuttall v. Bracewell, L. R. 2 Ex. 1: "It is a natural stream or flow of water, though flowing in an artificial channel." Other cases recognizing the doctrine are the following: Magor v. Chadwick, 11 Ad. & E. 571; Holker v. Poritt, L. R. 8 Ex. 107; Sutclife v. Booth, 32 L. J. Q. B. 136; Reading v. Althouse, 93 Pa. 400; Weatherby v. Meiklejohn, 56 Wis. 73, 13 N. W. 697. The principle is analogous to that under which other rights are acquired in real property by prescription or adverse use. If the public authorities, [572] representing the sovereign power, by a formal legislative act in 1652, took a part of the water of the Charles river and conducted it three-quarters of a mile through a new channel, and thereby made a new watercourse, satisfying by compensation or otherwise all private rights of property affected by the change, if there were any, there would be good ground for contending that thereby a watercourse was established, which should be treated at once by the courts like a natural watercourse. Certainly after a long lapse of time, and even after no more than twenty years, if this watercourse continued without change, with the acquiescence of the public authorities and of everybody interested, there is every reason, both upon principle and authority, for applying the same rules of law to it as to a natural watercourse. In the early years of the colony the towns, for many purposes, were representatives of the sovereign power as to the management and disposition of common lands and public rights in land within their boundaries: Attorney General v. Herrick, 190 Mass. 307, 76 N. E. 1045, and cases cited. It is conceivable that the mere construction of a watercourse and dedication of property to that use by all the persons whose rights of property might be affected by the change, with acceptance by the public, if public interests were involved, might give these persons the same rights in it that they would have if it were a natural watercourse. It is unnecessary to determine for every conceivable case under what conditions such rights might be created. We think, in the present case, that if the flow of water through Long Ditch for many years was such as would constitute it a natural watercourse carrying a part

of the water of the Charles river if the flow had begun without artificial aid, the jury might find that it was a watercourse to which the same rules of law apply as are applicable to natural watercourses.

As there was evidence tending to show that an important reason for digging the ditch was drainage of the meadows, and as there was other evidence relied on by the defendants, it was a question of fact for the jury whether it was ever in any proper sense a watercourse of any kind, or anything more than a ditch for carrying off surface water and draining the land through which it passed.

If this should be treated as a watercourse, the judge rightly [573] ruled that the defendant would be liable if it maintained a dam which held back the water that otherwise would have flowed through the ditch, and thus sent down the Charles river an increased quantity of water, to the injury of the riparian proprietors below. But he was wrong in telling them that, if this was a nuisance affecting all the riparian proprietors on the stream below, not affecting one person more than another, this is not the proper remedy. By an illustration he suggested that the remedy in such a case would be by indictment, and added: "If this dam did not affect the particular plaintiff more than any other owner on the stream below the locus of the dam, then perhaps this defendant might be called into some other court to answer, rather than in this in an action of tort." The plaintiff's request on this subject was as follows: "The plaintiff can recover if he proves any special damage to his land, although similar damage may have been sustained by some other riparian proprietors." This instruction should have been given. The rule is that if every riparian owner suffers damage in his property precisely like that of every other riparian owner, he may have his remedy in an action of tort: Lawrence v. Fairhaven, 5 Gray, 110; Wesson v. Washburn Iron Co., 13 Allen, 95, 90 Am. Dec. 181; Blackwell v. Old Colony R. R. Co., 122 Mass. 1. The plaintiff asked the judge to instruct the jury that "the fact that other obstructions had grown or been placed in Long Ditch, will not preclude the plaintiff from recovery if the dam erected by the defendant contributed or tended to impede the free flow of water through the ditch." The proposition of law intended to be embodied in the request is correct: Wheeler v. Worcester, 10 Allen, 591; Jackman v. Arlington Mills, 137 Mass. 277; Sherman v. Fall River Iron Works, 5 Allen, 213; Monmouth v. Gardiner, 35 Me. 247. But there was no error in refusing the

instruction, for the mere fact that the dam tended to impede the flow of water through the ditch, would not necessarily show that it would so far affect the flow of the Charles river as to cause any injury to the plaintiff's property.

It is true, as the plaintiff contends, that to maintain an action he is not obliged to show in his use of the land actual present damages. It is enough if it appears that an injurious effect is produced upon his property by the maintenance of the dam, such [574] as to diminish its value, if the defendant, by lapse of time, should acquire a right to maintain the dam: Newhall v. Ireson, 8 Cush. 595, 54 Am. Dec. 790; White v. Chapin, 12 Allen, 516; Peck v. Clark, 142 Mass. 436, 8 N. E. 335; Parker v. American Woolen Co., 195 Mass. 591, 81 N. E. 468, 10 L. R. A., N. S., 585.

Exceptions sustained.

A Watercourse is a Stream of Water Ordinarily Flowing in a certain direction, through a defined channel, with bed and banks; the size of the stream is not material: Maxwell v. Shirts, 27 Ind. App. 529, 87 Am. St. Rep. 268. As to whether a watercourse may be artificial as well as natural, see Hawley v. Sheldon, 64 Vt. 491, 33 Am. St. Rep. 941; Missouri Pacific Ry. Co. v. Keys, 55 Kan. 205, 49 Am. St. Rep. 249; Diana Shooting Club v. Lamoreux, 114 Wis. 44, 91 Am. St. Rep. 898. Where the flow of a stream has been diverted from its natural channel, or obstructed by a permanent dam, and this has continued for the time necessary to establish a prescriptive right, the riparian owners along the stream, who have improved their property with reference to the change and in reliance on the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed: Kray v. Muggli, 84 Minn. 90, 87 Am. St. Rep. 332. As to the liability to riparian proprietors of one who overflows their land by constructing a dam, see Allen v. Thornapple Electric Co., 144 Mich. 370, 115 Am. St. Rep. 453; Rankin v. Harrisonburg, 104 Va. 524, 113 Am. St. Rep. 1050; note to Mizell v. McGowan, 85 Am. St. Rep. 711.

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

DRIGGS v. BUSH.

[152 Mich. 53, 115 N. W. 985.]

STATUTE OF FRAUDS.—Part Payment, to Take a Contract for the Sale of goods out of the statute of frauds, need not be in money. (p. 391.)

STATUTE OF FRAUDS—Part Payment.—The Baling of Hay by the Purchaser Thereof, in pursuance of an oral contract of sale, constitutes a sufficient part payment to take the transaction out of the statute of frauds. (p. 393.)

SALE—Damages for Breach of Contract.—Vendors of Goods Who have repudiated the sale and refuse to make a delivery cannot urge, in a suit against them by the vendee to recover damages, that the title to the goods has passed by delivery and receipt. (p. 393.)

Anderson & Warner, for the appellants.

Barnard & Lewis, for the appellees.

[53] MONTGOMERY, J. The plaintiff is a buyer of hay, and through his agents, Homer B. McWilliams and John Van Horn, made a contract with the defendants, who own and operate two farms in Van Buren county, and who were the joint owners of the hay crop thereon, for the purchase of twenty-four tons of hay or more, at the option of the defendants. The contract was by parol, and as appears by the testimony offered on behalf of the plaintiff, was as follows: [54] "Mr. Dean said, 'I want ten dollars a ton, and you bale the hay.' We finally bought all of the hay for ten dollars a ton and we to do the baling and we were to take the hay the first cars we could get at Gobleville after the hay was baled."

The testimony of the other witness for plaintiff does not vary materially from this, he stating: "We were to pay him ten dollars a ton for it, and we was to pay for the baling."

It was also a part of the agreement that the defendants were to draw the hay to Gobleville and place the same on board cars. After the contract was made, the plaintiff sent

balers to the premises of the defendants, who baled the hay, the defendants being present and assisting in the work. The price paid for baling the hay was one dollar and ten cents per ton, or thirty-three dollars and fifty-five cents, that being the regular price for such services. The defendants subsequently refused performance of the contract, and this action was brought to recover damages for the breach. Plaintiff was permitted to recover below the difference between the purchase price of the hay and its actual market price at the date when delivery was contemplated. Defendants bring error, and contend that the contract was void under the statute of frauds, and has never been validated, and this presents the principal question for our consideration.

Our statute of frauds, 3 Compiled Laws, section 9516, reads as follows: "No contract for the sale of any goods, wares or merchandise, for the price of fifty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods sold, or shall give something in earnest, to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby or by some person thereunto by him lawfully authorized."

It is obvious that at the time this contract was made there was no such delivery or part payment as satisfied the terms of this statute. But as this statute does not require the payment or acceptance to be at the time of the [55] making of the contract, as is the case in New York and some other states (see 1 Mechem on Sales, sec. 419), it is competent for the parties to validate their contract by any act which amounts to a delivery and acceptance or to a payment. The circuit judge was of the opinion that when the hay was baled by the plaintiff's agents upon the premises of the defendants and with their co-operation, this constituted such a delivery and acceptance as would answer the requirements of the statute of frauds.

It is strenuously insisted that there was no such delivery or acceptance, and plaintiff's counsel do not seek to maintain that there was. Without passing directly upon the question, therefore, in this case, we may assume that there was no such completed delivery as the statute requires, and that the defendants still retained the title to the property after the same was baled. We are not concerned with the correctness of the reasoning of the circuit judge if the correct result was reached. The question occurs, therefore, whether the expenditure of one dollar and ten cents per ton upon this hay, which re-

mained the property of the defendants, which expenditure was received and accepted by them, and was made in pursuance of the contract between the parties, was such a part payment as answered the requirements of the statute. It is contended that the thing in earnest must be actually paid, and received by the seller. This we fully accept. But there can be no doubt in this case that the service of baling this hay was received and accepted by these defendants, and if this was done at a time while the hay remained their property, and such service was received in pursuance of the contract made between the parties, we can conceive of no valid objection to treating this as a part payment of the consideration which was to pass from the plaintiff to the defendants at a time prior to the passing of the title of the hay to plaintiff. This being so, there has been a payment by the plaintiff and a receipt by the defendants of a part of the consideration. It was the hay in its improved form as baled hay which, according to the theory of the defendants, [56] was to pass from the defendants to the plaintiff, and if this be accepted as true, which it doubtless is, it cannot be successfully contended that the defendants have not received the value of services performed by the plaintiff in pursuance of this contract.

Suppose this agreement had been on the part of the plaintiff to pay a stated price for this hay when baled and delivered and at the same time to thresh defendants' oats on the farm. The contract would not be materially different. In the one case, as in the other, plaintiff is performing a service for defendants which increases the value of their property. It is not necessary that the payment made upon the contract be in money: See Kuhns v. Gates, 92 Ind. 66; Howe v. Jones, 57 Iowa, 130, 8 N. W. 451, 10 N. W. 299; McLure v. Sherman, 70 Fed. 190.

Defendants rely upon Corbett v. Wolford, 84 Md. 426, 35 Atl. 1088; Terney v. Doten, 70 Cal. 399, 11 Pac. 743; Galbraith v. Holmes, 15 Ind. App. 34, 43 N. E. 575; Hudnut v. Weir, 100 Ind. 501, which was again before the court as Weir v. Hudnut, 115 Ind. 525, 18 N. E. 24.

The case of Corbett v. Wolford, 84 Md. 426, 35 Atl. 1088, is claimed to be controlling. In that case, however, while the facts are somewhat similar to the case under consideration, the question of whether the baling of the hay was a part payment was not under consideration at all. The case dealt with the sole question as to whether there had been in fact any delivery and acceptance which would take the transaction out of the statute of frauds.

The case of Terney v. Doten, 70 Cal. 399, 11 Pac. 743, arose under a statute which rendered invalid all sales of personal property or agreement to buy or sell unless there was a note or memorandum in writing, or an acceptance by the buyer at the time of sale paid as part of the price. In that case defendant agreed to sell plaintiff one hundred unbroken horses at the price of seventy-five dollars each. The defendant was to gather up a number of horses from the band, from time to time, and place them in corrals, from which plaintiff was to select not less than twenty and commence rough-breaking them, having for that purpose [57] the use of defendant's harness, cart, etc., after which the numbers so selected and broken were to be turned into defendant's pasture field and another selection made in a like manner and for a like purpose, and so on until the whole number agreed upon had been bought and sold. Under the contract, the plaintiff later on went to defendant's ranch, got together a number of horses, from which plaintiff selected twenty-two, and commenced breaking them, upon the conclusion of which he turned them into the pasture field of defendant and waited for defendant to gather another lot. It was held that none of the horses forming the subject matter of the contract ever passed into the absolute control and possession of the plaintiff, and that there was no acceptance and receipt of any of them by the plaintiff within the meaning of the statute. The question whether there had been payment to the defendant by the plaintiff upon the contract was not involved, as it obviously could not have been urged on plaintiff's behalf, for the reason that there was no pretense that any payment was made at the time of the sale, which is the requirement of the California statute. It is needless to repeat that our statute contains no such requirement.

The cases of Galbraith v. Holmes, 15 Ind. App. 34, 43 N. E. 575, and Hudnut v. Weir, 100 Ind. 501, are very similar in their facts. In Galbraith v. Holmes it appeared that plaintiff made an agreement with the defendant by the terms of which defendant was to ship him flour to apply upon an indebtedness owing from defendant to plaintiff. Plaintiff also agreed to deliver to defendant his own sacks in which to put the flour and return to the plaintiff. In the case of Hudnut v. Weir the arrangement was very similar, except that the purchaser agreed, as a part of the consideration of the sale, to furnish the bags in which to put corn when shelled, but it was said, and very properly, that the delivery of the sacks to the seller was a matter for the purchaser's own accommo-

dation, and was not part payment, and that therefore this did not take the transaction out of the statute. But in Weir v. Hudnut the averment of the declaration being [58] that the use of the sacks was to be treated as part consideration for the purchase of the property, the court held that this stated a case. It will be noted that in these cases there was no passing of the title of the sacks from the purchaser to the seller. In the present case, any work done upon the hay in baling the same passed a present benefit from the purchaser to the seller, and as it was done in pursuance of the contract, it could be nothing else than payment upon the contract. None of these cases, therefore, militate against the conclusion which we announce, that this contract was validated by the receipt of the benefit of baling the hay in pursuance of the contract.

None of the other questions presented call for discussion, as they relate to the other feature of the case. For instance, it is contended that the rule of damages was improper if the case is rested upon the view that the title to the hay had passed from defendants to the plaintiff. It does not lie with the defendants to urge that the title had passed by delivery and receipt. They have repudiated that view of the case, and having refused to perform on their part, the plaintiff's remedy under the contract, as an executory contract, would seem to be complete, and properly applied in this case: See Davis v. Strobridge, 44 Mich. 157, 6 N. W. 205.

The judgment is affirmed.

Grant, C. J., and Ostrander, Hooker, and Carpenter, JJ., concurred.

STATUTE OF FRAUDS—WHEN SATISFIED BY PART PAYMENT OF PURCHASE PRICE UNDER ORAL CONTRACT FOR SALE OF CHATTELS.

I. Scope, 394.
II. Introduction, 394.
III. Earnest or Part Payment.
a. Ancient and Modern Distinctions, 394.
b. General Rule as to Effect of Part Payment and Illustration, 395.
c. Payment Need not be in Money, 397.
d. Agreement to Credit Seller's Account, 398.
e. Payment by Check.
1. In General, 400.
2. To Agent, 400.
f. Payment by Note, 401.
g. Unaccepted Tender not Sufficient, 402.
h. Forfeit Money, 402.
i. Time When Payment must be Made, 403.

I. Scope.

The discussion in this note will be limited strictly to the subject indicated by the title. The effect of acceptance and delivery as taking a contract for the sale of goods out of the statute of frauds will be found fully treated in the monographic note appended to Devine v. Warner, 96 Am. St. Rep. 215, and also in the note appended to Shindler v. Houston, 49 Am. Dec. 325. What acts constitute part performance, so as to take an oral contract for the sale of chattels out of the statute of frauds is the subject of the note appended to Christy v. Barnhart, 53 Am. Dec. 539.

II. Introduction.

Speaking of the statute of frauds, with reference to an oral contract for the sale of personal property, Judge Gardiner, in an early case before the New York court of appeals, said: "The statute of frauds has been pronounced by high authority. (2 Kent's Commentaries, V, 494), to be, in many respects, the most comprehensive, salutary and important legislative regulation on record, affecting the security of private rights. Its benefits, it is believed, will be most effectually secured, by rejecting refined distinctions, overlooking the supposed equity of particular cases, and adhering steadily to its language as the best exponent of the intention of the legislation": Shindler v. Houston, 1 N. Y. (1 Comst.) 261, 49 Am. Dec. 316. But the courts have not always followed Judge Gardiner's advice and overlooked the "supposed equity of particular cases," for there has been such difference of judicial opinion as to when an oral contract is or is not relieved from the operation of the statute of frauds, that Judge Houston, of the supreme court of Idaho, in speaking of when part payment in a particular case took the contract out of the statute, said: "To undertake to reconcile the numerous opinions upon this statute 'were a task as rash as ridiculous.'" There is no doubt, as we shall presently see, that notwithstanding there is no actual transfer and delivery of chattels under an oral contract of sale, that such contract will be taken out of the statute of frauds, by the purchaser making a part payment of the price, in addition to the contract, but there are many limitations to the rule, as will appear hereafter.

III. Earnest or Part Payment.

a. Ancient and Modern Distinctions.—It was a custom under the common law to require a purchaser to give "earnest" to bind an oral contract, but this "earnest" was not necessarily a part payment; and we are told by Mr. Benjamin, in his admirable work on Sales, seventh edition, section 196, that there was a species of earnest under the Roman law which contemplated the payment of a sum for the option of purchase, which was to be deducted from the price, if the sale took place, but if the purchaser declined to complete the purchase, he forfeited the earnest-money, and if the seller refused to perform, he was bound to return the earnest-money or an equivalent amount by way of forfeiture on his part. Whether this system of forfeit money,

as it was called under the civil law, was ever a species of "earnest" under the common law is now of no practical importance, for in both this country and England earnest and part payment are regarded as the same thing. "As used in the statute of frauds, 'earnest' is regarded as a part payment of the price": Howe v. Hayward, 108 Mass. 54, 11 Am. Rep. 306; and to the same effect is Weir v. Hudnut, 115 Ind. 525, 18 N. E. 24, and Binell v. Balcom, 39 N. Y. 275.

b. General Rule as to Effect of Part Payment and Illustration.— The general rule that part payment of the agreed purchase price, under an oral contract for the sale of goods, will take the contract out of the statute of frauds, is universally recognized, and the following cases will serve to show how it has been applied. Thus, in C. R. Shaw Lumber Co. v. Manville, 4 Idaho, 369, 39 Pac. 559, a purchaser had requested the seller to obtain for him certain articles not kept by the seller. The seller did so, and notified the purchaser of their arrival, exhibited to him the bill of lading, and notified him where the articles had been stored. The purchaser declined to examine the articles, but said he "guessed they were all right," and that he would remove them in a few days, and paid the seller $100 on the price. It was held that the purchaser had made a part payment on the articles, and the contract was therefore not within the statute of frauds. So, also, where, under an agreement to deliver certain merchandise, the place and time of delivery and price were fixed, and part of the price paid, and the seller agreed to be present on the next day and receive a further sum and reduce the contract to writing, but failed to do so and refused to perform his agreement, though the buyer was present and ready, the part payment took the contract out of the statute of frauds: White v. Allen, 9 Ind. 561. In French v. Boston Nat. Bank, 179 Mass. 404, 60 N. E. 793, a pledgor, to save his collateral, which was about to be sold, in order to permit the pledgee to participate in insolvency proceedings against the pledgor, as an unsecured creditor, for the balance due after crediting the proceeds of the sale of the collateral, agreed to procure a purchaser for one item of the collateral; and the pledgee thereupon agreed to bid at the sale, for the other items thereof, stipulated sums, for which they were thereafter accordingly sold, and to hold the same for the pledgor till he repaid the amount of such bids, with interest, and the balance due on the secured obligation. It was held that assuming the pledgee's agreement was within the statute of frauds relating to the sale of goods, the statute was satisfied by the payment of the stipulated price and the acceptance and receipt of the specified collateral by the purchaser, furnished by the pledgor under his agreement. And in Berwin v. Bolles, 183 Mass. 340, 67 N. E. 323, the plaintiff had purchased certain shares of stock through defendants, through whom he had also bought shares of stock in other companies, but had received no certificate or memorandum therefor in writing, but claimed that he had made partial payments on his general account; held, that payments made by the plaintiff to the defendants generally on account were applicable to all the stock, and took the transaction out of the

statute of frauds. So, too, in Burhans v. Corey, 17 Mich. 282, the action was to recover damages for breach of an oral contract for the sale of wool. The plaintiffs, by their agent, sold each his several parcels of wool in a single sale, to defendant for the agreed price of $600. The defendant paid plaintiff's agent $30 in part payment of the price. It was held that the $30 paid as earnest would be regarded as belonging ratably to the plaintiffs, and would therefore constitute a sufficient part payment under the statute of frauds as to all of the plaintiffs. In Dow v. Worthen, 37 Vt. 108, plaintiff had bought from defendant a lot of poultry, the contract of sale was a verbal one. Plaintiff had previously sold to defendant a lot of apples. At the time of closing the poultry sale, it was agreed that the price of the apples sold by plaintiff to defendant, and which had not been paid for, should be $75, and this amount was to be as part payment on the poultry. It was held that the contract for the poultry was binding within the statute of frauds.

In Lilly v. Lilly, Bogardus & Co., 39 Wash. 337, 81 Pac. 852, the action was to recover damages for breach of contract in failing to ship and deliver fifty tons of hay and fifty tons of oats under an oral agreement between plaintiff and defendants. Plaintiff, who was a merchant in Dawson, Yukon Territory, in pursuance of the contract, paid defendants $1,769.68, it being then agreed that the sum of $1,075 of said amount was to be applied in an indebtedness due from plaintiff to defendant, and the remainder of said payment, $694.68, was to be applied and credited as part payment in advance on account of the hay and oats purchased as aforesaid. Defendants shipped five tons of the hay and oats and no more. It was held that for the reason that there was a part payment, and also a part delivery, the contract was not within the statute of frauds. And in Cooper v. Bay State Gas Co., 127 Fed. 482, the defendants had contracted to purchase all of the stock of a corporation for $160,000, and paid $25,000 of that sum, it being understood that the seller should hold the stock for the balance of the purchase price. It was held that the $25,000 paid would take the sale out of the statute of frauds.

In Organ v. Stewart, 60 N. Y. 413, the defendant was the owner of three lots of wool. He entered into an oral agreement with plaintiff for the sale of two of the lots, and a sale of the third upon certain conditions. Two of the lots were delivered, but a dispute arose over the conditions upon which the bargain as to the third lot depended, and defendant refused to deliver said lot and plaintiff declined to pay for those that had been delivered. They finally compromised, defendant agreeing to deliver the third lot, and plaintiff paid the price of the other two. The defendant failed to carry out his part of the compromise agreement, and refused to deliver the wool, and in an action therefor pleaded the statute of frauds. It was held that the payment made by the plaintiff on the compromise could not be deemed to have been made on the three lots so as to take the contract for the third lot out of the statute of frauds

(reversing 1 Hun, 411). And where the buyer, at the time of the contract of sale, agreed to pay, as part of the purchase price, a debt of the seller, and afterward did pay it, the creditor not knowing or consenting to the agreement, the sale was not taken out of the statute of frauds: Paine v. Fulton, 34 Wis. 83.

c. **Payment Need not be in Money.**—The part payment required by the statute of frauds as an act, in addition to the parol contract, need not be in money, but anything of value which by mutual agreement is given by the buyer and accepted by the seller on account of or in part satisfaction of the purchase price is a part payment. Thus, where the respective owners of a colt and a mare made an oral contract of exchange, whereby the owner of the mare was to take the colt and deliver the mare upon the payment of $40 by the owner of the colt, but the exchange not to be final until the consent of a third person had been obtained, and the colt was delivered in pursuance of the agreement, the delivery of the colt was sufficient part payment to take the bargain out of the statute of frauds: Kuhns v. Gates, 92 Ind. 66. So, also, in Weir v. Hudnut, 115 Ind. 525, 18 N. E. 24, the complaint alleged in substance that plaintiff sold five thousand bushels of corn to defendant under a verbal contract, whereby defendant agreed to pay for said corn fifty cents per bushel when delivered at a certain place, and in part payment, and in addition to said fifty cents per bushel, defendant further agreed to hire to plaintiff, and give him the use of, a sufficient number of sacks in which to sack said corn and deliver the same, and that such use of said sacks was a part of the purchase price of the corn, and that the purchase price would have been greater except for the payment and furnishing the use of the sacks by the defendant; that defendant furnished the sacks in pursuance of the contract and in part payment of the purchase price, and the use of the sack was worth the sum of $25. That plaintiff sacked and delivered the corn at the place agreed upon, but defendant refused to accept the same, to plaintiff's damage, etc. It was held that a demurrer to the complaint was improperly sustained, as the furnishing of the sacks to plaintiff by the defendant would constitute a part payment of the purchase price of the corn within the statute of frauds. It is well to note the distinction between this case and a former case between the same parties, over the same contract: Hudnut v. Weir, 100 Ind. 501. In the case last mentioned the complaint, after alleging that the defendant agreed to furnish the sacks as a part of the consideration of the sale, further averred that the sacks were furnished "in pursuance and part performance of said contract," and it was held on appeal that a demurrer to the complaint was improperly overruled. The distinction between the two cases, as emphasized by the court in Weir v. Hudnut, 115 Ind. 525, 18 N. E. 24, is, that in the one case the complaint alleged that the sacks were furnished in part payment, while in the other the averment was that they were furnished as part performance, and that proof of part performance

would "not be an earnest to bind the bargain," since the plaintiff must prove payment, as payment of part, at least, of the agreed price."

In Burton v. Gage, 85 Minn. 355, 88 N. W. 997, a logging contract between a lumber company and the contractor, for services to be performed by the latter, had been verbally transferred by the contractor to a firm of grocers as security for supplies to enable him to carry out the contract with the lumber company. The grocers furnished the contractor a considerable quantity of goods at the time of the transfer and subsequently furnished other supplies to the total of $2,000. The verbal transfer was held not void under the statute of frauds. The case of White v. Drew, 56 How. Pr. 53, affords an excellent illustration of the rule under discussion. The plaintiff being indebted to the defendant, and having become possessed of certain valuable information in regard to the probable rise of certain stock, offered to impart his information to the defendant upon condition that if the defendant acted upon it, he would hold and "carry" certain shares of stock for the plaintiff without margin for a specified time. Defendant agreed to the conditions and the transaction as proposed, and plaintiff imparted to defendant the information regarding the stock. It was held that the consideration for the agreement being of great value, "was just as effective to take the case out of the statute of frauds as if a cash payment had then been made." Another excellent illustration of this rule that the part payment required by the statute of frauds may be made in other things than money is afforded by the case of Driggs v. Bush, 152 Mich. 53, ante, p. 389, 115 N. W. 985, 15 L. R. A., N. S., 654.

d. **Agreement to Credit Seller's Account.**—Though, as we have seen, the part payment need not be in money, it must be of value—money's worth—and it must be agreed by both parties at the time that the value is then actually passed from the buyer to the seller—i. e., a present payment. Hence a mere agreement to pay is not sufficient. The payment must be actually made, and both parties must so understand it. Thus, where plaintiff orally contracted to buy a carload of wheat from defendant, and agreed, as payment, to credit an account due from defendant, and to send him goods to make up the balance, the agreement as to credit to be allowed on defendant's account was not such a part payment as would take the transaction out of the statute of frauds, there being no receipt for actual credit given at the time: Galbraith v. Holmes, 15 Ind. App. 34, 43 N. E. 575. So, too, where one purchases property under an oral contract of sale, and agrees to apply the purchase price in cancellation of a debt due him from the vendor, but fails to execute any written evidence that it has been so applied, the transaction does not amount to a payment within the meaning of the statute of frauds: Gorman v. Brossard, 120 Mich. 611, 79 N. W. 903; and to same effect is Artcher v. Zeh, 5 Hill, 200, and Clark v. Tucker, 2 Sand. 157; Mattice v. Allen, 3 Abb. Dec. 248. And where a seller, who kept a day-book and a ledger for the purposes of his business, only entered

a credit to the buyer, who was his debtor, upon a blank leaf of his account-book, it did not constitute payment under the statute of frauds: Brabin v. Hyde, 32 N. Y. 519.

In Teed v. Teed, 44 Barb. 96, the defendant by oral agreement had promised to deliver to plaintiff certain butter of the value of over $100. The defendant at the time was indebted to the plaintiff in the sum of $6.50 for a barrel of flour charged to him in account, and it was a part of the contract that this sum should apply as a part payment on the butter. An entry of sale was made by the plaintiff, in a memorandum-book; the entry also stating that defendant accepted the flour on the butter, but no entry was made on the plaintiff's account-book, to show that the flour was paid for by the butter or otherwise. It was held not a sufficient part payment to take the case out of the statute of frauds. In Matthiessen & Weichers R. Co. v. McMahon's Admr., 38 N. J. L. 536, is found another good illustration of the rule. The contract under consideration in this case was an agreement by the defendant to sell the plaintiff certain goods in payment of his indebtedness, and that the property in the goods should pass to the plaintiff immediately. No note or memorandum of the contract of sale was made; but it was contended by the defendant that the requirement of the statute of frauds had been complied with by payment of the contract price. The question presented, as stated by De Pue, J., speaking for the court, was, "whether an agreement in parol by the seller to sell, and the buyer to buy goods to the value of an existing debt, and thereby satisfy and pay the debt is a valid sale within the statute, though there be no delivery of the goods, and no receipt or voucher be given as evidence of the discharge of the indebtedness." The learned judge then reviewed at length many English and American authorities on the question stated and continued: "The principle which underlies the cases cited, and on which they rest is that, where no written evidence of the contract is made, and payment is relied on as the compliance with the statute, mere words are not sufficient; some act in part performance, or part execution of the contract, such as the surrender or cancellation of the evidence of the debt, or a receipt or discharge of the indebtedness, is necessary to make the contract valid." The ruling in this case is strongly indorsed in Milas v. Covacevich, 40 Or. 239, 66 Pac. 914. There it was orally agreed, on an accounting between plaintiff and defendant, that defendant's debt should be liquidated by the transfer of certain property to plaintiff, including a fish net of the value of over $50. A receipt was subsequently given by the plaintiff to the defendant reciting the transfer of certain property, not including the fish net, and further reciting that the transfer was in full payment of all claims. It was held that the parol agreement as for the sale of the fish net was not taken out of the statute of frauds by the giving of the receipt.

So, also, when a debtor sold his creditor some goods, and there was no proof that the price should be, or that it was, applied by receipt or otherwise to the debts, no sufficient payment was shown

to take the case out of the statute of frauds, although it appeared from the bill of parcels that the creditor was to give a note at ten months payable to his own order: Wylie v. Kelly, 41 Barb. 594. But where a buyer, as part of the consideration of the thing purchased, agreed to pay a debt due by the seller to a third person, and the seller's creditor accepted the promise, and thereupon discharged the seller, such transaction is a part payment of the price within the statute of frauds. And after acceptance of part of the property by the purchaser and part payment by the discharge of the seller, by his creditor, the buyer cannot repudiate the arrangement and refuse to pay the creditor on the ground that the sale was invalid: Cotterill v. Stevens, 10 Wis. 422. And where credit is at once given by the buyer to the seller for the value of goods sold on the seller's account, if made in good faith, it is as much payment as though money had actually been paid over to the seller: Norwegian Plow Co. v. Hawthorn, 71 Wis. 529, 37 N. W. 825. And to same effect is Dow v. Worthen, 37 Vt. 108.

e. Payment by Check.

1. In General.—The question whether a check possesses such money value as to constitute part payment sufficient to take a contract out of the statute of frauds does not seem to have been very often before the courts, but in Logan v. Carroll, 72 Mo. App. 13, the buyer of certain horses under an oral contract of sale gave the seller his check on a bank in St. Louis for $550 in payment. The horses were to remain in the seller's possession until the next day, when the buyer would take them away. On the next day the buyer countermanded the payment of the check and refused to take the horses. After notice to the buyer, the seller sold the horses at public auction for a much less price than that for which they had been sold under the oral contract above mentioned, and sought to recover under the contract the loss sustained by reason of the buyer's failure to accept the horses. It was held that, as the check was accepted as payment, the statute of frauds was satisfied, and a verdict in favor of the seller against the buyer under the oral contract of sale was upheld. The ruling in this case is based entirely upon the fact that the seller had accepted the check as payment, and that the statute of frauds was satisfied, although payment of the check was stopped. In McLure v. Sherman, 70 Fed. 190, it was held that a check drawn upon a deposit in the bank named as drawee has such money value as to make it a sufficient part payment of the price, upon a sale of personal property, within the statute of frauds. The ruling in this case is placed upon the doctrine that a check given in the ordinary course of business is of such value that the person who receives it cannot look to the drawer of the check for the amount named therein until he has presented the check to the drawer or payee for payment and payment refused.

2. Payment to Agent.—If a check has such money value that it satisfies the statute of frauds when given to the seller as part pay-

ment of the price of personalty, there seems to be no good reason why such check given to an agent of the seller who was duly authorized to make the sale should not also be a sufficient compliance with the statute of frauds. There are but few reported cases, however, which bear directly upon this question. In Jones v. Wattles, 66 Neb. 533, 92 N. W. 765, the question was squarely before the court. Plaintiff in this case had purchased from defendant, through his agent, under an oral contract, a large amount of stock, and gave the agent his check for $1,000, payable to him as agent for the defendant. Defendant refused to deliver the stock, and the action was to recover damages for breach of the contract. The defendant contended that the part payment made by the check to the agent was not sufficient to satisfy the statute of frauds. In overruling this contention the court said: "The only question here involved is, whether the payment thus made was sufficient to satisfy the statute of frauds. None of the cases cited present that question, and none of them, so far as we have been able to find, contain the slightest indication, even by way of dicta, that such payment would not have been sufficient for that purpose, especially where no loss on that account results to the seller, and where at the time the agent's authority is not repudiated. We presume that, if the transaction had been permitted to proceed far enough there would have been no question but that the statute of frauds would be satisfied. Must that result be prevented because Jones interfered and repudiated the transaction, not on the ground of Harder's lack of authority, but because of a conclusion not to perform?" In Case v. Cramer, 34 Mont. 142, 85 Pac. 878, it was held that a check given by the purchaser to the agent of the seller in part payment of goods was sufficient to take the contract out of the statute of frauds. But the check in this case was actually paid and the money credited to the principal's account; and it is upon this ground that the decision rests, the court saying that it was not called upon to inquire whether it was usual or customary in such transactions to make payments in checks. Moreover, the check delivered to the agent was payable to his principal, and the contention was more over the authority of the agent to make the contract of sale at all, or to receive any payment thereunder, than it was over the question as to whether a check was a proper medium of payment within the statute of frauds. This case, therefore, is of but little value on the direct question as to the sufficiency of a check to an agent as part payment under the statute of frauds.

f. **Payment by Note.**—There are also but few cases where the question has been adjudicated whether the giving of a note by the buyer to the seller as part payment of the price will take the contract for the sale of personalty out of the statute of frauds. The rule supported by those found, however, is, that the giving of a note, not governed by the law-merchant, as part payment, will not suffice to satisfy the statute of frauds: Krohn v. Bantz, 68 Ind. 277; Combs

v. Bateman, 10 Barb. 573; Ireland v. Johnson, 28 How. Pr. 463. These cases are based upon the same theory that we found in those cases which hold that an agreement to credit the seller's account in part payment of the price does not operate as payment, unless such credit is actually made at the time; and that the giving of a note is only a promise to pay at some future time, and is therefore not the actual payment which is required by the statute of frauds. It was said in Krohn v. Bantz, 68 Ind. 277, that, even if there was an express agreement between the parties, that a buyer's note should be received as part payment on a contract within the statute of frauds, "it would seem to be quite doubtful whether such an agreement would make the note operate as part payment within the statute. It would be but an agreement that a promise of future part payment should operate as part payment; while the statute requires something more than words, it requires part payment, and not a promise of part payment to be received as payment." But the rule above followed has no application to the surrender of a vendor's note held by the vendee, for in Sharp v. Carroll, 66 Wis. 62, 27 N. W. 832, it was held that the actual surrender of a promissory note of the vendor by the vendee, as part of the purchase money for goods bought, is such a part payment as will take the sale out of the statute of frauds.

g. **Unaccepted Tender not sufficient.**—The mere tender of part payment of the price of goods bargained for under a contract within the statute of frauds is not sufficient to satisfy the statute. The payment must be accepted by the seller as part payment on the contract. Thus, in an action to recover damages for breach of an oral contract for the sale of certain lumber, it appeared that the defendant had made its check for $200, payable to the order of the plaintiff, as a part payment on the lumber, and deposited the same with plaintiff's partner. The check was afterward tendered to the plaintiff and refused, and returned to defendant. It was held that no such part payment had been made as would satisfy the statute of frauds: Hershey Lumber Co. v. St. Paul Sash, Door & Lumber Co., 66 Minn. 449, 69 N. W. 215. So, too, in Edgerton v. Hodge, 41 Vt. 676, the parties had entered into an oral contract of sale for a large quantity of cheese. No payment was then made. The day after the verbal contract the seller wrote to the buyer that he would stand by the bargain, but "Shall want you to pay me $50 to bind it." The day after receipt of this letter the buyer sent to the seller $50 by mail, which sum was received by the latter six days thereafter, but the seller refused to accept the same, and returned the letter and the money to the buyer without any communication in regard thereto. It was held that the seller had the right to decline to accept the payment and thus leave the contract void under the statute.

h. **Forfeit Money.**—The sum which was termed "forfeit money" under the civil law and regarded as a species of earnest, as we have hereafter seen, is not favored in this country. The rule here is that money deposited with a third person by the parties to an oral con-

tract, to be by him paid to either of them, as a forfeiture, if the other should neglect to fulfill his part of the contract, is not given in earnest to bind the bargain, within the statute of frauds: Howe v. Hayward, 108 Mass. 54, 11 Am. Rep. 306; Jennings v. Dunham, 60 Mo. App. 635. The case of Alexander v. Moore, 19 Mo. 143, has sometimes been cited as opposed to this rule. But in that case the purchaser had deposited with a third party money in part payment, taking a receipt from the third party that the money had been deposited with him by the purchaser on a contract made with the seller, and it was simply held that the purchaser could prove that the money had been deposited with the third party on account of the seller and as part payment of the purchase price; hence there was no question of forfeiture involved.

1. **Time When Payment must be Made.**—The time when part payment should be made, when relied upon to take an oral contract for the sale of goods out of the statute of frauds, depends upon the statutory provisions of the different states. In California, New York, and Wisconsin the part payment must be made at the time of the contract: Cal. Civ. Code, sec. 1739; Hawley v. Keeler, 62 Barb. 231 (affirmed 53 N. Y. 114); Walrath v. Ingles, 64 Barb. 265; Hallenbeck v. Cochran, 20 Hun, 416; Bates v. Chesebro, 36 Wis. 636; Pike v. Vaughn, 39 Wis. 499; Kerkhof v. Atlas Paper Co., 68 Wis. 674, 32 N. W. 766; Crosby Hardwood Co. v. Trester, 90 Wis. 412, 63 N. W. 1059. There are doubtless other states where the statute requires the payment to be made "at the time" of the contract, but the following illustrations will serve to show how the rule has been applied by the courts in some of the states above mentioned when the question of time of payment was brought squarely before them. Thus in Walrath v. Ingles, 64 Barb. 265, the parties had made a parol contract for the sale of a quantity of clover seed. The seller had agreed to take a barrel of sugar as part payment, to be taken away when he should deliver the clover seed the next day. The barrel of sugar was filled in his presence, and headed up, with directions that it be put aside for the seller and his name marked upon it. The price of the sugar per pound was also agreed upon, but neither the weight nor the aggregate sum to which the sugar would come at the price per pound agreed upon was ascertained until after the parties separated. It was held that there was no such part payment at the time as would satisfy the statute of frauds. But in Webster v. Zeilly, 52 Barb. 482, it was held that payment of a part of the purchase price of goods under an oral contract of sale, made a few days after the contract, was to be considered "time" of the contract within the spirit and intent of the statute of frauds, the payment having been accepted by the seller; and to the same effect is Bissell v. Balcom, 39 N. Y. 275. And in Hawley v. Keeler, 62 Barb. 231 (affirmed 53 N. Y. 114), it was held that where the seller gave the buyers two days to decide whether they would purchase, and if they so elected, they were to deposit a certain amount in a designated bank to the credit of the seller, and the balance to be paid at fixed

times, and the buyers deposited the money and gave notice thereof, and the seller called at the bank and verified the deposit and expressed himself as satisfied, it amounted to part payment at the time of making the contract within the statute of frauds. So, too, in Thompson v. Alger, 53 Mass. (12 Met.) 428, an oral contract had been made in New York between the parties for the purchase of certain stock, and afterward the buyer paid part of the price, but finally refused to pay the balance and take the stock; and it was held that the contract was not void within the New York statute of frauds requiring part payment of the price "at the time." When this decision was rendered, however, the courts of New York had not placed any judicial construction on the language in the statute above quoted, and the supreme court of Massachusetts referred to this fact, and said had they done so, "we should readily have yielded our concurrence." In Wisconsin, where the provision of the statute of frauds as to payment "at the time" is similar to the New York statute, the supreme court of that state has held even more rigidly to the necessity of a strict compliance with the statute as to "time" than the courts of New York. Thus, in Bates v. Chesebro, 36 Wis. 636, plaintiff and defendant entered into an oral contract in September for the sale of certain corn to be delivered before the first of April following. They met in December and the defendant paid and the plaintiff accepted $47 as part payment on the corn, and acknowledged the payment by written memorandum of the amount paid. It was held that, in the absence of proof, the minds of the parties met in making a new contract of sale for the corn at the time the payment was made in December; the part payment then made did not satisfy the statute of frauds. In Koewing v. Wilder, 128 Fed. 558, 63 C. C. A. 186, plaintiff and defendant had made two oral contracts, one for the sale of all the stock of the S. Co. to defendant for $500,000; this contract was subsequently reduced to writing. The other contract was for the sale of one hundred shares of the stock of the B. Co. by defendant to plaintiff for $10,000; this was not reduced to writing. It was held that, in the absence of evidence that at the time the contract for the S. stock was reduced to writing and delivered, the parties restated the prior oral agreement for the sale of the B. stock, and intended to validate the same, as a part of the contract, the delivery and the performance of the contract for the sale of the S. stock did not constitute a payment of a part of the purchase money for the sale of the B. stock at the time, so as to take that contract out of the statute of frauds. So, also, in Colton v. Raymond, 114 Fed. 863, 52 C. C. A. 382, the United States circuit court of appeals, in construing the statute of frauds of New York, which requires payment "at the time," held that in order that a receipt given by the seller of a part of the price for goods, after the time when a verbal contract for their sale was made, shall render the contract valid, there must be, at the time of such payment and receipt, such action taken by the parties as amounts to the making of a new contract, either by making an ac-

ceptance of the payment for the expressed purpose of complying with the statute and making valid the contract, and renewing its terms, and a delivery of such part of the consideration by the buyer, with the statement that it was "in compliance and fulfillment of the trade that we made" on a day stated, and the acceptance of the same by the seller in silence does not amount to a renewal of the prior contract, or the making of a new one, but at most is an implied recognition of the validity of the form or contract, and the payment is not made "at the time" within the statutory exception. And the general doctrine that to make a part payment effective to take a contract out of the statute of frauds when such payment is made subsequent to the date of the contract, that there must be a reaffirmance of the contract at the date of the payment is further upheld in Hunter v. Wetsell, 57 N. Y. 375, 15 Am. Rep. 508; 84 N. Y. 549, 38 Am. Rep. 544; Jackson v. Tupper, 101 N. Y. 515, 5 N. E. 65; Bates v. Cheseboro, 32 Wis. 594. In Allis v. Read, 45 N. Y. 142, no payment was made at the time sufficient to take the contract out of the statute of frauds, but at a subsequent time when a payment became due the parties made a further contract varying in some respects the original agreement, and the purchaser then delivered to the sellers a promissory note to be collected and applied by them on the purchase price of the goods. He also, at that time, consigned to the sellers, merchandise which they were to sell and apply the proceeds to the price of the goods. It was held that the minds of the parties met on the terms and conditions of the last agreement, and by the purchaser's transfer of the note and consignment of the merchandise, the contract was binding under the statute of frauds.

But the rule that part payment of the purchase price of goods sold under a verbal contract void under the statute of frauds must be made at the time of the contract, in order to take the contract out of the statute, is not universal; for, in the absence of any express statutory provision requiring payment to be made at the time, the rule established by the cases above given has not been followed. Thus in Dallavo v. Richardson, 134 Mich. 226, 96 N. W. 20, plaintiff and defendant, in August, had entered into an oral contract for the sale of certain ties to plaintiff by defendant, which was void under the statute of frauds. In September or October, plaintiff sold defendant a part of a shingle-mill, the purchase price of the mill to be applied as part payment on the ties. It was held that if it was intended by the parties that the price of the mill was to be applied to the purchase price of the ties, the contract as to the ties was taken out of the statute of frauds; the court saying: "If a part payment be made at any time when it is intended by the parties to be received as a payment upon the contract price, it is sufficient to take the case out of the statute." And a similar ruling was made in Driggs v. Bush, 152 Mich. 53, ante, p. 389, 115 N. W. 985, 15 L. R. A., N. S., 654.

SMITH v. WERKHEISER.

[152 Mich. 177, 115 N. W. 964.]

FRAUD—Means of Discovering Falsity of Statements.—The fact that the books of a newspaper business are placed at the disposal of a prospective purchaser does not deprive him of the right to rely on the statements of the seller as to the circulation and advertising receipts of the paper, which statements prove false; a defrauded person does not owe to the person who defrauds him an obligation to use diligence to discover the fraud. (p. 408.)

FRAUD.—The Measure of Damages for Misrepresenting the Circulation and advertising receipts of a newspaper, made by the owner to effect a sale thereof, is the difference between the represented value and the actual value as indicated by the cash receipts of the business. (p. 408.)

FRAUD—Right of Purchaser to Damages.—The Purchaser of a Newspaper may recover damages against the seller for his false statements concerning the circulation and advertising receipts of the paper. (pp. 408, 409.)

FRAUD—Right to Recoup Damages.—The Purchaser of a Newspaper, when sued for the unpaid balance, may recoup the damages caused by the false representations of the seller as to the circulation and advertising receipts of the paper, whether the suit is brought by the seller or by his assignee with notice. (p. 409.)

EQUITY.—The Defendant in Equity may Avail Himself of every legal defense not inequitable in its nature. (p. 409.)

FRAUD—Equitable Relief from Sale Procured by.—Where a sale of a newspaper has been effected by false statements of the vendor, equity will enjoin the enforcement of the mortgage given for part of the purchase price, and decree a cancellation of the mortgage and notes, where the damages from the fraud exceed the mortgage indebtedness. (p. 410.)

Black & Roberts and Brennan & Cook, for the complainants.

Lee & Parker and Brown & Farley, for the defendant.

178 CARPENTER, J. Defendant Keturah C. Werkheiser is the wife of her codefendant, William H. Werkheiser, and the mother of the other two defendants, Frank F. Werkheiser and George Werkheiser. In the year 1905 the defendants William H., Frank F., and George Werkheiser, constituting a partnership under the name of W. H. Werkheiser & Sons, owned and published the "Flint Daily News" and the "Genesee Democrat." November 16, 1905, they sold the same to complainants for the agreed consideration of thirteen thousand five hundred dollars. All the consideration except four thousand two hundred and sixty-one dollars was paid in cash. For that amount complainants gave their promissory notes secured by a mortgage on the plant. The mort-

gage authorized the mortgagee to take possession of the mortgaged property if any part of the same should be sold, assigned or disposed of. Subsequently, this [179] mortgage was transferred to the first named defendant, Keturah C. Werkheiser. For the purpose of inducing complainants to make said purchase, certain false representations were made by Frank F. Werkheiser. One of those representations was that the paper had a circulation of four thousand, when in fact the circulation was not in excess of two thousand five hundred. Another of those false representations related to the amount of advertising done by the paper. Notwithstanding these false representations, complainants chose to keep the property purchased by them, and subsequently sold the same to another purchaser. Shortly after this second sale defendant Keturah threatened to seize said property on her chattel mortgage. Thereupon this suit in equity was instituted whereby complainants sought and obtained a temporary injunction restraining the threatened seizure, and wherein they prayed for a decree canceling said mortgage upon the ground of fraud. Defendant Keturah filed an answer in the nature of a cross-bill praying a decree of foreclosure. The case was heard on pleadings and testimony taken in open court, and a decree entered dismissing complainants' bill and granting defendant relief on her cross-bill. From that decree an appeal is taken to this court.

Complainants have not disaffirmed the contract, and, therefore, they cannot seek relief upon the ground of rescission. They have affirmed the contract. They contend they were damaged by the fraud of defendants; that the amount of those damages exceed the amount represented by the mortgage in question; that defendant Keturah is not a bona fide holder of that mortgage, and that they have a right to a decree in equity canceling the same. The testimony that the firm of W. H. Werkheiser & Sons misrepresented the circulation is clear and convincing. It is insisted, however, that complainants placed no reliance upon this misrepresentation, but did rely upon an examination of the books which contained a correct statement of the circulation. It is true that complainants did undertake [180] to verify the statements made to them by an examination of the books, but we are convinced that that examination was by no means an exhaustive one. In short, we are bound to say that their examination of the books did not lead complainants to discredit the false statements made to them. It is urged that inasmuch as the books were placed at their disposal complainants were bound to as-

certain the truth and to place no reliance upon the false statements that had been made to them. This is not the law. A defrauded party does not owe to the party who defrauds him an obligation to use diligence to discover the fraud: Smith v. McDonald, 139 Mich. 225, 102 N. W. 738; Bristol v. Braidwood, 28 Mich. 191. We are therefore of the opinion that it must be said that complainants did rely upon the false representations, and that they did therefore have a cause of action against the members of the firm of W. H. Werkheiser & Sons for the alleged fraud. We are also of the opinion that it must be said that defendant Keturah was not a bona fide holder of the mortgage in question. The evidence convinces us that she took the same with knowledge of the fraud practiced by her husband and sons, and with actual notice, too, that complainants would raise the question of fraud to resist payment of the mortgage.

It is urged that the testimony affords no basis for measuring complainants' damages. We think otherwise. Defendant Frank F. Werkheiser testified that the cash receipts for the year preceding the sale affords a proper measure of the worth of a newspaper, and that this rule was stated to complainants before they purchased. We know from other testimony how much greater the annual earnings of the plant would have been had the circulation been as represented. In that case (that is, if the circulation had been as represented) the annual earnings the year before the sale would have exceeded the actual earnings by an amount greater than the mortgage indebtedness. This excess of earnings under the rule testified to by Frank F. Werkheiser indicates the difference in value [181] between the property as it was represented to be and as it actually was, and that difference is the measure of complainants' damages: Page v. Wells, 37 Mich. 415.

Defendants present an ingenious argument in support of their proposition that complainants were not damaged by the fraudulent representations. That argument, briefly stated, is this: It was represented to complainants by defendants that the gross income of the plant for the year preceding the sale was eighteen thousand eight hundred dollars; that it is established by the testimony that it did earn that year eighteen thousand eight hundred dollars; that this being so, the false statement relating to the circulation was utterly immaterial and affords no ground for claiming that complainants were damnified. We are forced to reject this argument, because in our judgment it is not established by the testimony that the in-

come of the property the year before complainants purchased was eighteen thousand eight hundred dollars. It is true that some of defendants' witnesses testified that the income was as represented, but this was not corroborated by a production of the books covering this entire period—and we believe them to have been missing through no fault of complainants—and for that and other reasons we discredit the testimony. We are therefore compelled to reject the argument of defendants under consideration, and to say that the testimony does satisfactorily prove that complainants' damages resulting from the fraud of defendants exceeded the indebtedness secured by the mortgage.

This disposition of the facts brings us to the important legal question in this case, viz., Can complainants resort to a court of equity for relief? There is no doubt that complainants might recover the damages caused by this fraud by bringing suit in a court of law against the defendants constituting the firm of W. H. Werkheiser & Sons. Nor is there any doubt that if complainants were sued in a court of law for the balance unpaid on the contract they might recoup the damages caused by said fraud. And this would be true whether that suit were brought in the name of the original parties to the fraud or in the [182] name of the assignee of those parties, unless that assignee stood in the attitude of a good-faith purchaser of negotiable paper. We emphasize the foregoing propositions of elementary law by declaring that if defendant Keturah C. Werkheiser had brought suit in a court of law to recover the indebtedness secured by her mortgage, the fraud established in this case would constitute a complete defense. The decree rendered by the learned circuit judge has denied that defense. In other words, complainants, by the decree of the circuit court, have been denied a defense in a court of equity which they might have successfully interposed in a court of law. I think it may be said, as a general rule, that a party defendant in a suit in equity may avail himself of every legal defense not inequitable in its nature. Certainly the defense under consideration is not inequitable. On the contrary, it is an equitable, as well as a legal, defense, and precisely such a defense was allowed in equity in Gilchrist v. Manning, 54 Mich. 210, 19 N. W. 959. But I do not think that our determination of this case should rest entirely upon the proposition that complainants had a right to assert the claim of fraud in defense of the proceeding taken by defendant Keturah to foreclose her mortgage. To rest it upon that proposition alone would give complainants less than they ask,

and less, in my judgment, than they are entitled to have; that is, it would not give them a decree canceling the notes and mortgage. When complainants instituted this suit defendant Keturah was threatening to seize the property mortgaged—and this she had a right to do if the mortgage was a valid and enforceable security. At that time complainants' damages caused by the fraud exceeded the mortgage indebtedness, and therefore an application of said damages in payment of said indebtedness would entirely satisfy the mortgage. Complainants had a right to have those damages so applied. It was the duty of defendant Keturah to recognize this right to so apply said damages and to surrender the mortgage. This duty she refused to perform. But, on the contrary, as heretofore stated, [183] she insisted that the mortgage constituted a valid lien on the property described therein and threatened to seize the same. Thereupon this suit was commenced; and a temporary injunction restraining the threatened seizure was prayed for and granted. A more appropriate case for equitable relief cannot well be stated. Here is a chattel mortgage which on its face purports to be a lien on the property therein described. Complainants insist, and have a right to insist, that because of the fraudulent conduct of the mortgagees the mortgage is not a lien upon that property. It is idle to say that they should have resorted to a court of law for relief. Their remedy at law is entirely inadequate, for the mortgagee was about to proceed to seize the mortgaged property and thereby take a step which violated complainants' legal and equitable rights. This could have been prevented by no process issued by a court of law. But it could be and was prevented by an injunction issued by a court of equity. The issuance of that writ clearly did not exhaust the remedial authority of the equity court. That writ was issued when the suit was commenced—when the court assumed jurisdiction. It thereupon became and was the duty of that court to adjudicate the controversy and to render a final appropriate decree—a decree which will afford adequate protection to complainants' rights—and that, it is clear, will be nothing less than a decree canceling the mortgage in controversy. This conclusion is in harmony with the authorities.

In Carroll v. Rice, Walk. Ch. 373, suit was brought in equity to procure the cancellation of certain securities given by complainant for the purchase of property on the ground that said purchase was induced by fraud. It was held that complainant's delay disentitled him to relief upon the ground

of rescission, but that he had a right to have his damages for the fraud determined and when determined "indorsed as so much paid on his bond for the purchase money."

[184] In Ranney v. Warren, 13 Hun, 11: "The plaintiff's complaint alleged that by defendant's fraudulent representations he was induced to purchase a farm of the defendant for the sum of eighteen thousand dollars; that the farm was in fact worth not over twelve thousand dollars; that if the defendant's representations had been true, the farm would have been worth twenty thousand dollars; that the plaintiff paid in cash five thousand dollars, assumed a mortgage of two thousand dollars, and gave a bond and mortgage for eleven thousand dollars, payable in one thousand dollars annual installments, one of which he has since paid."

He prayed that the bond and mortgage might be canceled, and for damages. The lower court dismissed this complaint on the ground that no damages had yet been sustained and that the facts alleged would defeat a recovery on the bond. This judgment was reversed, the court saying: "Without discussing the correctness of the decision of the learned justice on the mere question of damages, it seems to us that he overlooked the fact that a part of the relief demanded was the equitable relief of the surrender and cancellation of the bond": See, also, Parks v. Burbank, 58 Iowa, 707, 12 N. W. 729; and Badgett v. Frick & Co., 28 S. C. 176, 5 S. E. 355.

Defendants' counsel cite many authorities which hold that a defrauded party, in order to rescind a contract, must act with diligence, and that he must restore to the party who defrauded him what he received. The propositions declared by these authorities are elementary principles of law. But they have no application to this case. Complainants are not seeking to rescind their contract. They have affirmed their contract and they recognize its binding force. They obtain relief in this case not upon the ground of rescission, but upon the ground that they are entitled to have their damages—damages computed upon the assumption that the contract is affirmed—resulting from defendants' fraud applied in payment of the mortgage in suit.

It follows from this reasoning that the decree entered [185] in the circuit court should be reversed and a decree entered in this court in accordance with the prayer in complainants' bill. Complainants will recover costs of both courts.

Grant, C. J., and Hooker, Moore, and McAlvay JJ., concurred.

The Rule that Equity will not Entertain a Suit to cancel a writing when there exists an adequate remedy at law, although frequently laid down by the courts, is not always strictly adhered to: Fitzmaurice v. Mosier, 116 Ind. 363, 9 Am. St. Rep. 854, and note; Vannatta v. Lindley, 198 Ill. 40, 92 Am. St. Rep. 270. If promissory notes are obtained by a railroad company from the inhabitants of a city on the fraudulent representation that unless the notes are given the road will not be built to the city, but to a rival town, equity will decree their surrender and cancellation: Crawford v. Mobile etc. R. R. Co., 83 Miss. 708, 102 Am. St. Rep. 476. But it has been held that if an adequate legal remedy exists, either affirmative or defensive, a suit cannot be maintained to cancel county warrants alleged to have been illegally issued: County of Ada v. Bullen Bridge Co., 5 Idaho, 188, 95 Am. St. Rep. 180.

YOUNG v. STEIN.

[152 Mich. 310, 116 N. W. 195.]

BUILDING CONTRACT—Conclusiveness of Architect's Certificate.—Where a building contract makes the determination of the architect as to what is required of the contractor by the plans and specifications conclusive upon him, a construction that such determination is not likewise conclusive upon the owner should not be adopted unless imperatively required by the terms of the contract. (p. 414.)

BUILDING CONTRACT—Conclusiveness of Architect's Certificate.—An architect's certificate of the performance of a building contract, made as the agent of the owner, binds the latter, in the absence of fraud or collusion, as much as though he himself had signed it. (p. 415.)

BUILDING CONTRACT—Conclusiveness of Architect's Certificates.—The certificate of an architect, made as agent of the owner, estops the latter from raising the question of a failure on the part of the contractor to comply with the plans and specifications, so far as such failure is not the result of bad workmanship or materials, which the building contract expressly excepts. (p. 415.)

Stellwagen & MacKay, for the appellant.

Isaac N. Payne, for the appellee.

310 McALVAY, J. Plaintiff is a contractor and builder in 311 the city of Detroit. He entered into a contract in writing to build a house for defendant for the sum of eighteen hundred and ninety-two dollars, according to certain plans and specifications. This suit was brought to recover a balance of five hundred and sixty dollars claimed to be due under the contract and for some extras amounting to one hundred and four dollars and fifty cents. The declaration was in assumpsit upon the contract, and on the common counts. Defendant, under the general issue, gave notice of special de-

fense, admitting that the contract was entered into, but that it was performed by plaintiff according to its terms, to his damage which he was entitled to recoup. He also gave notice of setoff. A verdict for seven hundred and thirty-eight dollars and fifty cents was rendered in favor of plaintiff, upon which a judgment was entered. The case is here for review upon writ of error.

The terms of the contract need not be set forth, as it is of considerable length. The owner agreed to pay the contractor eighteen hundred and ninety-two dollars for the work and materials as follows: "On certificates issued from time to time as the work progresses, reserving ten per cent until the work is entirely completed and accepted by the owner and architect. It being understood that the final payment shall be made within thirty days after this contract is completely finished; provided that in each of said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to their satisfaction."

The contract also provides: "It is further mutually agreed by the parties hereto that the inspection of any work by the architect, or the issuance of certificates thereon by him, or payments made by the owner under this contract, shall not release the contractor of any obligation to perform the work in a good and workmanlike manner, and in case of any default or defects being found at any time, either in workmanship or materials, the same, with all damages due thereto, shall be repaired, replaced or made good by the contractor at his own cost and expense."

Defendant insists that the house was not built according to plans and specifications, and he was not bound by [312] the certificates of the architect. Paragraph 1 of the contract requires the contractor to do the work under the direction and to the satisfaction of architect (acting as agent of said owner) agreeably to the drawing and specifications made by said architect. Under paragraph 2, in case of doubt "respecting the true meaning of the drawings or specifications, reference shall be made to the architect, whose decision thereon shall be final and conclusive." Paragraph 4 requires the contractor, on notice from the architect, "to remove from the grounds or building all materials condemned by them or take down all portions of the work which the architect shall condemn as unsound," etc. Paragragh 8 provides: "The contractor shall make no claim for additional work unless the same shall be done in pursuance of an order from the architect."

Paragraph 10 provides: "Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on his part herein contained, such refusal, neglect or failure being certified by the architect, the owner shall be at liberty, after three days' written notice to the contractor, to provide any such labor or materials, etc.

"And if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession of all materials thereon, and to employ any other person or persons to finish the work, and to provide materials therefor.

"The expense incurred by the owner as herein provided either for furnishing materials or for finishing the work and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

It is clear that, under this contract, the determination of the architect as to what is required of the contractor by [313] the plans and specifications is conclusive upon the contractor, and unless such determination is likewise conclusive upon the owner, we should have the anomalous and unconscionable result that the owner might contest the contractor's right to compensation for work performed by him precisely as ordered by the owner's agent, the architect, whose orders he was bound to obey. Such a construction of the contract ought not to be adopted unless imperatively required by its terms: Wildey v. School District, 25 Mich. 419.

The contract was drawn by the architect as the agent of the owner, and was signed by the architect and not by the owner, the owner adopting the contract as his after its execution. The architect is described in the contract as agent of the owner. The provision in paragraph 13, "that in each of the said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to their satisfaction," indicates clearly that the acceptance "by the owner and architect" is to be evidenced by the certificate of the architect. This certificate the contractor obtained, and being made by the owner's unquestioned agent acting entirely within the scope of his express authority, it bound the owner, in the absence

of any showing of fraud or collusion, as much as though he himself had signed it: Lamson v. Marshall, 133 Mich. 250, 95 N. W. 78. The trial judge correctly held that defendant was estopped by the architect's certificates from raising the question of a failure on the part of the contractor to comply with the plans and specifications, so far as such failure was not the result of bad workmanship.

Defendant was not allowed to show faulty workmanship, the court holding that he had accepted the house and was estopped. The question of acceptance upon this record was one of fact for the jury so far as the question of good workmanship and materials was concerned: Gier v. Daiber, 148 Mich. 190, 111 N. W. 773.

The question of damages from faulty workmanship [314] should have been submitted to the jury, under the fourteenth paragraph of the contract. The testimony tended to show, and it was substantially admitted by plaintiff, that certain rooms were constructed with one side several inches longer than the parallel one; that on one side of the bay window twenty-two inch glass was used and on the other twenty-four inch, which twisted the window around and threw it out of shape. Such construction is at least evidence of bad workmanship, which the parties undertook to cover by the fourteenth paragraph. The court was in error in excluding such evidence.

The judgment of the circuit court is reversed, and a new trial ordered.

Grant, C. J., and Blair, Moore, and Carpenter, JJ., concurred.

If the Parties to a Building Contract agree that the architect shall pass upon the work and certify upon payments to be made, his decision is usually binding, and can be attacked only for fraud, mistake and the like: See the note to Baltimore etc. Ry. Co. v. Scholes, 56 Am. St. Rep. 312. An agreement that an architect's certificate shall be a condition precedent to a contractor's right to payment is valid, but is always deemed to embody the condition that the architect shall exercise his function as arbitrator in good faith: Halsey v. Waukesha Springs Sanitarium Co., 125 Wis. 311, 110 Am. St. Rep. 838.

GRANGER v. FRENCH.

[152 Mich. 356, 116 N. W. 181.]

MANDAMUS—Payment of Officer's Salary.—Mandamus is the proper remedy to enforce the payment by a municipal corporation of an officer's salary, the amount of which is fixed. (p. 416.)

OFFICERS.—The Assignment by a Public Officer of his unearned salary is void as against public policy. (p. 416.)

MANDAMUS—Payment of Assigned Salary.—Mandamus lies to compel a municipality to pay an officer his salary, although he assigned it before it was earned, such assignment being void as against public policy. (p. 417.)

Holmes & Holmes, for the relator.

R. M. Ferguson and R. L. Newnham, for the respondents.

357 OSTRANDER, J. Relator, a justice of the peace of the city of Grand Rapids, with an official salary of thirteen hundred dollars a year, payable monthly out of the city treasury, assigned unearned salary to obtain money and credit to relieve his financial embarrassment. Respondents are respectively the comptroller and city clerk of the city of Grand Rapids, and have refused to issue to relator the usual checks or warrants for his salary or to countersign or pay such checks because said assignments of relator's salary have been filed in the comptroller's office. Relator applied to the superior court for a writ of mandamus to compel respondents to perform their duties in the premises. The writ, after a hearing, was denied. The court found the assignments to have been given to persons who, in reliance upon them and in perfect good faith, advanced money or credit to relator, and in the opinion the learned judge said: "I cannot bring myself to feel that a court of justice is called upon to lend its aid to the relator in depriving his creditors of the opportunity of getting from him what he had solemnly promised to give them."

I think the writ of mandamus should have been granted, not in indorsement and appreciation of relator's conduct, nor in furtherance of relator's private interest, but because to deny it is, in effect, to refuse to enforce a rule of sound public policy. Mandamus is the proper remedy to enforce the payment by a municipal corporation of a salary, the amount of which is fixed: McBride v. City of Grand Rapids, 47 Mich. 236, 10 N. W. 353; Speed v. Common Council of Detroit, 100 Mich. 92, 58 N. W. 638. The assignments of his salary which relator gave are void. The rule, with copious references

358 to authorities, is stated in 2 American and English Encyclopedia of Law, second edition, page 1033, as follows:

"It is well settled, both in England and the United States, that a public officer cannot assign by anticipation the salary and fees paid to him for the purpose of maintaining the dignity of his office and securing the due discharge of its duties.

"The protection thus extended to those engaged in the performance of public duties is not based upon the ground of their private interest, but upon the necessity of securing the efficiency of the public service by insuring that the funds provided for its maintenance shall be received by those who are to perform the work, at the periods appointed for their payment. The assignment of such funds before they are due impairs the efficiency of the public service, and is void both in law and equity as being against public policy": See, also, 4 Cyc. 19; Bliss v. Lawrence, 58 N. Y. 442, 17 Am. Rep. 273; In re King's Estate, 110 Mich. 203, 68 N. W. 154.

It is true that the writ of mandamus will not be issued in all cases where a prima facie right to it is shown: Tennant v. Crocker, 85 Mich. 328, 48 N. W. 577; MacKinnon v. Auditor General, 130 Mich. 552, 90 N. W. 329; Van Akin v. Dunn, 117 Mich. 421, 75 N. W. 938; 26 Cyc. 150. So in Walhier v. Weber, 142 Mich. 322, 105 N. W. 772, and in Benson v. Bawden, 149 Mich. 584, 113 N. W. 20, 13 L. R. A., N. S., 721, the court refused relief in actions at law to parties seeking its aid to recover money or property parted with under illegal agreements, both parties to which were equally culpable. The court, in those cases, was enforcing a rule of public policy. The rule demanded that the parties be left where they had placed themselves. In the case at bar, the rule of public policy makes all anticipatory assignments of salary by the relator void, and demands that he be paid his official salary notwithstanding such assignments. The office of the writ applied for is to enforce the rule. It should issue, and the order denying it is reversed, with costs.

Grant, C. J., and Blair, Montgomery, and McAlvay, JJ., concurred.

The Question as to When Mandamus will lie is discussed in the notes to State v. Gardner, 98 Am. St. Rep. 863; Ward v. Commissioners of Beaufort County, post, p. 489.

ROSS v. LOESCHER.

[152 Mich. 386, 116 N. W. 193.]

DAMAGES—Penalty or Liquidated Damages.—Courts will disregard the express stipulation of parties to a contract as to the damages for the breach thereof, only in those cases where it is obvious from the contract before them, and the whole subject matter, that the principle of compensation has been disregarded. (p. 419.)

DAMAGES—Penalty or Liquidated Damages.—In cases where it is difficult accurately to determine the damages which one party may suffer by the failure of the other to perform his contract, the parties themselves may agree upon such sum as in their judgment will be ample compensation for the breach. (p. 419.)

DAMAGES—Penalty or Liquidated Damages.—A stipulation in a contract for repairing a dwelling-house to forfeit twenty dollars a day for failure to complete the work within a prescribed time when cold weather is coming on, is not per se excessive and, as a matter of law, penalty. (p. 419.)

DAMAGES—Penalty or Liquidated Damages.—The use of the word "forfeit" does not necessarily imply a penalty. (pp. 419, 420.)

BUILDING CONTRACT—Days of Grace.—Under a stipulation in a building contract that "if the work is pushed a few days grace will be allowed," it is not for the court to say that thirteen days of delay are the days of grace contracted for, for the question depends upon the character of the work, the time required to do it, and all the circumstances surrounding the transaction. (p. 420.)

Cross, Lovelace & Ross, for the appellant.

Turner & Turner, for the appellee.

[387] GRANT, C. J. The defendant was overhauling the interior of his residence, and in June, 1905, he made a contract with plaintiff for certain building material to be used in finishing the interior. The contract rested in parol. Plaintiff produced a statement of the material proposed to be furnished. It was not signed by either party, and no price was mentioned. Subsequently, eight hundred and twenty-five dollars was the price agreed upon, and it was evidently the intention that the material should be furnished some time during or before September. Some extras were furnished, and subsequently plaintiff furnished to defendant material for building a porch and some outside work. The material furnished for the porch amounted to two hundred and seventy dollars and sixty-nine cents. Three hundred dollars were paid by defendant August 30th. On September 27th a written contract was made, defendant refusing to make any further payments until he had a contract in writing. In this contract plaintiff agreed to furnish all the material for the interior by the 10th of October, 1905, "or forfeit the sum of twenty dol-

lars a day for every day's delay thereafter. If work is pushed a few days of grace will be allowed." Defendant then paid plaintiff three hundred dollars.

Plaintiff did not furnish all the material until thirteen days after the 10th of October. Plaintiff brought this suit to recover the balance due on the first contract. The court directed a verdict for the amount of his bill, over which there was no controversy.

[388] The court held that the twenty dollars per day was a penalty, and could not have been considered by the parties in the nature of compensation. This presents the most important question in the case. It is ably and fully discussed by Christiancy, J., in Jaquith v. Hudson, 5 Mich. 123. It was there said that "there is some conflict and more confusion in the cases." But the principle is there established that courts will "disregard the express stipulation of parties only in those cases where it is obvious from the contract before them, and the whole subject matter, that the principle of compensation has been disregarded": See, also, Ward v. Hudson River Building Co., 125 N. Y. 230, 26 N. E. 256; Hennessy v. Metzger, 152 Ill. 505, 43 Am. St. Rep. 267, 38 N. E. 1058; Wilcus v. Kling, 87 Ill. 107; Western Gas Construction Co. v. Dowagiac Gas & Fuel Co., 146 Mich. 119, 109 N. W. 29.

In cases where it is difficult to accurately determine the damages which one party may suffer by the failure of the other to perform his contract, the parties themselves may agree upon such sum as in their judgment will be ample compensation for the breach.

The defendant desired the possession of his house at a specified time. The plaintiff understood and contracted with reference to this. He had not complied with his first contract as to time. Cold weather was approaching. The damages which a householder would naturally suffer under such circumstances cannot be estimated by the amount of the contract or the rental value of the house. The purpose for which the building is to be used, the necessity for having the work done within the prescribed time, and the indirect as well as direct damages to a householder desiring to move into his house before cold weather, are elements which the parties to such a contract take into consideration. It would be difficult, under such circumstances, to accurately determine the damage which the householder might receive in being compelled to store his goods, and to live at a hotel or boarding-house. We cannot, therefore, hold that the amount is per se excessive [389] and a penalty. The use of the word "forfeit" does not

necessarily imply a penalty (Western Gas Construction Co. v. Dowagiac Gas & Fuel Co., 146 Mich. 119, 109 N. W. 29), and the circumstances were not such as to justify the court in holding, as a matter of law, that it was a penalty. For cases holding that the stipulated amount was a penalty rather than a fixed compensation, see Trustees of First Orthodox Congregational Church v. Walrath, 27 Mich. 232; Myer v. Hart, 40 Mich. 517, 29 Am. Rep. 553; Daily v. Litchfield, 10 Mich. 29; Davis v. Freeman, 10 Mich. 188; Cochran v. People's Ry. Co., 113 Mo. 359, 21 S. W. 6; Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671.

Where the provision is held to be a penalty the defendant is entitled to recover his actual damages.

A more doubtful question arises out of the stipulation in the contract that "If work is pushed, a few days of grace will be allowed." We think it was not for the court to say that thirteen days was the few days of grace contracted for. The question depends upon the character of the work to be done, the time necessarily required in doing it, and all the circumstances surrounding the transaction. The question should have been submitted to the jury.

The court also held that this provision for a few days of grace was a waiver of the provision for damages. No reason was given for the holding, and we are unable to suggest any. It was a waiver of damages only if the work was pushed, and upon this point there is a conflict of evidence.

Two other questions are raised, but the ruling of the court thereon was correct, and they are not of sufficient importance to discuss.

Judgment reversed, and new trial ordered.

Montgomery, Ostrander, Hooker, and Carpenter, JJ., concurred.

The Question of Liquidated Damages and Penalties is discussed at length in the note to Stillwell v. Paepcke-Leicht Lumber Co., 108 Am. St. Rep. 46.

KUITE v. LAGE.

[152 Mich. 638, 116 N. W. 467.]

EJECTMENT—Right of Vendor to Maintain.—The vendor of land under an executory contract which reserves in him the legal record title, but which gives the vendee the right to possession, cannot maintain ejectment against a stranger in possession of a strip of the land. (p. 421.)

EJECTMENT—Right of Vendee to Maintain.—Vendees who take possession of land under an executory contract of sale which reserves the legal title to the vendor may maintain ejectment against one who ousts them from the land. (p. 421.)

POWERS OF ATTORNEY are Construed Strictly, and not extended by construction. (p. 422.)

POWER OF ATTORNEY—Authority to Maintain Suit.—A special power of attorney to institute proceedings "in our name, place and stead," etc., does not confer authority upon the attorney to institute suit in his own name. (p. 422.)

Sooy & Heck and Smedley & Corwin, for the appellant.

George A. Farr, for the appellee.

638 BLAIR, J. As stated in the brief for appellant: "The only question involved in this appeal is, whether the vendor of land, by an executory land contract which gives the vendee the right to immediate possession, but who still holds the legal record title, can bring ejectment against a stranger, who has taken possession of a strip of the land so sold, and ousted plaintiff's vendees therefrom."

639 The trial judge was of the opinion that the ejectment statute compelled a negative answer to this question and directed a verdict for defendant. We concur in this opinion. Section 10,949 of 3 Compiled Laws provides: "No person can recover in ejectment, unless he has at the time of commencing the action a valid subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial."

This statute is plain and explicit in its terms; it makes no exception, as to the proof of the right to recover possession, in the case of strangers or intruders, but clearly states a universal rule applicable in all cases of ouster. The vendees in the land contract were in actual possession of the land at the time of the commencement of this suit and at the time of the trial. Under the decisions of this court, such vendees were entitled to maintain ejectment against one who should oust them from the land: Covert v. Morrison, 49 Mich. 133, 13 N. W. 390; Olin v. Henderson, 120 Mich. 149, 79 N. W. 178.

The right of the vendee to bring the action to recover possession necessarily negatives the possession of any such right by the vendor, since the right of the one would be destructive of the other. This was recognized by the court in Olin v. Henderson, 120 Mich. 149, 79 N. W. 178, where it was said: "A vendor in a land contract giving the vendee right of possession cannot maintain ejectment until he has in some manner terminated the contract relation: Michigan etc. Iron Co. v. Thoney, 89 Mich. 226," 50 N. W. 845; See, also, Bay County v. Bradley, 39 Mich. 163, 33 Am. Rep. 367; Van Vleet v. Blackwood, 39 Mich. 728; Corning v. Loomis, 111 Mich. 23, 69 N. W. 85; Stephens v. Motl, 82 Tex. 81, 18 S. W. 99; Gazzalo v. Chambers, 73 Ill. 75; Lannay v. Wilson, 30 Md. 536; State v. Cincinnati J. Co., 66 Ohio St. 182, 64 N. E. 68; 15 Cyc. 15, 28.

In their reply brief, filed since the case was received on briefs, counsel lay stress upon a power of attorney whereby the vendees in the land contract [640] "Made, constituted and appointed, and by these presents do make, constitute and appoint Jacob Kuite, of Holland, Michigan, true and lawful attorney for us and in our name, place and stead, to conduct suit in chancery instituted by us against Gerhard Lage, of Zeeland, Michigan, and to negotiate any settlement or institute any further proceedings said Jacob Kuite may deem expedient," etc.

The suit in chancery referred to was for an injunction to prevent the defendant cutting off the eaves of the building purchased by the vendees, to make room for the building defendant was erecting on adjoining land. After said power of attorney was given, the complainants therein (vendees in said land contract) filed an amended bill, making Jacob Kuite a complainant, and the ejectment suit was also started.

Powers of attorney are strictly construed and not extended by construction. The power of attorney in question was special, and only authorized the institution of proceedings "in our name, place and stead," etc.; it did not confer authority upon the plaintiff to institute suit in his own name. Instead of constituting a warrant for the plaintiff's position in this case, the power of attorney was a clear recognition on his part as well as on the part of the principals that they alone had authority to institute suits on account of the ouster.

The judgment is affirmed.

Montgomery, Ostrander, Hooker, and Moore, JJ., concurred.

The Question as to What Property Ejectment Lies to Recover is discussed in the note to Butler v. Frontier Telephone Co., 116 Am. St. Rep. 568. A bare legal title will not ordinarily sustain ejectment: Barrett v. Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331. As to whether an equitable title will sustain the action, see Walker v. Miller, 139 N. C. 448, 111 Am. St. Rep. 805; Ables v. Webb, 186 Mo. 233, 105 Am. St. Rep. 610. That an equitable title may present a good defense to an action of ejectment, see Gates v. Gray, 85 Ark. 25, 122 Am. St. Rep. 19.

SCOTT v. UNIVERSITY OF MICHIGAN ATHLETIC ASSOCIATION.

[152 Mich. 684, 116 N. W. 624.]

ATHLETIC ASSOCIATION—Liability for Injury to Spectator.—Where a voluntary athletic association, composed of the undergraduates and alumni of a university, obtain permission from the regents to erect a bleacher on the field, it and its officers, not the regents, are the proper parties defendant to an action by a spectator at a football game for injuries received from the collapse of the structure, owing to its negligent construction. (p. 425.)

ATHLETIC ASSOCIATION—Liability for Fall of Bleacher.—The managers of a university athletic association who erect a stand to which they charge an admission fee to view a game of football are in the position of proprietors of a public resort, and it is their duty to see that the structure is in a fit and proper condition for such use, and to exercise a high degree of care to prevent disaster. They are not insurers of safety; they do not contract that there are no unknown defects not discoverable by the use of reasonable means, but they do contract that except for such defects the stand is safe. (p. 426.)

Lee N. Brown, E. B. Norris and J. W. Bennett, for the appellant.

Arthur Brown, Edson R. Sunderland and Thomas Bogle, for the appellees.

685 OSTRANDER, J. Testimony was given from which the jury might have found that plaintiff was injured by the collapse of a stand, or bleacher, erected by the defendant association, for the use of, and used by, the public, at a game of football to which the public was invited and required to pay an admission fee for the profit of said association; that the stand, designed to support five thousand spectators, collapsed, from inherent and discoverable weakness, when put to its intended use, when occupied by less than three thousand persons. At the trial, both parties introduced testimony and the court, without, so far as the record discloses, assigning reasons, directed a verdict for defendants. Judgment was entered on the verdict.

Plaintiff, appellant, contends that the case should have been submitted to the jury. Defendants make three contentions. They are, (1) that the plaintiff has in any event no right of action against these, or any of these, defendants; (2) that plaintiff has not shown that defendants were guilty of any negligence; (3) that if the circumstances made out a prima facie case of negligent construction of the stand, the undisputed testimony for defendants established the fact of the exercise of due care on the part of defendants to render the premises safe.

And first as to the parties defendant. They are the 686 voluntary association and its officers, of whom defendant Baird is one, filling the position of graduate director. The active members of the association are the undergraduates and alumni who contribute money, with an associate membership of business men. Defendant Pipp is the person employed by the association to erect, and who did erect, the stand. The theory of defendants is:

"Mr. Baird, as agent of the board of regents, was authorized by Regent Fletcher to put up the bleacher; he did so, had it inspected, and the board of regents had it inspected. Not only does the record fail to show any act whatever on the part of the Athletic Association in regard to the building of the bleacher, but it shows affirmatively that the Athletic Association could not have built a bleacher had it desired to do so. Ferry Field was a recreation ground for the students, and the students, of course, used the field and the structures standing upon it. As Regent Fletcher testified, the association was simply the student in another form. It appears, therefore, that while the Athletic Association had nothing to do with the erection of this bleacher, it was allowed by the regents to use the field and the bleacher for the purpose of carrying on and exhibiting the football game between Michigan and Wisconsin Universities on November 18, 1905. But the board of regents never surrendered full and absolute control of Ferry Field. While the association was using the field it was as much subject to the control of the board of regents as at other times. In other words, Ferry Field is exactly like other University property; it is owned and controlled by the board of regents for the use of the students, but such use can never be hostile to or exclusive of the continued control by the board. Having no independent rights in Ferry Field the Athletic Association could sustain no independent liabilities consequent upon its use.

"It seems clear that the Athletic Association, under its permission from the board of regents to use Ferry Field pursuant to the general purposes of the University, at most merely represented the board of regents in conducting the game in question. So far as the public is concerned, the association might therefore be deemed the agent of the board of regents in conducting and exhibiting the game for the benefit of all who wished to witness it. And in that capacity the liability of the Athletic Association would appear to be the same as that of Mr. Baird [687] himself. Each is liable, if at all, as agent of the board of regents.

"Now, it is an elementary principle of the law that an agent is not liable for mere acts of nonfeasance, but only for acts of misfeasance. This principle has been applied in a great variety of cases."

Whether the fact is or is not controlling, a point not precisely involved, we do not find in the record any testimony tending to prove that the regents, directly or indirectly, constructed or supervised the construction of the stand, or that the defendant association or Mr. Baird was an agent of the regents in that behalf. The record discloses that while Mr. Baird applied to the chairman of the committee on buildings and grounds for and received permission to build the bleacher, it and all other structures upon the grounds were paid for out of the moneys of the defendant association. The funds of the association are devoted to athletics and to the furnishing and maintaining of Ferry Field. The association receives and disburses its money and the regents exercise no control of its funds except to insist that there shall be a proper auditing of accounts. Assuming that the regents might have refused permission to erect the particular bleacher, they did not do so. They did not erect it. Assuming, further, that Mr. Baird is paid for his services as adviser of the association's athletic policy by the regents, and that his position of graduate director is dependent upon his engagement with the regents, he is nevertheless one of the directors of defendant association, and by its constitution is a member of its financial committee, and he also exercises such powers and performs such duties as its board of control may from time to time determine and require. Whether the related facts affect alike all of the defendants, whether for any reason the judgment should be affirmed as to some of the defendants, are subjects not referred to in argument and questions not considered.

The remaining contentions may be considered together. The testimony goes much beyond proving merely an accident

ess and resulting injury. That relied upon to show that defendants exercised due care tends to prove that the stand was erected by a competent and experienced builder, of good materials; that before it was used it was inspected by engineers and others admittedly competent to perform the work of inspection, who pronounced it safe. It is clear, however, that a wholly inadequate structure was in fact tendered for public use, and it cannot be determined, upon this record, as matter of law, that a latent and not a patent defect, discoverable in the exercise of proper care, existed. The managers of the grounds and stands occupied upon the occasion in question the position of proprietors of a public resort. Plaintiff was not a mere licensee and did not occupy the stand by mere invitation. Whether responsibilty to the plaintiff is grounded, in the form of action instituted, upon a contract or upon a duty, its exists, if at all, because of an implied contract. The implied contract was that the stand was reasonably fit and proper for the use to which it was put; the duty was to see to it that it was in a fit and proper condition for such use. Neither plaintiff nor the public generally would be expected to examine the stand and judge of its safety. This consideration, and the probable consequences of failure of the structure, imposed upon the responsible and profiting persons the duty of exercising a high degree of care to prevent disaster. They were not insurers of safety, they did not contract that there were no unknown defects, not discoverable by the use of reasonable means; but, having constructed the stand, they did contract that, except for such defects, it was safe: 1 Thompson on Negligence, secs. 994-997; 21 Am. & Eng. Ency. of Law, 2d ed., 472; Francis v. Cockrell, L. R. 5 Q. B. 184, 39 L. J. Q. B., N. S., 113, 291. See, also, Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788, 163 N. Y. 559, 57 N. E. 1109.

The judgment is reversed and a new trial granted.

Grant, C. J., and Blair, Montgomery, and Carpenter, JJ., concurred.

If the Owner or Occupier of Land, either directly or indirectly, induces people to come upon his premises, he thereby assumes an obligation that such premises are in a reasonably safe condition, so that persons there by his invitation shall not be injured by them or in their use for the purpose for which the invitation was extended. This rule has been applied to the owner of a racecourse who is giving thereon public exhibitions of racing: Hart v. Washington Park Club, 157 Ill. 9, 48 Am. St. Rep. 298; to an agricultural society giving a fair: Dunn v. Agricultural Society, 46 Ohio St. 93, 15 Am. St. Rep. 556; to the owner of a park who invites the public thereto to view

an exhibition of fireworks: Sebeck v. Plattdeusche Volkfest Verein, 64 N. J. L. 624, 81 Am. St. Rep. 512; to a street railway company which maintains a place on the line of its road for exhibitions of markmanship: Thompson v. Lowell etc. Ry. Co., 170 Mass. 577, 64 Am. St. Rep. 323; and to the proprietors of a bathing resort: Larkin v. Saltair Beach Co., 30 Utah, 86, 116 Am. St. Rep. 818.

BACHINSKI v. BACHINSKI'S ESTATE.

[152 Mich. 693, 116 N. W. 556.]

WILLS—Omission of Child—Evidence.—In a proceeding by a pretermitted child to establish her share in her father's estate, evidence is inadmissible that after the will was made she entered a house of ill-fame and became estranged from her father. (p. 428.)

WILLS—Omission of Child.—Extrinsic Evidence is admissible to show that a testator omitted to provide for his child through mistake. (p. 428.)

WILLS—Omission of Child Through Mistake of Law.—A child is entitled to inherit from her father's estate if he omits to provide for her in his will through a mistake of law, as where he relies on the opinion of the scrivener that the daughter would share in his estate notwithstanding her omission from the will. (p. 428.)

WILLS—Omission of Child.—Evidence of the Financial Condition of the estate of a testator is not admissible in a proceeding by a pretermitted child to establish her share in his estate. (p. 429.)

Pierce & Kinnane, for the appellant.

Frank S. Pratt and W. A. Hayes, for the appellee.

694 GRANT, C. J. Petitioner, the daughter of John Bachinski, deceased, filed the petition in this case in the probate court of Bay county, asking that she be decreed the same share in her father's estate that she would have been entitled to had he died intestate. The petition was presented under 3 Compiled Laws, section 9286, which provides that such child shall be entitled to such a decree, if it appear that such omission was not intentional but was made by mistake or accident. Petitioner's mother died when she was between four and five years of age. Some time after her death the father became acquainted with a widow, Mrs. Frances Plath, who had two daughters. The latter part of 1890, Mr. Bachinski took the petitioner and went to live with Mrs. Plath and her daughters. Mrs. Plath had a child by Mr. Bachinski. Some ten years after the birth of the child Mrs. Plath and Bachinski were married. The will was executed July 13, 1891. It gave all his property to Mrs. Plath, and made her his executrix. After the will was admitted to probate this petition was filed. The prayer was granted, and Mrs. Bachin-

ski appealed to the circuit court, where the case was tried by a jury, who rendered a verdict in favor of the petitioner.

To a special question, "Was the omission to provide in the will in question for Annie Bachinski intentional?" the [695] jury answered, "No"; and to the question, "Was the omission to provide in the will in question for Annie Bachinski due either to accident or mistake?" they answered "Yes."

Mrs. Bachinski seeks a reversal in this court for alleged errors upon the trial.

1. The petitioner was eleven years old when the will was made. She lived with her father about six years thereafter. Respondent sought to show, on cross-examination of the petitioner, that she, when about eighteen years of age, became an inmate of a house of prostitution. The testimony was properly rejected: People v. McLean, 71 Mich. 309, 15 Am. St. Rep. 263, 38 N. W. 917; People v. Mills, 94 Mich. 630, 54 N. W. 488; People v. Abbott, 97 Mich. 484, 37 Am. St. Rep. 360, 58 N. W. 862.

2. It is claimed that on account of this conduct an estrangement took place between the father and daughter. Even if this were so, it would have no bearing upon the condition of affairs at the time the will was made, six years before, when petitioner was a little over eleven years of age, neither would it afford any reason for his omission to provide for her. The record contains no evidence tending to show that there was the slightest estrangement between them at the date of the will, neither could there well be in the case of a child of such tender years. The only excuse offered for disinheriting his own daughter is that Mrs. Plath had loaned him some money.

3. Kinney v. Kinney, 34 Mich. 250, and Waldron v. Waldron, 45 Mich. 350, 7 N. W. 894, have no application to a case under this statute. Those cases apply to the construction of provisions of wills devising property to devisees therein named, not to a case where the testator omits his own offspring from his bounty. There is a serious conflict in the cases as to the character of the evidence required by this and similar statutes: 1 Underhill on Wills, sec. 243. A rule that the question must be determined "from the four corners of the instrument" would render the statute of little [696] value. In reason and common sense resort must be had to extrinsic evidence. The intent cannot often appear from the will itself: See note to Thomas v. Black, 8 Am. Prob. Rep. 340, 113 Mo. 66, 20 S. W. 657, where numerous authorities are cited; Coulam v. Doull, 133 U. S. 216, 10 Sup. Ct. Rep. 253, 33 L. ed. 596.

It appears from the testimony of the scrivener who drew the will that the testator knew that he omitted to mention his daughter, but it also appears that the scrivener told him that it would not cut off his daughter from a share in his estate. The mistake, therefore, was one of law. Is such mistake within the statute? We held that it is not a universal, though a general, rule that equity will not relieve against a mistake of law: Renard v. Clink, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692.

It would certainly be a harsh rule to hold that where it clearly appeared that the testator omitted his own children from his will by a mistake of law and in the belief that he had not disinherited them, the omission was intentional. This question is decided under a statute practically like our own by the supreme court of Massachusetts: Ramsdill v. Wentworth, 101 Mass. 125. It was there said: "The nature of the mistake is not material. There is no distinction between mistake of fact and mistake of law in this regard. If the testator, in ignorance or mistake of law, supposed that he had provided for them by the terms used in his will, then his failure to name them, or to use apt words of devise to them, cannot, within the meaning of the statute, be regarded as an intentional omission."

In this case it is clear that the testator did not, within the meaning of the statute, purposely omit his daughter from his will. The statement made by the scrivener to him, and statements made by the testator that his property would go to his two children, were competent to show that he unintentionally omitted petitioner from his will. We held in Re Estate of Stebbin, 94 Mich. 304, 34 Am. St. Rep. 345, 54 N. W. 159, that although the testator had named his grandchild in his will but without making any provision for her, the question of whether he intentionally or unintentionally omitted [697] her from the will was a question of fact for the jury. We think there is stronger evidence in this case than in that to show the testator's intention.

4. The court did not err in refusing to permit the respondent to show the financial condition of the estate of the deceased. Whether the deceased left an estate large or small has no bearing whatever upon the issue. The amount of the estate would not afford any reason for excluding his only legitimate child from his bounty.

5. It is also urged that the court erred in refusing to admit certain letters, claimed to have been written by the petitioner but which she denied writing. Neither the letters nor

a statement of their contents are in the record. The question of their admissibility, therefore, is not properly before us.

Judgment affirmed.

Moore, J., concurred.

OSTRANDER, J. I agree to an affirmance of the judgment. As to the point first discussed in the opinion of Mr. Justice Grant, the record discloses that the petitioner denied on her direct examination that she had ever been an inmate of a house of ill-fame. Appellant then offered to prove the fact. I think, under the circumstances of this case, as set out in the opinion of Mr. Justice Grant, the testimony was properly excluded. Upon the subject of the condition of the estate of the deceased, which appellant offered to prove and was not permitted to prove, I concur in holding that the condition of the estate was not a part of the res gestae, which is the ground, and only ground, asserted in this court for admitting the testimony.

Blair and Montgomery, JJ., concurred.

When a Testator Omits to Provide for His Child, it is presumed that the omission was intentional. And some courts have thought that extrinsic evidence is not admissible to rebut the presumption and show his intention to pretermit the child; that his intention so to do must appear from the words of the will. Other courts, however, have taken a contrary view, which appears more reasonable. It has been suggested that as to children born after the death of the testator, or after the making of his will, there is some reason why the intention to omit them should appear on the face of the will—the same reason as that upon which the doctrine of revocation rests, namely, the change in the testator's situation. But this reason has no force in the case of children living when the will was executed. There is no doubt that a codicil may be referred to for the purpose of ascertaining that the omission was intentional: See 1 Ross on Probate Law and Practice, 87; note to Brown v. Brown, 115 Am. St. Rep. 571.

The Effect of Omitting a Child from a Will through a mistake of law is discussed in the note to Brown v. Brown, 115 Am. St. Rep. 583.

WEBB v. DEPEW.

[152 Mich. 698, 116 N. W. 560.]

CONTRACT OF EMPLOYMENT—Action for Breach.—An action is for the breach of a contract of employment rather than for wages, where a special count in the declaration sets out the contract and its breach, and a bill of particulars is filed with an item of damages claimed for the breach. (p. 432.)

CONTRACT OF EMPLOYMENT—Damages for Breach.—In an action by an employé for a breach of his contract of employment, the damages are not limited to those that have accrued at the time of the trial. (pp. 434, 435.)

Nims, Hoyt, Erwin & Vanderwerp, for the appellant.

Cross, Lovelace & Ross and Ed. E. Kane, for the appellee.

699 MOORE, J. This suit was brought in justice's court on July 3, 1907. The plaintiff filed a written declaration containing a special count alleging a contract, breach and damages, and the common counts, with bill of particulars attached. The defendant pleaded the general issue and gave notice of justification for the discharge of plaintiff and a set-off. The case was tried in justice's court before a jury, and on July 17, 1907, a judgment was rendered in favor of plaintiff for one hundred and ninety dollars. Defendant appealed the case to the circuit court, and on September 25, 1907, it came on for trial before a jury.

Counsel for plaintiff in his opening statement said that plaintiff and her daughter, Anna, were employed by defendant as domestics at defendant's summer home near Muskegon, Michigan, for a period from about June 21, 1907, to such time as defendant should leave said summer home, but to at least October 1, 1907; that after plaintiff and her daughter had worked for defendant under this contract for about ten days, they were discharged by defendant without cause; that this suit was then instituted to recover the wages plaintiff and her daughter had already earned and damages for breach of the contract on the part of defendant.

After the opening statement had been made, and before any evidence had been introduced, the trial court made a ruling that plaintiff would be limited to recover such damages only as had accrued from the date of her discharge by defendant to the date of trial in justice's court, a period of seventeen days. To this ruling plaintiff's counsel excepted.

Plaintiff's counsel contended that, if the rule adopted 700 by the court was correct, plaintiff was still entitled to recover such damages as had accrued from the date of her dis-

charge to the date when the case was tried in circuit court. The trial court held that the case must be determined as it existed in justice's court, and no damages could be recovered beyond that time, to which ruling plaintiff's counsel excepted.

The assignments of error are discussed by counsel under two heads:

"First. The court erred in holding that plaintiff could not recover damages for the whole contract period, but that she was limited in her recovery to such damages as had accrued at the time of the trial in justice's court.

"Second. The court erred in not allowing plaintiff to recover such damages as had accrued up to the time of the trial in circuit court."

Before proceeding to discuss the two heads presented by counsel for appellants, some attention must be given to the contention of counsel for defendant. It is claimed the verdict was a consent verdict and not appealable. We do not so understand the record. The plaintiff claimed the right to prove her damages in full, but the court ruled she could not make proof of damages later than the date of trial in justice's court. Exception was duly taken and the action of the court is reviewable.

It is claimed the special count is not for a breach of the contract, but is an action on the contract to recover plaintiff's wages. We do not agree with this contention. The special count set out the contract and its breach. A bill of particulars was filed, one item of which reads: "To damage by breach of contract being what plaintiff and daughter would have earned if allowed to complete contract, one hundred and forty-four dollars."

Under her plea, defendant gave notice of justification for the discharge of plaintiff and her daughter. The defendant was not misled: See Costello v. Ten Eyck, 86 Mich. 348, 24 Am. St. Rep. 128, 49 N. W. 152.

We now come to the important question, and that is, [701] Was the trial court right in relation to the measure of damages? An examination of the authorities will show that there is a hopeless conflict in them. The precise question is a new one in this state. This court has held that, in case of a contract for life, or during one's ability and disposition to perform the duties of his position, prospective damages are recoverable in an action for its breach, and that the plaintiff is entitled to recover such a sum as represents fairly and reasonably the extent of his loss, the measure of damages being

the present value of the contract: Brighton v. Lake Shore & M. S. Ry. Co., 103 Mich. 420, 61 N. W. 550, 112 Mich. 217, 70 N. W. 432; Stearns v. Lake Shore & M. S. Ry. Co., 112 Mich. 651, 71 N. W. 148.

In Cutter v. Gillette, 163 Mass. 95, 39 N. E. 1010, it was said: "The remaining question is whether the jury should have been allowed to assess damages for the period of time subsequent to the trial. The plaintiff was hired for five years from April 25, 1892, and was discharged about the middle of July, 1892. He brought suit on November 10, 1892, and the verdict was rendered on March 14, 1894. The verdict assessed at the sum of three thousand one hundred and eighty dollars and ninety-five cents the plaintiff's whole damages for breach of the contract for hiring, and stated that of the amount thirteen hundred and ninety-two dollars and ninety-five cents was the damage to the time of trial. The defendant concedes that the plaintiff is entitled to recover damages for an entire breach, so far as such damages can be ascertained, but contends that, as the trial occurred before the expiration of the contract period, it was impossible for the jury to ascertain or assess the damage for the unexpired portion of the contract period subsequent to the time of trial. In support of this contention defendant cites the cases of Colburn v. Woodworth, 31 Barb. (N. Y.) 381; Fowler v. Armour, 24 Ala. 194; Litchenstein v. Brooks, 75 Tex. 196, 12 S. W. 975, and Gordon v. Brewster, 7 Wis. 355, in which cases it seems to have been held that, if the suit is begun before the expiration of the contract period, damages can only be allowed to the time of the trial. He asserts that in the case of Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285, in which full damages were given, the writ was brought after the expiration of the contract period. On the other hand, it has been held in Vermont that, if there has been such a breach as to authorize the plaintiff to treat it as entirely putting an end to the contract, he may recover damages for an [702] entire nonfulfillment, and is not limited to what he has actually sustained at the time of his bringing suit or the time of trial: Remelee v. Hall, 31 Vt. 582, 76 Am. Dec. 140. And in Maine, in an action for breach of a contract for hiring, brought before the expiration of the contract period, it was held that the just recompense for the actual injury sustained by the illegal discharge was the stipulated wages, less whatever sum the plaintiff actually earned, or might have earned by the use of reasonable diligence: Sutherland v. Wyer, 67 Me. 64.

"Such would seem to be the rule in Pennsylvania: See King v. Steiren, 44 Pa. 99, 84 Am. Dec. 419; Chamberlin v. Morgan, 68 Pa. 168. And the defendant concedes that such is the rule in England. We do not go into an exhaustive consideration of the decisions upon the question, as we consider it to have been settled in favor of the ruling given at the trial by our decisions: Dennis v. Maxfield, 10 Allen, 138; Blair v. Laflin, 127 Mass. 518; Jewett v. Brooks, 134 Mass. 505; Paige v. Barrett, 151 Mass. 67, 23 N. E. 725. See, also, Warner v. Bacon, 8 Gray, 397, 69 Am. Dec. 253; Amos v. Oakley, 131 Mass. 413; Parker v. Russell, 133 Mass. 74; Drummond v. Crane, 159 Mass. 577, 38 Am. St. Rep. 460, 23 L. R. A. 707. The plaintiff's cause of action accrued when he was wrongfully discharged. His suit is not for wages, but for damages for the breach of his contract by the defendant. For this breach he can have but one action. In estimating his damages the jury have the right to consider the wages which he would have earned under the contract, the probability whether his life and that of the defendant would continue to the end of the contract period, whether the plaintiff's working ability would continue, and any other uncertainties growing out of the terms of the contract, as well as the likelihood that the plaintiff would be able to earn money in other work during the time. But it is not the law that damages, which may be larger or smaller because of such uncertainties, are not recoverable. The same kind of difficulty is encountered in the assessment of damages for personal injuries. All the elements which bear upon the matters involved in the prognostication are to be considered by the jury, and from the evidence in each case they are to form an opinion upon which all can agree, and to which, unless it is set aside by the court, the parties must submit. The liability to have the damages which he inflicts by breaking his contract so assessed is one which [703] the defendant must be taken to have understood when he wrongfully discharged the plaintiff, and if he did not wish to be subjected to it he should have kept his agreement."

To the same effect are the following cases: Blair v. Laflin, 127 Mass. 518; Boland v. Glendale Quarry Co., 127 Mo. 520, 30 S. W. 151; Rhoades v. Chesapeake & O. Ry. Co., 49 W. Va. 494, 87 Am. St. Rep. 826, 39 S. E. 209, 55 L. R. A. 170; Prichard v. Martin, 27 Miss. 305; Saxonia Mining etc. Co. v. Cook, 7 Colo. 569, 4 Pac. 1111; Hamilton v. Love, 152 Ind. 641, 71 Am. St. Rep. 384, 53 N. E. 181, 54 N. E. 437; Forked Deer Pants Co. v. Shipley, 25 Ky. Law Rep. 2299, 80 S. W.

476; Moore v. Central Foundry Co., 68 N. J. L. 14, 52 Atl. 292; Pierce v. Tennessee C. I. etc. R. R. Co., 173 U. S. 1, 19 Sup. Ct. Rep. 335, 43 L. ed. 591; Dugan v. Anderson, 36 Md. 567, 11 Am. Rep. 509; Winkler v. Racine W. & Carriage Co., 99 Wis. 184, 74 N. W. 793; Remelee v. Hall, 31 Vt. 582, 76 Am. Dec. 140; Sutherland v. Wyer, 67 Me. 64.

The rule of damages stated in these cases is in harmony with the rule approved in Brighton v. Lake Shore & M. S. Ry. Co., 103 Mich. 420, 61 N. W. 550.

Judgment is reversed and new trial ordered.

Grant, C. J., and Blair, Montgomery, and Ostrander, JJ., concurred.

Damages for the Wrongful Discharge of an Employé are considered in the notes to McMullan v. Dickinson Co., 51 Am. St. Rep. 515; Decamp v. Hewitt, 43 Am. Dec. 205. The measure of damages for the wrongful discharge of an employé, before the expiration of the period of service stipulated for, is an amount equal to the stipulated wages for the whole period covered by the contract, less the sum earned, and which probably can, by reasonable diligence, be earned during the time covered by the breach: Hamilton v. Love, 152 Ind. 641, 71 Am. St. Rep. 384. See, also, Allen v. International Textbook Co., 201 Pa. 579, 88 Am. St. Rep. 834. If an action for the wrongful discharge of a servant is commenced during the term contracted for, but the trial occurs after the expiration of the term, he is entitled to recover the same damages that he would have been entitled to recover had the action been commenced after the expiration of the term: Howay v. Going-Northrup Co., 24 Wash. 88, 85 Am. St. Rep. 942.

CASES

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

EAMES v. ARMSTRONG.

[146 N. C. 1, 59 S. E. 165.]

DEEDS.—Covenants of Seisin in a deed extend only to guarantee the bargainee against any title existing in a third person and which might defeat the estate granted, and does not embrace a title that may be already in the grantee. (p. 438.)

DEEDS—Estoppel Against Grantee.—A grantee is estopped from setting up title previously acquired against his vendor. (pp. 438, 439.)

DEEDS—Taxes—Validity.—The fact that land is listed in the name of some one other than the owner does not invalidate a tax deed, unless it is shown that the true owner listed and paid the taxes on it. (p. 439.)

DEEDS—Taxes—Validity.—If land belonging to the wife has been listed for taxes in the name of her husband, who has no interest therein, a tender to redeem made by him, notwithstanding the birth of issue, when he is not acting for her or claiming under her, does not invalidate the tax deed. (p. 440.)

DEEDS—Taxes—Right to Attack.—No one can question the title acquired by a tax deed, without first showing that he or the person under whom he claims had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person, and a husband in whose name his wife's land was listed for taxation cannot, in his own right, attack a tax deed to the premises. (p. 440.)

DEEDS—Breach of Covenant of Seisin—Measure of Damages. Generally, the purchase money is the measure of damages for the breach of a covenant of seisin; yet if the covenantee perfects his title for a less sum, his recovery is limited to the amount paid. (p. 441.)

DEEDS—Covenants of Seisin—Right to Sue for Breach.—If the grantee in a deed with covenants of seisin procures the deed to clear the title to the property which his wife had formerly held subject to a tax deed to the grantor, and thereafter both husband and wife convey the land to another, whose possession is never disturbed, the husband cannot recover for an alleged breach of the grantor's covenant of seisin. (p. 442.)

DEEDS.—Covenants of Seisin are Covenants of Indemnity, and do not run with the land. (p. 442.)

J. S. Henderson, for the plaintiff.

T. F. Kluttz, L. H. Clement and T. J. Jerome, for the defendant.

[2] CONNOR, J. This was an action for breach of covenant of seisin. The facts, in regard to which there is no controversy, are as follows:

The tract described in the deeds and in the complaint as the "Russell Gold Mine," containing three hundred and fifty-six acres, was, prior to May 5, 1902, the property of Mrs. Elizabeth Eames, the wife of plaintiff. The tract described as the "Coggins Meeting House," containing three acres, was, at said date, the property of plaintiff. On May 6th, 1903, W. D. Clark, sheriff of Montgomery county, executed to defendant a deed, conveying, by the same metes and bounds set out in the complaint, the "Russell Gold Mine," containing three hundred and fifty-nine acres. The preamble to the deed is in the following words: "Whereas, at a sale of real estate for the nonpayment of taxes, made in the county aforesaid on the fifth day of May, 1902, the following described real estate was sold, to wit: Three hundred and fifty-nine acres in El Dorado Township, listed by Richard Eames," etc. In this [3] and all other parts, the language of the deed conformed to the provisions of the statute (Revival, sec. 2906). The deed was duly proven and recorded May 7, 1903.

On May 7, 1903, defendant, C. A. Armstrong, and his wife, in consideration of two thousand three hundred dollars, executed a deed to plaintiff, conveying, by metes and bounds as in the deed to them, the "Russell Gold Mine," containing three hundred and fifty-six acres, and, by a separate description, the "Coggins Meeting House," of three acres. This deed was duly proven and recorded, and contains the following covenant: "To have and to hold the aforesaid tracts of land; and the said parties of the first part covenant that they are seised of said premises in fee and have a right to convey the same in fee simple; that the same are free and clear from all encumbrances."

On May 9, 1903, plaintiff and his wife conveyed both said tracts to George T. Whitney in consideration of five thousand dollars. Plaintiff paid to defendant the consideration of two thousand three hundred dollars named in his deed. Plaintiff alleges that, at the time defendant executed the deed of May 6, 1903, and made the covenant therein, he was not seised of either of the tracts therein conveyed, and had no title thereto, and for breach of said covenant demands as

damages the amount of the purchase money. Defendant denies the allegation, and alleges seisin, etc.

In response to issues submitted, the jury found that, at the date of the deed, the "Coggins Meeting House" was the property of plaintiff, and, under the instructions of the court, found that plaintiff was not entitled to recover any damage on account thereof; that defendant was seised of the "Russell Gold Mine," and that there had been no breach of the covenant in respect thereto.

It was in evidence that plaintiff was desirous of selling both tracts to one Whitney, and had entered into a contract to do so for the sum of five thousand dollars; that his attorney, residing in Salisbury, went to the town of Troy, Montgomery county, for the purpose of examining the title; that a few days thereafter [4] plaintiff met defendant in Troy, and, after some negotiation, agreed to pay him two thousand three hundred dollars for deed with full covenants; that some question was raised in regard to whether the sheriff's deed covered the "Coggins Meeting House," whereupon plaintiff said that, while the land was his, defendant could put it in the deed to satisfy Mr. Whitney, and that no trouble would ever come to him on account of it. Upon the execution of the deed by plaintiff and wife to Whitney, he went into and has continued in the unmolested possession of the land.

His honor instructed the jury to answer the issues. Judgment was thereupon rendered for defendant. Plaintiff's exceptions are noted in the opinion. Plaintiff appealed.

We were of the opinion, when this case was here at the fall term, 1906, that the covenant of seisin extended to the "Coggins Meeting House" tract: 142 N. C. 506, 55 S. E. 405. It appears that, at the time the deed was made by Armstrong to the plaintiff, the title to that tract was in the plaintiff, and that this was well known to him. It further appears that plaintiff immediately conveyed the same land to Whitney, who went into possession and remains therein. In Fitch v. Baldwin, 17 Johns. 161, it is said: "The covenant of seisin extends only to guarantee the bargainee against any title existing in a third person, and which might defeat the estate granted." In Furness v. Williams, 11 Ill. 229, Treat, C. J., says: "It is attempted on the part of defendant to establish a breach of the covenant by proving that he was himself seised, instead of his grantor. The law does not allow this to be done. The covenant of seisin extends only to a title existing in a third person. It does not embrace a title that may be already in the grantee. The grantee is estopped from

setting up the title previously acquired against his vendor": [5] Tiedeman on Real Property, sec. 851; Rawle on Covenants, 431; Jones on Real Property, 444; 11 Am. & Eng. Ency. of Law, 442. His honor, therefore, correctly instructed the jury to answer the issue in regard to that tract.

For the purpose of showing that defendant was not seised of the "Russell Gold Mine" tract, plaintiff sought to attack the deed executed by the sheriff to the defendant of May 6, 1903. To this end he offered to show that a tender of the taxes, interest, cost, etc., was made by his attorney and the attorney of Mr. Hambley to the defendant, on May 5, 1903, and declined. He further offered to show that plaintiff tendered the amount to both the defendant and the sheriff, and that both were declined. He further offered to show that defendant had not given the notice required by the statute before calling for the deed. To each of the questions bearing upon these contentions defendant objected. His honor ruled "that plaintiff not having shown that he had title to the 'Russell Gold Mine' tract of three hundred and fifty-six acres at the time of the sale of the same for taxes, on May 5, 1902, and not having shown that he now claims the same under the person who had the title at the time of such sale, and not having shown that all taxes due upon the property had been paid to him or the person who had the title at the time of the sale, the court held that the plaintiff could not be permitted to question the title which had been acquired by the defendant under the sheriff's tax deed, nor could the plaintiff question the validity of the deed." The objection was sustained, and plaintiff excepted. It will be observed that the land conveyed by defendant to plaintiff was, at the time it was listed for taxation, sold and the deed executed by the sheriff, the property of Mrs. Eames. The deed recites that it was listed by Richard Eames. This, we think, in view of the provisions of section 2894 of Revisal, immaterial. It is therein expressly provided that the fact that the land is listed in the name of some one other than the owner shall not invalidate the deed, unless it is [6] shown that the true owner listed and paid the taxes on it. No evidence was offered that Mrs. Eames did either. The tender to redeem was not made by Mrs. Eames or anyone acting for her or claiming under her. That her husband had no "estate or interest" in the land, notwithstanding birth of issue, is settled: Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127; Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655. Plaintiff, however, insists that he had a right to show that the defend-

ant failed to give the notice required by section 2903 of Revisal, being sections 15-17, chapter 558, Laws of 1901, and thereby invalidated the deed, under the decision of this court in King v. Cooper, 128 N. C. 347, 38 S. E. 924, and Matthews v. Fry, 141 N. C. 582, 54 S. E. 379. It will be observed that in both of those cases the controversy was between the owner of the land and the purchaser, whereas section 2909 of Revisal, which is the same as section 20, chapter 558, Laws of 1901, provides: "In all controversies, actions and proceedings involving the title to real property claimed and held under and by virtue of a deed made substantially as required by this chapter, the person claiming title adverse to the title conveyed by such deed shall be required to prove, in order to defeat the title which such deed purports to convey, either that such real property was not subject to taxation for the year or years named in the deed, or that the taxes had been paid before the sale, or that the property had been redeemed from the sale according to the provisions of this chapter, and that such redemption was had or made for the use and benefit of the persons having the right of redemption under the laws of this state, or that there had been an entire omission to list or assess the property, or to levy the taxes or to sell the property. No person shall be permitted to question the title required by a sheriff's deed, made pursuant to this chapter, without first showing that he, or the person under whom he claims, had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person under whom he claims title." It is clear that the plaintiff never [7] had any title to the property and never had any claim thereto under the owner thereof. He is, in contemplation of law, an absolute stranger to the title. If any effect is to be given to the plain language of the statute, it is manifest that his honor's ruling is correct. It is difficult to see how or why plaintiff should be permitted, as a volunteer, to come into the court to attack a deed, the validity of which can in no possible contingency affect him. Mrs. Eames, the owner of the property, assuming for the sake of the argument that the defendant's title was not good as against her, has parted with her title, and there is no person in existence who can attack the title of her grantor or disturb his possession. The facts presented upon the record are peculiar. At the time the land was listed for taxation it was the property of Mrs. Eames. The tax not having been paid on May 5, 1902, the sheriff sold it for nonpayment of taxes, when the defendant Armstrong became the purchaser. It appears that plaintiff

had entered into a contract to sell the land to Mrs. Hambley, who represented Mr. Whitney. On May 5, 1903, Mr. Henderson, who had gone to Troy to investigate the title "in behalf of Richard Eames and Hambley," offered to pay defendant "all the taxes, interest, cost and penalties," which offer was declined. The same offer was made to the sheriff and declined. A few days after Mr. Henderson's visit to Troy plaintiff went there and, after some negotiation with defendant and his attorneys, agreed to pay him two thousand three hundred dollars and take the deed. Pursuant to this agreement, the deed containing the covenant was delivered and the money paid on May 7, 1903. Plaintiff, before taking the deed, offered to pay defendant and the sheriff the taxes, etc., which offer was declined. On May 9, 1903, the plaintiff and his wife, Mrs. Elizabeth Eames, conveyed the land to Whitney for five thousand dollars, and he went into possession and has remained therein, unmolested. This action was brought March 4, 1904. If plaintiff should recover, as he seeks to do, the purchase money paid defendant, he should be required to [8] reconvey to him such title or interest as he acquired by the deed. This he cannot do, because, assuming his contention correct, that the title was not devested out of Mrs. Eames by the tax deed, he has joined with her in conveying his rights to Whitney. While it is true that usually the purchase money is the measure of damages for breach of covenant of seisin, it is equally true that, if the covenantee perfect his title for a less amount, he will recover only the amount paid by him therefor. In this case he and his wife sold to Whitney for five thousand dollars. It does not appear that he paid Mrs. Eames any sum whatever for her interest or title, or whether the whole of the purchase money went to him. It does appear that his contract was to sell the land to Hambley, representing Whitney, for five thousand dollars, and that by reason of acquiring defendant's title he was enabled to carry out his contract. It is certain that he and Mrs. Eames have conveyed to Whitney a perfect title, and that plaintiff cannot put defendant back in the position which he occupied when he made the covenant. This he should be able to do: Rawle on Covenants, sec. 184. Is it not clear that, if plaintiff should recover the purchase money upon the theory that defendant had no title, he should reconvey to the defendant? In Stinson v. Sumner, 9 Mass. 143, 6 Am. Dec. 49, Parker, J., says: "It would certainly be manifestly against the principles of justice that a grantee should recover either his purchase money or the value of the land against the grantor upon an

alleged breach of covenant that nothing passed by the deed, and that he should be considered the owner of the land under the very deed which he had alleged to be inoperative." The plaintiff has conveyed the land to Whitney for an amount more than double the purchase money paid by him to defendant. The fact that his wife joined in the deed, from this point of view, does not affect the question. He cannot restore to defendant the title which he got from him. How, then, can he call upon him to restore the purchase money? It may be, assuming that there was a breach of the covenant, that he could recover such sum as he was required to pay out to perfect his [9] title. In Farmers' Bank v. Glenn, 68 N. C. 35, it is said: "If there be an outstanding paramount title, which the covenantee purchases, he is not entitled to recover the whole of the purchase money, with interest, but only the amount paid to perfect the title, with interest from date of payment. In other words, when the loss has been less than the purchase money and interest, the plaintiff can recover only for the actual injury sustained." The language of the court in that case is applicable here. "The plaintiff does not stand in a very graceful attitude before the court when it seeks to recover the purchase money after its title to the land has been perfected and when it has by a deed in trust conveyed the same land to secure its debts. The bank is seeking to have the land and the purchase money. To allow it to do so would be grossly inequitable." The purpose of the covenant is indemnity, not speculation. The defendant, in addition to the defenses to which we have adverted, urges us to reverse the former rulings of the court that a covenant of seisin does not run with the land. He cites a number of cases in which it is held that the breach is continuing and the right to sue passes with the title and may be prosecuted whenever the paramount title is asserted to the disturbance of the possession of the grantee under the deed containing the covenant. From this position defendant concludes that Whitney is the owner of the covenant and the real party in interest, who alone can sue. It is true, as contended by the learned counsel, that the law has been so held by a number of highly respectable courts. The other view has always been held by this court, and we are not disposed to reverse these decisions. Mr. Rawle, in his excellent work on Covenants, fifth edition, 205, discusses the question, reviews the authorities and concludes that the weight of authority is with the opinion of this court. We noted the cases upon the subject in Eames v. Armstrong, 142 N.

C. 506, 55 S. E. 405. We are of the opinion that his honor's ruling upon the admissibility of the evidence offered by plaintiff for the purpose of attacking the [10] sheriff's deed was correct. This renders it unnecessary to discuss a number of the plaintiff's exceptions. The constitutionality of our revenue and machinery acts is not presented.

The judgment must be affirmed.

No error.

COVENANTS OF SEISIN.*

I. Nature and Definition of Covenant.
- a. Definition of Covenant, 443.
- b. What Satisfies Covenant, 445.
- c. Form in Which Covenant is Expressed, 446.
- d. Whether Implied in Bargain and Sale Deed, 446.
- e. Whether Synonymous with Covenant of Right to Convey, 446.

II. Breach of Covenant.
- a. Rule that Covenant is Broken, if at All, as Soon as Made, 447.
- b. Rule that Covenant is Personal and does not Run with Land, 448.
- c. Rule that on Breach the Covenant Becomes a Nonassignable Chose, 449.
- d. Statutory Modification of this Rule, 450.
- e. Doctrine of Continuous Breach, 450.
- f. What Constitutes a Breach in General, 451.
- g. Existence of Encumbrance, 453.
- h. Existence of Dower Right, 453.
- i. Existence of Easement, 454.
- j. Misdescription of Property, 455.

III. Actions for Breach of Covenant.
- a. Persons Who may Sue, 455.
- b. Persons Liable to Suit, 457.
- c. Measure of Damages.
 - 1. General Rule, 457.
 - 2. Nominal Damages, 461.
 - 3. Damages for Partial Breach, 463.
 - 4. Damages When Grantee Buys Outstanding Title, 464.
- d. Evidence.
 - 1. Burden of Proof, 464.
 - 2. Parol Evidence as to Damages, 465.

I. Nature and Definition of Covenant.

a. Definition of Covenant.—The covenant of seisin has been defined in England to be "an assurance that the grantor has the very estate in quantity and quality which he purports to convey": Howelle v. Richards, 11 East, 633, 11 R. R. 287. The words, from having been originally used as synonymous with possession, came to be looked upon less as one of the parts of a title than as synonymous with title itself; and the covenant that one was seised in fee was regarded as

*REFERENCES TO MONOGRAPHIC NOTES.

Real and personal covenants: 47 Am. Dec. 569-577.
Covenant running with the land: 82 Am. St. Rep. 664; 56 Am. Rep. 151-167.
Covenants restricting the use of land: 21 Am. St. Rep. 484-508.
What damages recoverable in breach of covenant of seisin: 99 Am. Dec. 73.
Implied covenants for title other than statutory: 32 Am. Dec. 353.

a covenant for the title, in contradistinction to the covenant for quiet enjoyment, which was called a covenant for possession. The English definition of this covenant has been adopted by a number of the American states: Lockwood v. Sturdevant, 6 Conn. 373; Brandt v. Foster, 5 Iowa, 287; Pecare v. Chonteau's Admr., 13 Mo. 527; Eagan v. Martin, 71 Mo. App. 60; Real v. Hollister, 20 Neb. 112, 29 N. W. 189; De Long v. Spring Lake & Sea Girt Co., 65 N. J. L. 1, 47 Atl. 491; Wetzell v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004; Kincaid v. Brittain, 5 Sneed (Tenn.), 119.

The weight of authority in the United States inclines to the rule that a covenant that one is seised, or lawfully seised, means seised of an indefeasible estate; and the covenant of seisin is regarded as a covenant for title, the word being used as synonymous with right: Martin v. Baker, 5 Blackf. (Ind.) 232; Fitzhugh v. Croghan, 2 J. J. Marsh. (25 Ky.) 429, 19 Am. Dec. 139; Greenby v. Wilcox, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; Woods v. North, 6 Humph. (Tenn.) 309, 44 Am. Dec. 312; Hastings v. Webber, 2 Vt. 407; Pollard v. Dwight, 4 Cranch, 421, 2 L. ed. 666; Thomas v. Perry, Pet. C. C. 49, Fed. Cas. No. 13,908; 4 Kent's Commentaries, p. 472.

The supreme court of Ohio, in Wetzell v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004, has given an exhaustive definition of the covenant of seisin, adopting the English definition and extending and enlarging upon it as follows: "A covenant of seisin is defined to be 'an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey,' and extends not only to land itself, but also to whatever is properly appurtenant to and passes by the conveyance of the land; and, though the covenant is usually found in conveyances of the fee, it is appropriate in leases and assignments of them. Indeed, it seems well settled that in leases the covenant, or its equivalent, will be implied, unless the terms of the lease exclude the implication. It is said in Rawle on Covenants for Title, section 272: 'With respect to estates less than freehold, covenants for title were from the earliest times implied, not only from the words of leasing, such as demisi, concessi, or the like, but even from the relation of landlord and tenant, and such is the law at the present day, unless where, as in some of the United States, it has been altered by legislation.' And in section 273 that author says: 'The covenants for title thus implied from the words of leasing were and are two: First, a covenant that the lessor has power to demise; and, secondly, a covenant for quiet enjoyment,—and both of these covenants are, of course, as are all common-law implied covenants, general and unlimited.' It is held by some authorities that no covenants are implied in the assignment of a lease: Waldo v. Hall, 14 Mass. 486; Blair v. Rankin, 11 Mo. 440. Other authorities, however, maintain the contrary doctrine. Thus, in Sonter v. Drake, 5 Barn. & Adol. 992-1002, it is said by Lord Denman that, 'unless there be a stipulation to the contrary, there is in every contract for the sale of a lease an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity.' And see Bensel v.

Gray, 38 N. Y. Super. Ct. Rep. 447. This would seem to be the better rule, because it can hardly be supposed to be the intention of one party to purchase, or of the other to sell, the mere instrument of lease, without any beneficial interest under it, but rather, that the subject of the purchase and sale is the right to enjoy the term purported to be demised, and all the benefits which it stipulates to confer on the lessee": Wetzell v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004.

The covenant of seisin extends only to guarantee the bargainee against any title existing in a third person, and which might defeat the estate granted: Fitch v. Baldwin, 17 Johns. (N. Y.) 161. In Illinois, in the case of Furness v. Williams, 11 Ill. 229, Treat, C. J., said: "It is attempted on the part of defendant to establish a breach of the covenant by proving that he was himself seised, instead of his grantor. The law does not allow this to be done. The covenant of seisin extends only to a title existing in a third person. It does not embrace a title that may be already in the grantee. The grantee is estopped from setting up the title previously acquired against his vendor"; citing Tiedeman on Real Property, sec. 851; Rawle on Covenants for Title, 431; Jones on Real Property, 444; 11 Am. & Eng. Ency. of Law, 442; Horrigan v. Rice, 39 Minn. 49, 38 N. W. 765; Eames v. Armstrong, 146 N. C. 1, ante, p. 436, 59 S. E. 165. The purpose of the covenant is indemnity, not speculation: Eames v. Armstrong, 146 N. C. 1, ante, p. 436, 59 S. E. 165.

The Missouri court of appeals follows the English definition of this covenant, and gives a general illustration of what would constitute a breach of it, as follows: "The covenant of seisin is defined to be an assurance that the covenantor has the very estate, both in quantity and quality, which he professes to convey; therefore, any outstanding right or title which diminishes the quality or quantity of the technical seisin will be a breach of the covenant. In such case it is broken as soon as made and thereby an immediate action accrues": Eagan v. Martin, 71 Mo. App. 60.

b. **What Satisfies Covenant.**—The title in the covenantor, to support the covenant, must be a complete legal title,—i. e., the juris et sesinae conjunctio, the title and possession united. This is the technical and legal import of the terms, "seised of legal title." Seisin means, "ex vi termini" the whole legal title. Therefore, the covenant is supported if the covenantor has the possession, or the right of possession, and the right, or legal title: Fitzhugh v. Croghan, 2 J. J. Marsh. (25 Ky.) 429, 19 Am. Dec. 139. See, also, the preceding subdivision, and subdivision II, post.

A different and conflicting view to the above is held in Massachusetts, Maine, and, to a qualified extent, in Ohio. In these states a peculiar construction has been adopted, by deciding that the covenant of seisin does not exact an indefeasible estate, but is answered by the transfer of an actual seisin—even though tortious—if it be a seisin under color of title: Marston v. Hobbs, 2 Mass. 433, 3 Am. Dec. 601; Bearce v. Jackson, 4 Mass. 408; Cushman v. Blan-

chard, 2 Greenl. (Me.) 268, 11 Am. Dec. 66; Griffin v. Fairbrother, 10 Me. 91; Backus' Admrs. v. McCoy, 3 Ohio, 211, 17 Am. Dec. 585; Foot v. Burnett, 10 Ohio, 327, 36 Am. Dec. 90.

The supreme court of Ohio, in Wetzell v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004, on this subject, said: "It has long been the law of this state that a covenant of seisin is not broken so as to give the covenantee a right of action if the covenantor had actual seisin, though not the legal title, at the time of the conveyance, and the former is put in possession under it, until there has been an eviction under a paramount title: Stambaugh v. Smith, 23 Ohio St. 584, and cases there cited."

c. **Form in Which Covenant is Expressed.**—The following form of this covenant is perhaps more generally used than most others: "Doth hereby covenant himself, his heirs, executors and administrators that [notwithstanding any act, matter or thing by him done] he, the said (vendor), is now lawfully seised of the said premises and hath good right to convey the same": Rawle on Covenants for Title, 5th ed., 29. The following form was, by a text-writer of authority, said to be in common use in New England: "I [A. B.], for myself, my heirs, executors and administrators, do covenant with [C. D.], his heirs and assigns, that I am lawfully seised in fee simple of the aforesaid premises": Rawle on Covenants for Title, 5th ed., 29; 3 Washburn on Real Property, 3d ed., 610n.

No precise or technical language is required by law, in which a covenant shall be worded—any words, which amounts to or import an agreement, being under seal, are sufficient: Midgett v. Brooks, 34 N. C. (12 Ired.) 145, 55 Am. Dec. 405.

d. **Whether Implied in Bargain and Sale Deed.**—By statutory enactment in a number of states it is expressly provided that the words "grant, bargain and sell" shall be adjudged an express covenant to the grantee, his heirs and assigns, that the grantor was seised of an indefeasible estate in fee simple, freed from any encumbrance done or suffered from the grantor, as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed: Selden v. Dudley E. Jones Co., 74 Ark. 348, 85 S. W. 778; Craig v. Donovan, 63 Ind. 513; Jackson v. Green, 112 Ind. 341, 14 N. E. 89; Gratz's Lessee v. Ewalt, 2 Binn. (Pa.) 95; Schnelle & Querl Lumber Co. v. Barlow, 34 Fed. 853.

e. **Whether Synonymous With Covenant of Right to Convey.**—In the United States the covenant of seisin and the covenant of good right to convey are by a strong current of authority regarded as synonymous: Martin v. Baker, 5 Blackf. (Ind.) 232; Brandt v. Foster, 5 Iowa, 287; Fitzhugh v. Croghan, 2 J. J. Marsh. (25 Ky.) 429, 19 Am. Dec. 129; Greenby v. Wilcox, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; Woods v. North, 6 Humph. (Tenn.) 309, 44 Am. Dec. 312; Hastings v. Welborn, 2 Vt. 407; Thomas v. Perry, Pet. C. C. 49, Fed Cas. No. 13,908; Pollard v. Dwight, 4 Cranch, 421, 2 L. ed. 666; Peters v. Bowman, 98 U. S. 56, 25 L. ed. 91.

II. Breach of Covenant.

a. Rule that Covenant is Broken, if at All, as Soon as Made.—It is a well-settled doctrine of the law that the covenant of seisin runs in the present, in reference to the date of the deed, in contradistinction to the covenant of warranty, or for quiet enjoyment, which runs in the prospective, and that in the event of its not being true when made, there is a breach of it eo instanti, as soon as the deed is executed and delivered. To this rule there is no exception: Anderson v. Knox, 20 Ala. 156; Sayre v. Sheffield L. I. & Co., 106 Ala. 440, 18 South. 101; Logan v. Moulden, 1 Ark. 313, 33 Am. Dec. 338; Ross v. Turner, 7 Ark. 132, 44 Am. Dec. 531; Pate v. Mitchell, 23 Ark. 590, 79 Am. Dec. 114; Abbott v. Rowan, 33 Ark. 593; Seldon v. Dudley E. Jones Co., 74 Ark. 348, 85 S. W. 778; Salmon v. Vallejo, 41 Cal. 481; Seyfried v. Knoblanch (Colo.), 96 Pac. 993; Hayden v. Patterson, 39 Colo. 15, 88 Pac. 437; Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169; Booth v. Starr, 5 Day (Conn.), 419; Redwine v. Brown, 10 Ga. 311; Furness v. Williams, 11 Ill. 229; King v. Gibson's Admx., 32 Ill. 348, 83 Am. Dec. 269; Tone v. Wilson, 81 Ill. 529; Newman v. Sevier, 134 Ill. App. 544; Martin v. Baker, 5 Blackf. (Ind.) 232; Craig v. Donovan, 63 Ind. 513; Bottorf v. Smith, 7 Ind. 673; Jackson v. Green, 112 Ind. 341, 14 N. E. 89; Bethell v. Bethell, 54 Ind. 428, 23 Am. Rep. 650; Scott v. Stetler, 128 Ind. 385, 27 N. E. 721; Wysong v. Nealis, 13 Ind. App. 165, 41 N. E. 388; Camp v. Douglas, 10 Iowa, 586; Zent v. Picken, 54 Iowa, 535, 6 N. W. 750; Schofield v. Homestead Co., 32 Iowa, 317, 7 Am. Rep. 197; Sturgis v. Slocum, (Iowa), 116 N. W. 128; Boon v. McHenry, 55 Iowa, 202, 7 N. W. 503; Foshay v. Shafer, 116 Iowa, 302, 89 N. W. 1106; Dale v. Shively, 8 Kan. 276; Daisy Realty Co. v. Brown (Ky.), 35 S. W. 637; Prescott v. Hobbs, 30 Me. 345; Allen v. Little, 36 Me. 170; Morrison v. McArthur, 43 Me. 567; Thompson v. Richmond, 102 Me. 335, 66 Atl. 649; Wyman v. Ballard, 12 Mass. 304; Slater v. Rawson, 1 Met. (42 Mass.) 450; Bumstead v. Cook, 169 Mass. 410, 61 Am. St. Rep. 293, 48 N. E. 767; Seckler v. Fox, 51 Mich. 92, 16 N. W. 246; Horrigan v. Rice, 39 Minn. 49, 38 N. W. 765; Tapley v. Labeaume's Exr., 1 Mo. 550; Carter v. Sonlard, 1 Mo. 576; Blondeau v. Sheridan, 81 Mo. 545; Allen v. Kennedy, 91 Mo. 324, 2 S. W. 142; Adkins v. Tomlinson, 121 Mo. 487, 26 S. W. 573; Langerberg v. Chas. H. Herr Dry Goods Co., 74 Mo. App. 12; Coleman v. Clark, 80 Mo. App. 339; Freymouth v. Nelson, 84 Mo. App. 293; Foster v. Byrd, 119 Mo. App. 168, 96 S. W. 224; Real v. Hollister, 20 Neb. 112, 29 N. W. 189; Breck v. Young, 11 N. H. 485; Morrison v. Underwood, 20 N. H. 369; Lot v. Thomas, 2 N. J. L. 407, 2 Am. Dec. 354; Chapman v. Holmes Exrs., 10 N. J. L. 20; Sedwick v. Hollenback, 7 Johns. (N. Y.) 376; Fitch v. Baldwin, 17 Johns. (N. Y.) 161; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; Hamilton v. Wilson, 4 Johns. (N. Y.) 72, 4 Am. Dec. 253; McCarty v. Leggett, 3 Hill, 134; Bingham v. Weiderwax, 1 N. Y. 509; Hebler v. Brown, 18 Misc. Rep. 395, 41 N. Y. Supp. 441; Fishel v. Browning, 145 N. C. 71, 58 S. E. 759; Eames v. Arm-

strong, 142 N. C. 506, 55 S. E. 405; 146 N. C. 1, ante, p. 436, 59 S. E. 165; Bowne v. Wolcott, 1 N. D. 497, 48 N. W. 426; Dahl v. Stakke, 96 N. W. 353, 12 N. D. 325; Backus Admrs. v. McCoy, 3 Ohio, 211, 17 Am. Dec. 585; Kincaid v. Brittain, 37 Tenn. (5 Sneed) 119; Garfield v. Williams, 2 Vt. 327; Catlin v. Hurlburt, 3 Vt. 403; Swasey v. Brooks, 30 Vt. 692; Rombough v. Koons, 6 Wash. 558, 34 Pac. 135; Burbach v. Schweinler, 56 Wis. 386, 14 N. W. 449; Building, Light & Water Co. v. Fray, 96 Va. 559, 32 S. E. 58; Schnelle & Querl Lumber Co. v. Barlow, 34 Fed. 853; Thomas v. Perry, Pet. C. C. 49, Fed. Cas. No. 13,908; Vorhis v. Forsythe, 4 Biss. 409, Fed. Cas. No. 17,004.

b. **Rule that Covenant is Personal and does not Run with Land.**—By the great weight of authority in the United States, the covenant of seisin is a personal covenant, and does not run with the land. See the note to Geiszler v. De Graaf, 82 Am. St. Rep. 684; Lawrence v. Montgomery, 37 Cal. 183; Mitchell v. Warner, 5 Conn. 497; Brady v. Spurck, 27 Ill. 478; Baker v. Hunt, 40 Ill. 264, 89 Am. Dec. 346; Jones v. Warner, 81 Ill. 343; Brandt v. Foster, 5 Iowa, 287; Mitchell v. Kepler, 75 Iowa, 207, 39 N. W. 241; Bolinger v. Brake, 4 Kan. App. 180, 45 Pac. 950; Scoffins v. Grandstaff, 12 Kan. 467; Fitzhugh v. Croghan, 2 J. J. Marsh. (25 Ky.) 429, 19 Am. Dec. 139; Thompson v. Richmond, 102 Me. 335, 66 Atl. 649; Eames v. Armstrong, 146 N. C. 1, ante, p. 436, 59 S. E. 165; Green v. Liter, 8 Cranch, 229, 3 L. ed. 545.

The reasons given in support of the foregoing rules, that the covenant of seisin is broken, if at all, as soon as made, that the covenant is personal and does not run with the land, that upon its breach it becomes a chose in action not assignable, were clearly and pointedly set forth in 1824 by Chief Justice Hosmer, of the supreme court of Connecticut, in the case of Mitchell v. Warner, 5 Conn. 497. Said the Chief Justice: "This covenant, from its nature, is broken instantaneously on the delivery of the deed, or it is never broken. It runs in the words of the present tense, and asserts, that the grantor is well seised. Now, if he is well seised according to his covenant, the agreement is fulfilled; and if he is not well seised, the covenant is false, and immediately broken. It follows from this, that it is a personal covenant, which, most clearly, never runs with the land, and that the grantee, in whose time the breach existed, can alone sue upon it; for after a breach the cause of action can never be assigned. It would be the assignment of a chose in action, which the common law will not permit. That the covenant of seisin, if false, is broken as soon as it is made, appears from Sheppard's Touchstone, 170; Bickford v. Page, 2 Mass. 455; Marston v. Hobbs, 2 Mass. 433, 3 Am. Dec. 61; Bennett v. Irwin, 3 Johns. 363; Abbott v. Allen, 14 Johns. 248; Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; Pollard v. Dwight, 4 Cranch, 421, 2 L. ed. 666; Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169. From its nature it does not run with the land, as none but real covenants do; and these are always suspended on some act posterior to the delivery of the deed. Hence, as I have said before, having been broken, the covenant has become a chose in action, and therefore cannot be assigned." Here the chief justice proceeds to quote from

Bickford v. Page, 2 Mass. 455: "This covenant being broken before the release, was, at a time, a mere chose in action, and unassignable." Continuing to quote: "The court, in the case of Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379, determined that the assignee of a covenant of seisin could not recover. In this case the opinion was delivered by Spencer, J., in which he says: 'Choses in action are incapable of assignment at the common law; and what distinguishes these covenants, broken the instant they are made, from an ordinary chose in action? The covenants, it is true, are such as run with the land; but here the substratum fails, for there was no land whereof the defendant was seised, and of consequence, none that he could alien; the covenants are, therefore, naked ones, uncoupled with a right to the soil. The same point was adjudged as far back as the reign of Queen Elizabeth in Lewes v. Ridge, Cro. Eliz. 863; and the case, so far as I can find, has never been overruled." The chief justice, in citing the last named case, lays stress upon the fact that the principle settled in that case was this: "That an assignee shall not have an action upon a breach of covenant before his own time. The same principle was recognized in Marston v. Hobbs, 2 Mass. 433, 3 Am. Dec. 461, in the determination of which case it was said by Parsons, C. J., when delivering the opinion of the court, that 'No estate passed, to which these covenants (i. e., of seisin and right to convey) could be annexed, because in fact broken before any assignment could be made, they were choses in action, and not assignable.' In Comyn's Digest, title 'Covenant,' B. 3, it is asserted that 'covenant does not lie by an assignee, for a breach done before his time.' It cannot run with the land; for nothing having been conveyed, what land is there for it to run with? To the same effect is Lucy v. Levington, 2 Lev. 26; S. C., 1 Vent. 175."

The foregoing reasons given in support of said rules are largely based upon the law laid down on the subject of seisin in 1757 by Lord Mansfield, in the case of Taylor v. Horde, 1 Burr. 60. This case, and that of Mitchell v. Warner, 5 Conn. 497, may be said to be respectively the leading English and American case on this important subject.

c. **Rule that on Breach the Covenant Becomes Nonassignable Chose.**—As the covenant is personal, as shown by the foregoing rule, it follows under the common law the covenantee or grantee, in whose time the breach existed, can alone sue on it; for after a breach the cause of action can never be assigned. It would be the assignment of a chose in action, which the common law will not permit. The personal representatives of the covenantor are bound by this covenant, in the states holding that the covenant does not run with the land: Lawrence v. Montgomery, 37 Cal. 183; Mitchell v. Warner, 5 Conn. 497; Brady v. Spurck, 27 Ill. 478; Baker v. Hunt, 40 Ill. 264, 89 Am. Dec. 346; Jones v. Warner, 81 Ill. 343; Brandt v. Foster, 5 Iowa, 287; Mitchell v. Kepler, 75 Iowa, 207, 39 N. W. 241; Bolinger v. Brake, 4 Kan. App. 180, 45 Pac. 950; Scoffins v. Grandstaff, 12 Kan.

467; Fitzhugh v. Croghan, 2 J. J. Marsh. (25 Ky.) 429, 19 Am. Dec. 139; Cushman v. Blanchard, 2 Me. 266, 11 Am. Dec. 76; Hacker v. Storer, 8 Me. 228; Griffin v. Fairbrother, 10 Me. 91; Ballard v. Child, 34 Me. 355; Marston v. Hobbs, 2 Mass. 433, 3 Am. Dec. 61; Caswell v. Wendell, 4 Mass. 108; Bartholomew v. Candee, 14 Pick. (31 Mass.) 167; Matteson v. Vaughn, 38 Mich. 373; Sherwood v. Landon, 57 Mich. 219, 23 N. W. 778; Kimball v. Bryant, 25 Minn. 496; Allen v. Allen, 48 Minn. 462, 51 N. W. 473; Moore v. Merrill, 17 N. H. 75, 43 Am. Dec. 593; Dickey v. Weston, 61 N. H. 23; Carter v. Denman's Exrs., 23 N. J. L. 260; Abbott v. Allen, 14 Johns. (N. Y.) 248; Fowler v. Poling, 2 Barb. (N. Y.) 300; Mygatt v. Coe, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646; Wilson v. Cochran, 46 Pa. 229; Johnson's Admrs. v. Veal, 3 McCord (S. C.), 449; Ingram v. Morgan, 4 Humph. (23 Tenn.) 66, 40 Am. Dec. 626; Kenney v. Norton, 10 Heisk. (57 Tenn.) 384; Westrope v. Chambers' Estate, 51 Tex. 178; Williams v. Wetherbee, 1 Aikens (Vt.), 233; Pierce v. Johnson, 4 Vt. 247; Peters v. Bowman, 98 U. S. 56, 25 L. ed. 91.

d. **Statutory Modification of this Rule.**—By local legislation, many courts held that the covenant of seisin does not run with the land, that its breach is assignable, and that a cause of action thereon inures to the covenantee's heirs, devisees and grantees: Martin v. Baker, 5 Blackf. (Ind.) 232; Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260; Overhiser v. McCollister, 10 Ind. 41; Funk v. Creswell, 5 Iowa, 62; Schofield v. Iowa Homestead Co., 32 Iowa, 317, 7 Am. Rep. 197; Kimball v. Bryant, 25 Minn. 496; Dickson v. Desere's Admr., 23 Mo. 151, 66 Am. Dec. 661; Chamber's Admr. v. Smith's Admr., 23 Mo. 174; Maguire v. Riggin, 44 Mo. 512; Leet v. Gratz, 124 Mo. App. 394, 101 S. W. 696; Devore v. Sutherland, 17 Ohio, 52, 49 Am. Dec. 442; Gratz's Lessee v. Ewalt, 2 Binn. (Pa.) 95 Mecklein v. Blake, 22 Wis. 495, 99 Am. Dec. 68; Hall v. Scott County, 2 McCrary, 356, 7 Fed. 341. The first statutory enactment of implied covenants of seisin was in 1715, in the colony of Pennsylvania. It seems that the framers of this statute had in mind the thirtieth section of the statute of Anne, chapter 35, from which it was evidently taken.

In both the English and Pennsylvania statute it was enacted that the words "grant, bargain, and sell" shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit, that the grantor was seised in fee simple, freed from any encumbrance done or suffered from the grantor, as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by the express words contained in such deed: Gratz's Lessee v. Ewalt, 2 Binn. (Pa.) 95. This is the leading and, it may be said, the first case on implied covenants in the United States.

e. **Doctrine of Continuous Breach.**—Aside from the change in the generally accepted doctrine governing covenants of seisin, wrought by statutory implied covenants of seisin, of right to convey, and against encumbrances, a marked change has also been wrought in the decisions of the courts of several states by reason of the decisions

handed down in the English cases of Kingdon v. Nottle, 1 Maule & S. 355, 14 R. R. 462, 4 Maule & S. 53, 16 R. R. 379. These cases introduced a doctrine new to English jurisprudence, namely, that of a continuing breach of the personal covenant of seisin running with the land.

A number of the states have approved and adopted the doctrine of a continuing breach: Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260; Kimball v. Bryant, 25 Minn. 496.

f. **What Constitutes a Breach, in General.**—It having been shown that if the covenant of seisin is not true when made, there is a breach of it, eo instanti, as soon as the deed is executed and delivered, the question naturally arises, What constitutes its breach? Bearing in mind the definition of this covenant, the covenant's breach necessarily would be a lack in the covenantor of any one or all of the elements constituting an indefeasible estate, of which the covenantor assures the covenantee that he is seised both in quantity and quality, which he purports to convey. In other words the covenantor must be seised in deed, or in fact, or have a seisin constructive, of the indefeasible estate: Slater v. Rawson, 6 Met. (Mass.) 439; Brown v. Wood, 17 Mass. 68; Green v. Chelsea, 24 Pick. (Mass.) 71; Towle v. Ayer, 8 N. H. 57; Green v. Liter, 8 Cranch, 229, 3 L. ed. 545. It follows, therefore, that if at the date of the deed the covenantor or grantor is not lawfully seised, or if he has not good right to convey, there is a breach of the covenant eo instanti upon the delivery of the deed: Carter v. Denman's Exrs., 23 N. J. L. 260; Abbott v. Allen, 14 Johns. (N. Y.) 248.

A complete legal title, is the juris et sesinae conjunctio, the title and possession united. This is the technical and legal import of the terms, "seised of the legal title." "Seisin" means "ex vi termini," the whole legal title. "A covenant of seisin is broken if the covenantor have not the possession, the right of possession, and the right, or legal title." It would, therefore, be difficult to imagine a case in which a party could be "seised" and yet not have the right to sell and convey the legal title. "Seisin" is a "nomen generalissimum," which includes the right to sell; "Omne majus continet in se minus": Fitzhugh v. Croghan, 2 J. J. Marsh. (25 Ky.) 429, 19 Am. Dec. 139. "Any outstanding right or title which diminishes the quality or quantity of the technical seisin will be a breach of the covenant": Egan v. Martin, 71 Mo. App. 60. This definition of a breach of the covenant was given by the Missouri court after stating the definition of the covenant to be, "An assurance that the covenantor has the very estate both in quantity and quality, which he professes to convey": Egan v. Martin, 71 Mo. App. 60.

In those states in which it is held that the covenant of seisin means that the covenantor is seised of an indefeasible estate, that the covenant is regarded as a covenant for title, synonymous with right to convey, and the weight of authority so holds, a breach of the covenant occurs whenever the covenantor has not this indefeasible estate, i. e., where there is an outstanding paramount title: Lawrence

v. Montgomery, 37 Cal. 183; Mitchell v. Warner, 5 Conn. 497; Brady v. Spurck, 27 Ill. 478; Baker v. Hunt, 40 Ill. 264, 89 Am. Dec. 346; Jones v. Warner, 81 Ill. 343; Brandt v. Foster, 5 Iowa, 287; Mitchell v. Kepler, 75 Iowa, 207, 39 N. W. 241; Bolinger v. Brake, 4 Kan. App. 180, 45 Pac. 950; Scoffins v. Grandstaff, 12 Kan. 467; Fitzhugh v. Croghan, 2 J. J. Marsh. (25 Ky.) 429, 19 Am. Dec. 130; Green v. Liter, 8 Cranch, 229, 3 L. ed. 545.

The covenant that the grantor has an indefeasible estate in fee simple is not supported by an estate for life in the grantor as tenant by the curtesy, with actual possession: Lockwood v. Sturdevant, 6 Conn. 373. A mere life estate is not sufficient to satisfy a lawful seisin in fee: Frazer v. Supervisors of Peoria County, 74 Ill. 282; Tanner v. Livingston, 12 Wend. 83.

In those states in which the covenant of seisin is answered by the transfer of an actual seisin—even though tortious—if it be a seisin under color of title, absence of the paramount title in the covenantor would be a breach of the covenant: Cushman v. Blanchard, 2 Greenl. (Me.) 266, 11 Am. Dec. 76; Griffin v. Fairbrother, 10 Me. 91; Marston v. Hobbs, 2 Mass. 433, 3 Am. Dec. 61; Bearce v. Jackson, 4 Mass. 408; Willard v. Twitchell, 1 N. H. 177; Dickey v. Weston, 61 N. H. 23; Backus' Admrs. v. McCoy, 3 Ohio, 211, 17 Am. Dec. 585; Foote v. Burnett, 10 Ohio, 317, 36 Am. Dec. 90; Devore v. Sutherland, 17 Ohio, 52, 49 Am. Dec. 442; Great Western Stock Co. v. Saas, 24 Ohio St. 542.

Actual seisin will support the covenant notwithstanding a lack of indefeasible title: Axtell v. Chase, 77 Ind. 74; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; Montgomery v. Reed, 69 Me. 510; Raymond v. Raymond, 10 Cush. (64 Mass.) 134; Scott v. Twiss, 4 Neb. 133; Peters v. Bowman, 98 U. S. 56, 25 L. ed. 91.

If the grantor was seised by deed which is voidable by his grantor, but which is not void, the covenant is not broken: Wait v. Maxwell, 5 Pick. (22 Mass.) 217, 16 Am. Dec. 391.

Payment of taxes for seven years, and possession for that time, under claim and color of title, will satisfy the covenant: Burton v. Reeds, 20 Ind. 87.

In Indiana, to constitute a breach of the covenant, there must have been an entire want of title in the grantor when the deed was executed or a subsequent eviction by a paramount title: Hooker v. Folsom, 4 Ind. 90. There is a breach of the covenant in Massachusetts if there is no such land in existence as the deed purports to convey: Bacon v. Lincoln, 4 Cush. (58 Mass.) 210, 1 Am. Rep. 765.

If at the date of the covenant of seisin, a stranger owns the fee, or by twenty years' adverse occupancy, has a right to possession, there is a breach: Fitzhugh v. Croghan, 2 J. J. Marsh. (25 Ky.) 429, 19 Am. Dec. 139. Where the covenantor is disseised at the time of executing the deed, there is a breach of the covenant of seisin: Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169; Gilbert v. Bulkley, 5 Conn. 262, 13 Am. Dec. 57; Mitchell v. Warner, 5 Conn. 497; Hacker v. Storer, 8 Greenl. (Me.) 228; Bartholomew v. Candee, 14 Pick.

(Mass.) 167; Wheelock v. Thayer, 16 Pick. (Mass.) 68; Wyman v. Ballard, 12 Mass. 304; Sprague v. Baker, 17 Mass. 586; Stewart v. Drake, 9 N. J. L. (4 Holst.) 139; Chapman v. Holmes' Exrs., 10 N. J. L. (5 Holst.) 20; Hamilton v. Wilson, 4 Johns. (N. Y.) 72, 4 Am. Dec. 253; Wilson v. Forbes, 13 N. C. (2 Dev.) 30; Williams v. Wetherbee, 1 Aikens (Vt.), 233; Garfield v. Williams, 2 Vt. 327; Pierce v. Johnson 4 Vt. 247; Richardson v. Dorr, 5 Vt. 9.

In a number of the states, as in Massachusetts, Maine, and, to a qualified extent, in Ohio, a different and peculiar construction has been adopted, by deciding that the covenant of seisin does not exact an indefeasible estate, but is answered by the transfer of an actual seisin, under color of title: Marston v. Hobbs, 2 Mass. 433, 3 Am. Dec. 61; Bearce v. Jackson, 4 Mass. 408; Cushman v. Blanchard, 2 Greenl. (Me.) 266, 11 Am. Dec. 76; Griffin v. Fairbrother, 10 Me. 95; Backus' Admrs. v. McCoy, 3 Ohio, 211, 17 Am. Dec. 585; Foot v. Burnett, 10 Ohio, 317, 36 Am. Dec. 90. If at the time of the conveyance, the grantor or covenantor does not own the land, the covenant is broken immediately. It is not necessary to allege an ouster or eviction; it is sufficient to negative the words of the covenant, and to allege that the grantor had no seisin or title to the land: Brandt v. Foster, 5 Iowa, 287; Rickert v. Snyder, 9 Wend. 416; Bickford v. Page, 2 Mass. 455.

After the conveyance is completed, no subsequent act thereto can constitute a breach of the covenant of seisin: Brady v. Spurck, 27 Ill. 478; Jones v. Warner, 81 Ill. 343; Seckler v. Fox, 51 Mich. 92, 16 N. W. 246; Wagner v. Finnegan, 54 Minn. 251, 55 N. W. 1129; Vorhis v. Forsythe, 4 Biss. (U S.) 409; Fed Cas. No. 17,004.

g. **Existence of Encumbrance.**—The covenant of seisin is not a covenant against encumbrances, and therefore no equitable lien on the land conveyed will create a breach. Hence, if after a mortgage, but while the fee is in the mortgagor, he sells and conveys the mortgaged premises to a stranger and covenants with him that he is seised, the existence of the mortgage is no breach of the covenant: Brady v. Spurck, 27 Ill. 478; Reasoner v. Edmundson, 5 Ind. 393; Fitzhugh v. Croghan, 2 J. J. Marsh. (25 Ky.) 429, 19 Am. Dec. 139; Sedgwick v. Hollenback, 7 Johns. (N. Y.) 376; Stanard v. Eldridge, 16 Johns. (N. Y.) 254. Outstanding judgment no breach: Sedgwick v. Hollenback, 7 Johns. (N. Y.) 376.

h. **Existence of Dower Right.**—The expectant right of a wife to dower, while her husband is living, cannot be, if it be anything in law, more than an encumbrance, and a very contingent one. Perhaps the husband may survive the wife. Her potential claim to dower, therefore, cannot have even as much effect on the covenant of seisin by the husband as an equitable lien or other existing encumbrance would have: Fitzhugh v. Croghan, 2 J. J. Marsh. (25 Ky.) 429, 19 Am. Dec. 139.

The covenant of seisin, or of the right to convey, is not broken by an outstanding, inchoate right of dower. It does not affect the technical seisin of the grantee. He has the title by virtue of his

deed, and although the right of dower in the land may be an encumbrance from which he may be protected by his covenant against encumbrances, yet it does not affect his possession of the land, or his legal title thereto: Building, Light & Water Co. v. Fray, 96 Va. 559, 32 S. E. 58; Devlin on Deeds, secs. 894, 899; to the same effect are the following cases: Whistler v. Hicks, 5 Blackf. (Ind.) 100, 33 Am. Dec. 454; Tuite v. Miller, 10 Ohio, 382; Aiple-Hemmelman Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480; Fishel v. Browing, 145 N. C. 71, 58 S. E. 759.

1. **Existence of Easement.**—The existence of a public easement over land, or other equitable encumbrance, which does not in any way affect the technical seisin of the purchaser, is no breach of the covenant of seisin. The reason is that there is no inconsistency between the public having the right of way over land and at the same time the vesting of a freehold: Moore v. Johnstone, 87 Ala. 220, 6 South. 50; Vaughn v. Sturzacker, 16 Ind. 338; Shelbyville & B. T. Co. v. Green, 99 Ind. 205; Douglas v. Thomas, 103 Ind. 187, 2 N. E. 562; Lamb v. Danforth, 59 Me. 322, 8 Am. Rep. 426; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Cortelyou v. Van Brunt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439; Whitbeck v. Cook, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272; Lewis v. Jones, 1 Pa. 336, 44 Am. Dec. 138; Smith v. Hughes, 50 Wis. 620, 7 N. W. 653.

A prior valid deed to a railroad company and its assigns of a strip of land along the line of its railroad for the uses and purposes of such company is a breach of the covenant of seisin in a subsequent deed, by the same grantor to a third person, of the parcel of land which includes such strip, although the company is in occupancy of the strip for the purposes of a railroad when such subsequent deed is executed: Messer v. Oestreich, 52 Wis. 684, 10 N. W. 6. This case distinguishes those of Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85, and Smith v. Hughes, 50 Wis. 620, 7 N. W. 653. Grantee's covenant is not broken on the ground that description in his deed described a former easement; Parker v. Moore, 118 Mass. 552. So where the owner of a parcel of land granted by deed, duly recorded, to A. a part of the land, and a right to maintain a dam on the rest, and afterward conveyed to a third person the whole parcel, "reserving" all rights of A., his heirs and assigns, therein, it was held that this created an exception, and not a reservation, and that the second grantee could not maintain an action against his grantor on the covenant of seisin in his deed: Stockwell v. Conillard, 129 Mass. 231. But where the deed purports to convey the right to raise a dam on the premises to a certain height, when the covenantor has not that right, there is a breach of the covenant of seisin: Traster v. Snelson's Admr., 29 Ind. 96; Walker v. Wilson, 13 Wis. 522. The right to erect a wall on premises conveyed is not breach of the covenant: Blondeau v. Sheridan, 81 Mo. 545.

The question of easement in a public or private right of way over land conveyed is a question of encumbrance, not that of seisin. As to a public right of way there is a conflict of opinion as to encum-

brance: Compare De Rochemont v. Boston etc. R. R. Co., 64 N. H. 500, 15 Atl. 131, with cases cited, ante, p. 453. Private easement is a breach: Mitchell v. Warner, 5 Conn. 497; Blake v. Everett, 1 Allen (Mass.), 248; Wetherbee v. Bennett, 2 Allen (Mass.), 428; Harlow v. Thomas, 15 Pick. (Mass.) 66; Schmissem v. Penn, 47 Ill. App. 278.

j. **Misdescription of Property.**—It has been declared by the great weight of authority, in accordance with the soundest reason, that in an agreement for the sale and purchase of land for an entire sum, either a description of the land by its boundaries or the insertion of the words "more or less," or equivalent words, will control a statement of the quantity of land or the length of one of the boundary lines, so that neither party will be entitled to relief on account of a deficiency or surplus, unless in case of so great a difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract: Noble v. Googins, 99 Mass. 231; Stebbins v. Eddy, 4 Mason, 414, Fed. Cas. No. 13,342; Marvin v. Bennett, 8 Paige, 312, 26 Wend. 169; Morris Canal Co. v. Emmett, 9 Paige, 168; Faure v. Martin, 7 N. Y. 210, 57 Am. Dec. 515; Ketchum v. Stout, 20 Ohio, 453; Stull v. Hunt, 9 Gill, 446; Weart v. Rose, 16 N. J. Eq. 290; Mann v. Pearson, 2 Johns. 37; Howe v. Bass, 2 Mass. 380, 2 Am. Dec. 59; Smith v. Evans, 6 Binn. 102, 6 Am. Dec. 136.

In accordance with the general principle of law as laid down by Justice Gray in Noble v. Googins, 99 Mass. 231, and by the cases above cited, the authorities maintain that there is no breach of the covenant of seisin where a breach is based on a misdescription or an incorrect description of the land conveyed: Wiley v. Loveley, 46 Mich. 83, 8 N. W. 716; Breck v. Young, 11 N. H. 485; Mann v. Pearson, 2 Johns. 37; McArthur v. Morris, 84 N. C. 405; Brown v. Southerland, 145 N. C. 331, 59 S. E. 114. Though where a deed describes land conveyed as bounded by the towpath of a canal, when in fact the grantor owns only to within twenty-five feet of the path, he is liable on his covenant of seisin: Hunt v. Raplee, 44 Hun, 149. If a vendor has no right to sell all the land within the boundaries of his deed, the covenant of seisin is broken: Wilson v. Forbes, 13 N. C. (2 Dev.) 30.

III. Actions for Breach of Covenant.

a. **Persons Who may Sue.**—In those states in which it is held that the covenant of seisin is a personal covenant not running with the land, and that in the event of its not being true when made there is eo instanti, a breach upon the execution and delivery of the deed, which breach then becomes a chose in action not technically assignable, it follows, under the general rules of pleading in relation to personal actions, that the persons who may sue on this nonassignable chose are the covenantee, or all of the covenantees, if more than one, the grantee, or all of the grantees of the original grantor, or their respective administrator, or other personal representative, and not the grantee of the covenantee or subsequent purchaser, in contradistinction to the respective heirs or devisees: Kytle v. Kytle, 123 Ga. 387,

57 S. E. 748; Newman v. Sevier, 134 Ill. App. 544; Blondeau v. Sheridan, 81 Mo. 545.

The breach being a chose in action, nonassignable, of course, the assignee thereof could not sue: Lawrence v. Montgomery, 37 Cal. 183; Salmon v. Vallejo, 41 Cal. 481; Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169; Gilbert v. Bulkley, 5 Conn. 262, 13 Am. Dec. 57; Mitchell v. Warner, 5 Conn. 497; Hacker v. Storer, 8 Greenl. (Me.) 228; Heath v. Whidden, 24 Me. 382; Bartholomew v. Candee, 14 Pick. (Mass.) 167; Wheelock v. Thayer, 16 Pick. (Mass.) 68; Clark v. Swift, 3 Met. (Mass.) 390; Sheldon v. Codman, 3 Cush. (Mass.) 318; Maiston v. Hobbs, 2 Mass. 433, 3 Am. Dec. 61; Bickford v. Page, 2 Mass. 455; Wyman v. Ballard, 12 Mass. 304; Sprague v. Baker, 17 Mass. 586; Collier v. Gamble, 10 Mo. 467; Moore v. Merrill, 17 N. H. 75, 43 Am. Dec. 593; Stewart v. Drake, 9 N. J. L. 139; Chapman v. Holmes, 10 N. J. L. 20; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; Hamilton v. Wilson, 4 Johns. (N. Y.) 72, 4 Am. Dec. 253; Kane v. Sanger, 14 Johns. (N. Y.) 89; Williams v. Wetherbee, 1 Aikens, 233; Garfield v. Williams, 2 Vt. 327; Pierce v. Johnson, 4 Vt. 247; Richardson v. Dorr, 5 Vt. 9.

Where a covenant is made with two or more covenantees, the general rule is that it will be construed as a joint covenant, and not a several covenant with each, unless the covenant contains express words of severalty, i. e., "with each of them," or equivalent words, or where the covenantees take separate interests in the fruits of covenant: Lahy v. Holland, 8 Gill (Md.), 445, 50 Am. Dec. 705; Jacobs v. Davis, 34 Md. 204; Crisfield v. Storr, 36 Md. 129, 11 Am. Rep. 480; Catlan v. Barnard, 1 Aikens, 9.

The general rule as to who may sue in personal actions, as well as who may be sued, is stated in the case of Kytle v. Kytle, 128 Ga. 387, 57 S. E. 748, where the court said: "For a breach of this covenant the grantor could have brought suit in his lifetime; and if he died without bringing an action for that purpose, the right of action survived to the legal representatives of his estate. In an action brought by his legal representatives, the measure of damages would be the reasonable value of a support to the grantor according to his circumstances and condition in life: McCardle v. Kennedy, 92 Ga. 198, 44 Am. St. Rep. 85, 17 S. E. 1001." The general rule is that a suit cannot be maintained directly by an heir to recover upon a right of action in the ancestor, but that such a suit must be brought by the legal representative: Murphy v. Pound, 12 Ga. 278. In Juhan v. Juhan, 104 Ga. 253, 30 S. E. 779, Mr. Justice Lewis, after recognizing and applying the rule just referred to, said: "We do not mean to say, however, that where there are no debts against the estate, nor against the copartnership, and all the heirs are sui juris, and no necessity appears for any administration, they cannot, by agreement among themselves, take charge of the estate and collect and distribute among themselves its assets: See, also, Bryant v. Atlantic C. L. R. Co., 119 Ga. 607, 46 S. E. 829"; Kytle v. Kytle, 128 Ga. 387, 57 S. E. 748. In this case the court further said: "We have

found no case in which it has been held that one heir at law can sue another heir at law for his proportion of a chose in action of his ancestor."

In Maine the last covenantee or assignee in whose possession the covenant was broken can alone sue for the breach. He has a right of action against any and all of the prior covenantors. No intermediate covenantee can sue his covenantor until he himself has been compelled to pay damages on his own covenant: Thompson v. Richmond, 102 Me. 335, 66 Atl. 649.

But where the covenant runs with the land, suit on it does lie by the assignee, devisee or heir of the grantee, and an administrator of the grantee cannot sue on this covenant without showing some special damage to have accrued to his intestate: Martin v. Baker, 5 Blackf. (Ind.) 232.

b. Persons Liable to Suit.—The converse of III, a, "Persons Who May Sue," is applicable under this head, i. e., in those states in which the covenant is held to be personal, the covenantor, or grantor, and their respective administrators, or other personal representatives, may be sued for a breach of their covenants of seisin. No intermediate covenantor, or covenantee, grantor, or grantee can be compelled to pay damages to their respective subsequent covenantees or grantees until the subsequent covenantees or grantees themselves have been compelled to pay damages: Kytle v. Kytle, 128 Ga. 387, 57 S. E. 748; McCardle v. Kennedy, 92 Ga. 198, 44 Am. St. Rep. 85, 17 S. E. 1001; Murphy v. Pound, 12 Ga. 278; Juhan v. Juhan, 104 Ga. 253, 30 S. E. 779; Thompson v. Richmond, 102 Me. 335, 66 Atl. 649.

In those states in which the covenant of seisin is held to run with the land, and in which the covenant is held not to be a purely personal one, the covenantor, and, under the general rules of common-law pleading, his heirs, devisees, assignees or subsequent purchasers, would be liable to suit for a breach of this covenant: Martin v. Baker, 5 Blackf. (Ind.) 232.

c. Measure of Damages.

1. **General Rule.**—The measure of damages for a total breach of a covenant of seisin, or of right to convey, where nothing passes to the grantee by the conveyance, is the amount of the consideration paid, with interest. In the earlier cases, it was sought to hold the covenantor liable for the increased value of the land, and for the value of improvements made after the purchase; but it was held—adhering to the policy of the law exhibited under the old warranty, and on the ground that it would be unjust to make the grantor liable for accidental increase in value, and for improvements made without his privity or sanction—that the true measure of damages was the value of the land at the time of the sale as agreed upon by the parties, and shown by the amount of the consideration paid, together with interest upon that sum: See note to Mecklem v. Blake, 99 Am. Dec. 73; J. M. Ackley & Co. v. Hunter, Benn & Co. (Ala.), 45 South. 909.

On this subject the supreme court of Minnesota said: "It is elementary that in actions for a breach of the covenants, where there has been an eviction, actual or constructive, the plaintiff is entitled to recover for the loss of the land, usually measured by the consideration paid, with interest (Devine v. Lewis, 38 Minn. 24, 35 N. W. 711; Devlin on Deeds, 894), and in case of a partial breach, damages pro tanto (Downer's Admrs. v. Smith, 38 Vt. 464; McNally v. White, 154 Ind. 163, 54 N. E. 794, 56 N. E. 214), and also costs and expenses and an attorney's fee reasonably and in good faith incurred in defending the title and resisting the eviction: Allis v. Nininger, 25 Minn. 525; Sutherland on Damages, 2d ed., sec. 617"; Brooks v. Mohl, 104 Minn. 404, 124 Am. St. Rep. 629, 116 N. W. 931, 17 L. R. A., N. S., 1195.

In the case of Daggett v. Reas, 79 Wis. 60, 48 N. W. 127, the supreme court of Wisconsin, after stating the general rule that the damages recoverable was the consideration paid for the land, with the interest thereon, limited this to six years previous to the commencement of the action, and held that it was error to include in the judgment the taxes paid by the plaintiff.

The supreme court of Ohio in Wetzell v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004, laid down the law on this subject as follows: "Where a grantee of an estate in fee simple, with warranty, is evicted by paramount title, of his entire estate, the rule of damages is settled in Ohio to be the amount of the original purchase money, with interest, not however, to exceed the time limited by statute for the recovery of mesne profits from the time of eviction. So, if he be evicted of a definite portion of the premises, the damages are a proportional amount of the purchase money with like interest; citing King v. Kerr's Admrs., 5 Ohio St. 154, 22 Am. Dec. 777; Foote v. Burnet, 10 Ohio St. 317, 36 Am. Dec. 90; McAlpin v. Woodruff, 11 Ohio St. 120; Backus' Admr. v. McCoy, 3 Ohio, 211, 17 Am. Dec. 585; Clarke v. Parr, 14 Ohio, 118, 45 Am. Dec. 529. In analogy to this rule it has been held that the rents received in a lease, where no other consideration is paid, must be regarded as a just equivalent for the use of the demised premises. The parties have agreed so to consider it. In case of eviction the rent ceases, and the lessee is relieved from a burden which must be deemed equal to the benefit which he would have derived from the continued enjoyment of the property. But where a further consideration has been paid, in addition to the rent reserved, its amount or value may be recovered. In the case of Lock v. Furz, 19 Com. B., N. S., 96, where a tenant in possession had, in consideration of a premium of four hundred pounds, obtained from the landlord a second lease, to commence when his old lease should expire, but before this time arrived the lessor died, it being discovered that the second lease was an excessive execution of a power, the lessee, upon being notified that it would not be recognized by the parties in interest, secured the premises at a much higher rent, and then sued on the covenant for quiet enjoyment contained in the lease, the court held "that the

measure of damages was, besides the four hundred pounds premium paid and costs of preparing the void lease, the difference in value, as estimated by the jury upon the evidence, between the term professed to be granted to the plaintiff by his lessor and the seven years' term which he obtained from the reversioners,—in other words, the value of the term he had lost." This decision was, on appeal, affirmed in exchequer chamber, and was followed in the later case in the court of exchequer of Rolph v. Crouch, L. R. 3 Ex. 44; and the rule it announces, it is said, prevails generally in this country: Taylor on Landlord and Tenant, sec. 317. At all events, in such cases the measure of damages is not less than the amount of the consideration paid, with interest: Wetzell v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004.

In Missouri, "The law seems to be well settled that a conveyance by one of several tenants in common which, upon its face, purports to convey the entire estate, will give color of title if possession is taken thereunder by the grantee claiming title to the whole of the lands conveyed. Such a conveyance will amount to an actual ouster and disseisin of his cotenants: Long v. Stapp, 49 Mo. 506; Newell on Ejectment, 405, 764. It will destroy the unity of the possession. An entry under such a conveyance is presumed to be in the assertion of a right in severalty, and is, of itself, sufficient evidence that the grantee intended thereby to assert all the rights with which his grantor has assumed the authority to invest him: Freeman on Cotenancy and Partnership, sec. 224, and the cases there cited. The entry of the grantee cannot be presumed to be that of a cotenant, nor in subordination to the rights of cotenancy: Freeman on Cotenancy and Partnership, sec. 224"; Eagan v. Martin, 71 Mo. App. 60. When the grantee is evicted by or yields to the title of the ousted cotenant, he is entitled to recover as damages the amount of the purchase money with interest at six per cent upon showing the cotenant's title paramount: Eagan v. Martin, 71 Mo. App. 60; and this point is supported in Kansas without mentioning interest: Bolinger v. Drake, 4 Kan. App. 180, 45 Pac. 950, affirmed 57 Kan. 663, 47 Pac. 537.

While it is true that usually the purchase money is the measure of damages for breach of the covenant of seisin, it is equally true that, if the covenantee perfects his title for a less amount, he will recover only the amount paid by him therefor: Eames v. Armstrong, 146 N. C. 1, ante, p. 436, 59 S. E. 165. In this case the court quoted from Farmers' Bank v. Glenn, 68 N. C. 35, as follows: "If there be an outstanding, paramount title, which the covenantee purchases, he is not entitled to recover the whole of the purchase money, with interest, but only the amount paid to perfect the title, with interest from date of payment. In other words, when the loss has been less than the purchase money and interest, the plaintiff can recover only for the actual injury sustained."

In support of this general rule, the Missouri court of appeals in the case of Mumford v. Keets, 65 Mo. App. 502, said: "It is essential

to a recovery of substantial damages for breach of the covenants of seisin or warranty sued on either that plaintiffs should have been evicted, or, what is tantamount thereto, should have yielded to a paramount outstanding title. In either case, they would have been entitled to a recovery, not exceeding the consideration money, interest and cost, measured by the facts."

A leading case on this subject is Curtis v. Brannon, 98 Tenn. 153, 38 S. W. 1073, 69 L. R. A. 760, where the court declares the rule of damages as follows: "The recovery of the consideration and interest is subject, however, to abatement for rents during the vendee's possession, when it appears that he cannot be made liable therefor to the owner of the paramount title. A vendee, having enjoyed the advantages of possession at the expense of the vendor, is bound, especially in a court of equity, to account for those advantages when he demands repayment of the purchase money with interest. He cannot, in such a case, hold benefits, and at the same time recover as if he had not received them. Some of the authorities treat liability for rents as the reason for allowing interest on the consideration paid. Kent says: 'The interest is to countervail the claim for mesne profits, to which the grantee is liable': 4 Kent's Commentaries, *475. Sutherland says: 'Possession without title may compensate for the interest on the purchase money, if there be no liability, which can be enforced to the real owner': 2 Sutherland on Damages, sec. 598. In Flint v. Steadman, 36 Vt. 210, it was ruled that the vendee, who had been in possession in such manner as not to be accountable for the use of the premises, could recover only the purchase money without interest. 'We can see no good reason for limiting the vendee's liability for rents to the interest on the purchase money if they have in fact been of greater value. He should account for all the benefits he has derived from the possession, and, if not responsible therefor to some other person, his vendor should have an abatement to that extent. The whole consideration money and interest cannot be the criterion of damages, except in those cases where the purchaser derives no benefit from the conveyance': Sutherland on Damages, sec. 597. 'But if some title passes, though so far short of that covenanted for that the grantee is clearly not bound to retain it for a proportionate part of the purchase money, on tendering a reconveyance and surrendering possession, recovery may be had of the entire consideration money and interest, together with taxes paid, less the value of the rents received': Sutherland on Damages, sec. 599. This last proposition is based upon the decision in Frazer v. Board of Supervisors, 74 Ill. 282, which goes further than the text, and holds that the grantee must answer not only for 'rents received,' but also for those that 'could have been received from the property.' In another case, Hartford & S. Ore Co. v. Miller, 41 Conn. 112—it is said that if the vendee takes any benefit, directly or indirectly, from the deed, he must be charged with that benefit in the assessment of his damages": Curtis v. Brannon, 98 Tenn. 153, 38 S. W. 1073, 69 L. R. A. 760.

The general rule above stated is supported by the following cases in addition to those already cited: Bollinger v. Brake, 4 Kan. App. 180, 45 Pac. 950, affirmed 57 Kan. 663, 47 Pac. 557; Mercantile Trust Co. v. South Park Residence Co., 94 Ky. 271, 22 S. W. 314; Adkins v. Tomlinson, 121 Mo. 487, 26 S. W. 573; Evans v. Fulton, 134 Mo. 653, 36 S. W. 230; Webb v. Wheeler (Neb.), 114 N. W. 636; Conklin v. Hancock, 67 Ohio St. 455, 66 N. E. 518; McLennan v. Prentice, 85 Wis. 427, 55 N. W. 764.

2. **Nominal Damages.**—The general doctrine of damages applicable to contracts applies to the covenant of seisin. In case of a technical breach of this covenant without actual loss to the covenantee or purchaser, the measure of damage is nominal damages: See note to Mecklem v. Blake, 99 Am. Dec. 73; J. M. Ackley & Co. v. Hunter, Benn & Co. (Ala.), 45 South. 909. In the case of McLennan v. Prentice, 85 Wis. 427, 55 N. W. 764, the court held: "The covenant of seisin in the deed from the defendant to the plaintiff was partially or wholly broken, if at all, when made; and if the deed did not pass any title to the plaintiff, or to the extent that it failed to pass title to the premises described in it, and if the grantee did not obtain possession, the covenant of seisin would thereby be turned, wholly or partially, as the case might be, into a right of action, and he might at once sue on the covenant of seisin, and recover the entire purchase money, with interest, or a proper proportion thereof, if the failure to convey title was only partial. If the grantee had entered or been put in possession of the premises included in the deed, the breach of this covenant would be technical, and would entitle the grantee, in case he sued on it, to nominal damages merely; but he could not in such case recover substantial damages until he had been evicted, or in some way deprived of the whole or a part of the premises, or suffered substantial loss. Proof of eviction is not necessary to entitle the grantee to recover on this covenant, and has no bearing in an action on it, except on a question of damages. But where the deed contains a covenant of warranty, by which the grantee has obtained seisin of title subsequently acquired by his grantor, it would be inequitable that he should have the seisin, and be allowed to recover back the consideration paid for it. In King v. Gilson's Admx., 32 Ill. 348, 83 Am. Dec. 269, it was held sufficient to restrict the grantee to nominal damages if he acquired, by inurement, the legal title, at any time before the assessment of damages in the action on the covenant of seisin: Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49. As already stated, the cases in which nominal damages only may be recovered in actions on the covenant of seisin, or less than the entire purchase money and interest, are those where the grantee has obtained, and still holds, possession, or where some other benefit or advantage, such as a title to a part only, has passed by the deed; but where no semblance of title or benefit whatever has passed, where the grantee has derived no advantage whatever from it, and can derive none without a wrongful entry upon the estate of another, he is entitled to recover at once substantial damages, and

to the full amount of the consideration and interest. Substantial damages, or damages to be measured by the consideration paid, and interest, cannot, in the former case, we think, be allowed, until there has been an eviction by title paramount, either actual or constructive. This is, we think, in accordance with well-settled principles. But the subject has been somewhat complicated in consequence of the effect given in later cases to a remark in Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68, not material to the case, to the effect that where there has been a breach of the covenant of seisin the plaintiff, "if he desired to rescind for want of title, and to recover back the purchase money paid, and interest, he should have tendered the defendant a reconveyance and the possession, and then he could have maintained his action"; citing Taft v. Kessel, 16 Wis. 273, in which the distinction between rescinding executory contracts for the conveyance of land, and deeds executed in performance thereof seems to have been overlooked, and the law in respect to the former class of cases was applied to a case where the contract had been executed by the delivery of a deed of conveyance. In the former class a want of title is ground for rescission, but, where the contract has been executed by the delivery of a deed of conveyance, no rescission can be had on the ground of want of title, without showing fraud. And this dictum in Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68, has been the foundation for subsequent statements to the effect that rescission may be had after deed executed, on the ground, only, of want of title in the grantor. In Booth v. Ryan, 31 Wis. 45, speaking to this point, Dixon, C. J., says: "Executory agreements for the purchase or conveyance of land may be rescinded on the ground of want of title, and the contracts canceled; but as to executed agreements, or conveyances made and possession delivered or taken under them, the rule is different, and the power has never been exercised." This is directly the reverse of what was said in Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68, where plaintiff had obtained possession. In Smith v. Hughes, 50 Wis. 620, 7 N. W. 653, the remark quoted from Mecklem v. Blake was noticed and withdrawn, and it was held that rescission could not be had, in the absence of fraud, after deed executed. In Clementson v. Streeter, 59 Wis. 429, 18 N. W. 540, the same ruling was made: Wetzell v. Richcreek, 53 Ohio, 62, 40 N. E. 1004.

The supreme court of Kansas in the case of Hammerslough v. Hackett, 48 Kan. 700, 29 Pac. 1079, has declared that nominal damages for breach of the covenant of seisin are awarded under the following facts: "Where personal covenants are connected with the sweeping covenant of warranty, and the covenant of seisin is broken, but the grantee has parted with the property, and has never been disturbed in his ownership, nor paid anything in purchasing the paramount title, nor became liable to pay anything, he can, at most, recover only nominal damages from the grantor for the breach of the covenant of seisin: Morrison v. Underwood, 20 N. H. 369; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; Kimball v. Bryant, 25 Minn. 496; Burke v. Beveridge, 15 Minn. (Gil. 160) 205; King v.

Gilson's Admx., 32 Ill. 349, 83 Am. Dec. 269; Brandt v. Foster, 5 Iowa, 287; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Middlebury College v. Cheney, 1 Vt. 336; Garfield v. Williams, 2 Vt. 327; Reese v. Smith, 12 Mo. 344; Wilson v. Forbes, 13 N. C. (2 Dev.) 30; McCarty v. Leggett, 3 Hill, 134; Colby v. Osgood, 29 Barb. 339; Brown v. McHenry, 55 Iowa, 202, 7 N. W. 503; Rawle on Covenants for Title, secs. 179, 180, 215, 220, 248; Tiedeman on Real Property, sec. 851; Devlin on Deeds, sec. 894."

In the case of Building, Light & Water Co. v. Fray, 96 Va. 559, 32 S. E. 58, the supreme court of appeals of Virginia stated the general rule as follows: "If, after the covenants are broken, and before the covenantee commences action, the paramount title is acquired by the covenantor, which by the operation of other covenants is transferred to the covenantee, the damages may be mitigated or reduced to a nominal amount by this fact; that is to say, that for the breach of the covenant of good right to convey, nominal damages are only recoverable where, before actual injury sustained, the title is perfected by inurement: See, also, note to Mecklem v. Blake, 99 Am. Dec. 76; 3 Sedgwick on Damages, sec. 978."

In support of the general rule as to nominal damages as set forth at the beginning of this subdivision, see the following cases: Lloyd v. Sandusky, 95 Ill. App. 593, affirmed 203 Ill. 621, 68 N. E. 154; Castor v. Dufur, 133 Iowa, 535, 111 N. W. 43; O'Meara v. McDaniel, 49 Kan. 685, 31 Pac. 303; Huntsman v. Hendricks, 44 Minn. 423, 46 N. W. 910; Eagan v. Martin, 71 Mo. App. 60; Jones v. Haseltine, 124 Mo. App. 674, 102 S. W. 40; Fishel v. Browning, 145 N. C. 71, 58 S. E. 759.

3. **Damages for Partial Breach.**—Upon a partial breach of the covenant of seisin, the rule is well settled that the covenantee recovers pro tanto only, and it seems that he cannot rescind and recover the whole consideration money: See note to Mecklem v. Blake, 99 Am. Dec. 73. The measure of damage, as stated by the Wisconsin court, is such fractional part of the whole consideration paid as the value, at the time of the purchase, of the part to which title failed bears to the whole of the lots purchased, and interest during the time covenantee has been deprived of the use of such part, not exceeding six years: Semple v. Whorton, 68 Wis. 626, 32 N. W. 690; McLennan v. Prentice, 85 Wis. 427, 55 N. W. 764.

In the case of Winnepiseogee Paper Co. v. Eaton, 65 N. H. 13, 18 Atl. 171, the supreme court of New Hampshire on this subject said: "When the covenants are broken as to part of the land conveyed, the damages are such a portion of the purchase money and interest as the value of that part bears to the value of the whole land measured by the consideration; citing Ela v. Card, 2 N. H. 175, 9 Am. Dec. 46; Partridge v. Hatch, 18 N. H. 498; Cornell v. Jackson, 3 Cush. (Mass.) 506; Morris v. Phelphs, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323; Furniss v. Ferguson, 15 N. Y. 437; Beauplaud v. McKeen, 28 Pa. 124, 70 Am. Dec. 115; Griffin v. Reynolds, 17 How. 609, 15 L. ed. 229. In this case the expenses incurred by the plaintiff in defend-

ing the suits, with interest thereon, was added to the amount of damages awarded him in his suit on covenant of title for the reason that the defendants had notice and failed to defend in suits against him as their vendee: Winnepiseogee Paper Co. v. Eaton, 65 N. H. 13, 18 Atl. 171; Adkins v. Tomlinson, 121 Me. 487, 26 S. W. 573.

"If the grantee be evicted of a definite portion of the premises, the damages are a proportional amount of the purchase money, with like interest: Wetzell v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004; citing King v. Kerr's Admrs., 5 Ohio St. 154, 22 Am. Dec. 777; Foote v. Burnet, 10 Ohio, 317, 36 Am. Dec. 90; Backus' Admrs. v. McCoy, 3 Ohio, 211, 17 Am. Dec. 585; Clarke v. Parr, 14 Ohio, 118." Egan v. Martin, 71 Mo. App. 60, citing Collier v. Gamble, 10 Mo. 467; Bolinger v. Brake, 4 Kan. App. 180, 45 Pac. 950. But where the grantee enters into possession of the granted premises, and occupies the same, and is not liable for the use of the premises, he is not entitled to interest during the time he so occupies the same: Bolinger v. Brake, 4 Kan. App. 180, 45 Pac. 950.

The general rule on this subject as above stated is further supported by the following cases: Conklin v. Hancock, 67 Ohio St. 455, 66 N. E. 518; Webb v. Wheeler (Neb.), 114 N. W. 636; Mercantile Trust Co. of New York v. South Park Residence Co., 94 Ky. 271, 22 S. W. 314; Haynie v. American Trust Inv. Co. (Tenn.), 39 S. W. 860.

4. **Damages When a Grantee Buys an Outstanding Title,** his recovery on the covenant of seisin is limited by the injury actually sustained, and he recovers only the amount paid by him, with interest from the time of payment, provided this sum is less than the amount recoverable for a total breach: See note to Mecklem v. Blake, 99 Am. Dec. 73; Dade v. Shively, 8 Kan. 277; Brooks v. Mohl, 104 Minn. 404, 124 Am. St. Rep. 629, 116 N. W. 931, 17 L. R. A., N. S., 1195; Lawless v. Collier's Exrs., 19 Mo. 483; Hutchins v. Roundtree, 77 Mo. 500. The United States circuit court for the southern district of New York, in deciding the question of damages for the breach of the covenant of seisin, given in a deed to land in Missouri, where the outstanding paramount title was purchased said: "The plaintiff was justified in his purchase of the paramount title without waiting for actual dispossession, and the measure of his damage is the reasonable sum which he paid for a good title. 'The covenantee is not bound to wait for actual dispossession, but may, after such assertion (the hostile assertion of a paramount right or title by suit or otherwise), pay off or extinguish the right by purchase; and his measure of damages will be the reasonable value of the right so discharged or extinguished by him': Ward v. Ashbrook, 78 Mo. 517; Hall v. Bray, 51 Mo. 288"; Schnelle & Querl Lumber Co. v. Barlow, 34 Fed. 853.

d. Evidence.

1. **Burden of Proof.**—The burden of proof lies upon the defendant to show title in himself in an action brought for a breach of the covenant in seisin: Evans v. Fulton, 134 Mo. 653, 36 S. W. 230; Baker v. Hunt, 40 Ill. 264, 89 Am. Dec. 346; Abbott v. Allen, 14 Johns. (N. Y.)

248; McLerman v. Prentice, 77 Wis. 124, 45 N. W. 943, 85 Wis. 427, 55 N. W. 764.

But where the covenantee has voluntarily yielded to a paramount title, the burden of proof is upon him to establish the paramount title to enable him to recover substantial damages. This doctrine is laid down by the Missouri court of appeals, as follows: "A party may voluntarily do an act which he may be compelled to do by legal process. In all cases of ouster in pais where there has been no judgment, the burden of proof is upon the covenantee to establish the paramount title to which he has yielded: Morgan v. Hannibal & St. J. Ry., 63 Mo. 129; Matheny v. Mason, 73 Mo. 677, 39 Am. Rep. 541; Lambert v. Estees, 99 Mo. 604, 13 S. W. 284; Hall v. Bray, 51 Mo. 288; Ward v. Ashbrook, 78 Mo. 515; Dickson v. Desire's Admr., 23 Mo. 167, 66 Am. Dec. 661. And the measure of damages in such case is the purchase money, with six per cent interest from the time of yielding possession: Hutchins v. Roundtree, 77 Mo. 500; Lambert v. Estee, 99 Mo. 604, 13 S. W. 284"; Egan v. Martin, 71 Mo. App. 60.

2. **Parol Evidence as to Damages.**—It may be stated as a general rule that parol evidence is admissible, in an action of covenant of seisin, to show the actual consideration paid for the estate to have been either greater or less than that expressed in the deed, for the purpose of either increasing or diminishing the damages for the breach of the covenant.

The Illinois appellate court held: "That in an action of covenant of seisin, parol evidence is admissible on the part of the plaintiff to show the actual consideration to have been greater than that expressed in the deed, for the purpose of increasing the damages, and, on the other hand, equally admissible on the part of the defendant to show the consideration less, for the purpose of diminishing them. So it has been held admissible for the defendant to show in reduction of damages that the part to which there was no title was included in the deed by mistake, and that no consideration was paid for it, though it is clear that such evidence is admissible solely in mitigation of damages, and not for the purpose of negativing a breach of the covenant: Rawle on Covenants for Title, 5th ed., sec. 174; and Leland v. Stone, 10 Mass. 459"; Lloyd v. Sandusky, 95 Ill. App. 593. To the same effect are Kinzie v. Penrose, 2 Scam. (Ill.) 515, and Sidders v. Riley, 22 Ill. 109.

IN RE BALDWIN.

[146 N. C. 25, 59 S. E. 163.]

WILLS—Attestation of.—A statutory requirement that a will to be valid shall be subscribed in the presence of the testator by at least two witnesses is mandatory. (p. 469.)

WILLS—Destroyed Will—Parol Proof—Copy.—If a paper is offered for probate as a copy of a will which has been destroyed by the testator, parol evidence that such paper is such copy is not admissible in the absence of any physical connection between such paper and the will. (p. 469.)

WILLS—Insufficient Execution.—If a paper offered for probate as a will was written by a third person who signed it as a witness before the testator signed and not in his presence, and such third person never saw the testator after the paper was signed by him and left at the residence of the testator to be executed by him, such paper does not constitute a will. (p. 469.)

WILLS, Attestation of.—To render a will valid, the attestation or subscription by witnesses must be on the same sheet of paper as that which contains the testator's signature, or else upon some paper physically connected therewith. (p. 470.)

J. T. Brittain and R. O. Frye, for the appellant.

R. T. Poole, for the appellee.

[25] BROWN, J. By agreement, the court found the facts. From the judgment rendered H. T. Baldwin, one of the propounders, appealed.

Findings of facts: 1. That the propounders, H. T. Baldwin and J. H. Le Grand, produced in court a paper-writing purporting to be the last will and testament of W. S. Baldwin, deceased, a copy of which is made a part of this finding:

"State of North Carolina,

Montgomery County.

"I, W. S. Baldwin, of the county and state above named, being of sound mind and memory, but considering the uncertainty of my earthly existence, do make and declare this my last will and testament, in manner and form following:

"I hereby will the children of my daughter, Dicey Le Grand, deceased, twenty dollars each; and the children of D. C. Baldwin, deceased, ten dollars each; and to J. B. Baldwin, [26] my son, fifteen acres of land, including all the buildings where I now live, after his mother's death, and if he should die without any children, his part to be equally divided between H. T. Baldwin, Rebecca Ewing and Emma Le Grand and their children after them. The remainder of my real estate to be equally divided between H. T. Baldwin,

J. B. Baldwin, Rebecca Ewing and Emma Le Grand and their children after them; and for my wife, Charlotte Baldwin, to have her dower off of each child's part equal, and for her to have all the personal property as long as she shall live, and at her death the same to be equally divided between H. T. Baldwin, J. B. Baldwin, Rebecca Ewing and Emma Le Grand and their children after them.

"I do hereby constitute and appoint my son, H. T. Baldwin, and J. H. Le Grand my lawful executors to all interests and purposes, to execute this, my last will and testament, according to the true intent and meaning of the same, and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made.

"In witness whereof, I have hereunto set my hand and seal, this the 11th day of September, 1907.

"W. S. BALDWIN. [Seal]

"Signed, sealed, published and declared by the said W. S. Baldwin to be his last will and testament, in the presence of us, who, at his request and in his presence, do subscribe our names as witnesses thereto.

"J. A. COVINGTON,
"B. B. BOWLES."

2. That the said witness, J. A. Covington, was called in by the alleged testator, W. S. Baldwin, and, as dictated by the said testator, wrote a paper-writing purporting to be the last will and testament of the alleged testator, wrote the attestation clause, and, at the request of the testator and in the presence of the said testator, signed his name as a witness thereto. [27] No other witness attested this paper-writing. Said W. S. Baldwin signed the paper-writing as his last will in the presence of said J. A. Covington.

3. That the paper-writing purporting to be the last will and testament of the alleged testator, W. S. Baldwin, deceased, as referred to in the second article of this finding of facts, not being on as good quality of paper as the said witness desired to have the same, said J. A. Covington took the said paper-writing, above referred to, to the home of the said witness and there transcribed it on better paper, and at the same time, at his home and in the absence of the alleged testator, wrote out the attestation clause and wrote his name as a witness thereto.

4. That, after making an exact copy of the paper-writing referred to in the second article of this finding, and signing his name thereto as an attesting witness, the said J. A. Cov-

ington returned the copy for probate, and also the original copy of the said paper-writing, to the home of the said alleged testator, and, the said W. S. Baldwin being away from home, left them with the wife of the said testator. Said Covington did not see the said paper-writing any more until after the death of said Baldwin, and did not see said Baldwin sign it or hear him acknowledge it.

5. That some time after this the alleged testator brought the copy of the purported will, to wit, the one offered for probate, to the other witness, B. B. Bowles, and asked him to "witness a paper for him," which the witness did, in the presence of the alleged testator, and the testator asked him to say nothing about it.

6. That the original paper-writing, being the one written at the dictation of the alleged testator and signed by the said alleged testator in the presence of the witness Covington, and witnessed by the said witness Covington at the request of and in the presence of the alleged testator, W. S. Baldwin, deceased, and also the copy of the original paper-writing, being [28] the one witnessed by the witness B. B. Bowles at the request of and in the presence of the said alleged testator, were both in the possession of the said alleged testator at the time of his death.

7. That both copies of the alleged will were signed by the alleged testator in his own handwriting.

8. That, after the death of the alleged testator, the copy (meaning the one that was on the best paper) was carried to the clerk of the superior court for probate, and the original copy was, at the request or advice of friends, burned by the wife of the alleged testator, then deceased.

9. That the alleged testator, at the time of his signing both paper-writings was of sound mind and discretion.

10. That the witnesses J. A. Covington and B. B. Bowles, are men of sufficient knowledge to act as such.

11. That the said paper-writing offered for probate, which purported to be the last will and testament of the said W. S. Baldwin, deceased, appeared on its face to be written and attested in due form.

Upon the foregoing facts the court is of the opinion that the paper-writing offered for probate is not the last will and testament of W. S. Baldwin, deceased.

It is, therefore, on motion of R. T. Poole, Esq., attorney for the objectors, ordered and adjudged by the court that the said paper-writing is not the last will and testament of said W. S. Baldwin, deceased, and is not entitled to probate as

such, and that this proceeding for the probate of the same be and the same hereby is dismissed.

It is further adjudged that said H. T. Baldwin and J. H. Le Grand, the propounders, pay the costs of this proceeding, to be taxed by the clerk.

[29] Our statute (Revisal, sec. 3113), referring to wills of the character of the paper-writing offered for probate, contains a specific requirement that the will shall be subscribed, in the presence of the testator, by two witnesses at least.

The paper offered by the propounders was never signed by witness Covington in the presence of Baldwin. It appears that Covington wrote a will for Baldwin, and he and Baldwin signed it in the presence of each other. There is no finding of fact that such paper had any other witness than Covington. It was destroyed after Baldwin's death. It was not attached in any way to the paper offered for probate, and had no physical connection with it. The fact that it is said to be exactly like the paper offered, and that the latter is a copy of the former, will not "mend matters." In the absence of any sort of physical connection between the two papers, resort cannot be had to parol proof to show a similarity of contents and that they constituted one and the same will.

The paper offered was written by Covington and signed by him as a witness before the testator signed, and not in his presence. In fact, Covington never saw Baldwin at all after he wrote and attested the paper and left it at the former's residence to be executed by him. Not only did Covington not sign in the presence of the testator, but his attestation preceded the signing of the maker of the will.

Some authorities hold that everything required to be done by the testator in the execution of a will shall precede in point of time the subscription by the attesting witness, and that, if the signature of the latter precede the signing by the testator, the will is void: Gardner on Wills, p. 236. Until the testator has signed, there is no will and nothing to attest. There are eminent authorities, however, which hold that where the signing of the testator and of the witnesses took place at the same time and constituted one transaction, it is immaterial who signed first: Gardner on Wills, p. 236. While this is very reasonable, [30] it does not help the propounders, upon the facts as found. Nor does the recognized legal presumption that the testator signed first, since that is rebutted by the admitted facts.

The propounders can take no benefit from the fact that Covington signed the destroyed paper after testator had signed

it, in his presence and at his request, although the contents of the two papers may have been identical. That will not help out the probate of the paper offered, for the reason, as we have observed, that there was no physical connection between the two. The authorities all hold that the attestation or subscription by witnesses must be on the same sheet of paper as that which contains the testator's signature, or else upon some paper physically connected with that sheet.

Mr. Schuler says: "Attestation or a subscription by witnesses on a paper detached and separated from the will and the testator's signature, nor affixed in his presence to the paper at the time of execution, fails of compliance with the policy of our law. We may assume it to be void, as otherwise a door must be open to fraud and perjury": Schouler on Wills, 2d ed., sec. 336; Cox's Will, 46 N. C. 321. 30 American and English Encyclopedia of Law, second edition, page 603, says: "An attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet, although no particular mode of fastening the papers together is required."

The judgment is affirmed.

The Attestation and Witnessing of Wills are discussed at length in the note to Lane v. Lane, 114 Am. St. Rep. 209.

CRITCHER v. WATSON.

[146 N. C. 150, 59 S. E. 544.]

LANDLORD AND TENANT—Right to Remove Betterments—Promise of Landlord to Pay for.—A tenant has the right to remove all betterments affixed by him, if done before the lease expires and without injury to the freehold, and the promise of the landlord to pay for them made during the duration of the lease is based upon a valuable consideration, and enforceable. (p. 471.)

Graham & Devin, for the plaintiff.

B. S. Royster, for the defendant.

150 CLARK, C. J. Action for recovery of rents, begun before a justice of the peace. The only exception is to the following charge of the court: "If defendant bought and paid for the window and frame and put it in the house, and, after that time, told plaintiff he had done so, and plaintiff could pay for it, or not, as he saw fit, and plaintiff ratified

and accepted it, [151] and plaintiff said he would pay for it, the plaintiff would be liable for the value of the window and frame, and defendant would be entitled to credit for the same."

The defendant could not put a betterment on the house without request, and, by such officious act, make the landlord his debtor. Nor, if the consideration was passed, would the promise of the plaintiff to pay therefor be binding, being gratuitous and without a consideration moving thereto. But the window and frame being a betterment to the house, of future benefit, if the plaintiff "accepted the same and promised to pay for it" (as the court charged), there were all the elements of a valid contract, for the tenant had a right to remove all betterments affixed by him, if done before the lease expired, if this were done without injury to the freehold. State v. Whitener, 93 N. C. 590, bottom of page, citing Tyler on Fixtures, pages 384, 385, on the very point of the right of a tenant to remove windows placed by him in a windowless house. If, under such circumstances, the plaintiff promised to pay for the window, this was ratification and acceptance.

This distinction reconciles the authorities. As the plaintiff contends, an executed or past consideration is no consideration to support an express promise in cases where the law does not raise an implied promise: 6 Am. & Eng. Ency. of Law, 690, 693; Allen v. Bryson, 67 Iowa, 591, 56 Am. Rep. 358, 25 N. W. 820. In Bailey v. Rutjes, 86 N. C. 517, Rutjes was lessee of the premises for five years, under a contract to make certain betterments. The plaintiff furnished the lumber to Rutjes for the purpose. He sued Rutjes and the lessors jointly, and the court held that, unless the lessors "were originally liable by reason of a contract of some sort, they cannot be made so because of their having resumed possession of the premises, with its improvements, upon the surrender of their tenant; nor, under such circumstances, would a promise to pay, after the lumber had been furnished and used, be binding on them, since it would be purely gratuitous, and, as such, would make no contract."

[152] But here the jury find that the plaintiff expressly agreed to pay for the window and frame their cost—one dollar and seventy-two cents—and the only query is whether the promise is void for lack of consideration. If the only claim were that, at the expiration of the lease, as in Bailey v. Rutjes, 86 N. C. 517, the property passed to the plaintiff, with the window and frame added, there would be, as in

that case, no liability of plaintiff, either to the maker of the window and frame or to the defendant. And even if, after the expiration of the lease, when the house, with its betterments, had already passed back to the landlord, he had then made an express promise to pay for the betterment, this would have been unenforceable because nudum pactum, being a promise to pay for what had already become his property.

But here the express promise, which the jury find was made, was made during the tenancy. The tenant had a right to remove the window, if before he went out, provided this could be done without injury to the freehold: 24 Cyc. 1101. It does not appear that it would have been irremovable, for the jury find that the plaintiff promised to pay for it. If so, he must have desired to keep it there, and that it was desirable to keep it appears from the plaintiff's own testimony that "the room was eighteen by eighteen feet, with no light except from the door." Such a house was unsanitary, and would be condemned by any board of health. Both parties testify that the conversation occurred during the tenancy and at the time when the defendant was doing work putting in the window, the plaintiff denying and the defendant affirming a promise to pay for the same.

A landlord cannot be "improved" into a liability for improvements put upon his property by the tenant without authority. Nor can anyone be held liable legally for a promise made without consideration; but here the betterment to the house was accepted at the time by the plaintiff, who promised to pay the one dollar and seventy-two cents for it, as the jury find. He has lost nothing, but still has the consideration of better light for a large room, which before had no light except from the door.

No error.

The Law of Betterments is the subject of an extended note to Cleland v. Clark, 81 Am. St. Rep. 164.

PATAPSCO GUANO COMPANY v. BOWERS-WHITE LUMBER COMPANY.

[146 N. C. 187, 59 S. E. 538.]

DEEDS—Boundaries—Artificial Pond.—Under a deed bounding the land therein surveyed by an artificial pond which has been in existence long enough to become a permanent body of water and is still being kept up and maintained as such, the line of the land conveyed does not extend to the thread of the stream from whose waters the pond was formed, but only to the low-water mark of the pond at the date of the deed. (p. 475.)

A. Dunn, for the plaintiff.

Kitchin & Smith, for the defendant.

187 BROWN, J. It is unnecessary to set out the lengthy statement of facts agreed contained in the record. It is admitted that the case turns upon the construction of a deed from R. H. Smith to George W. Graffin and upon the following call in the deed: "And thence down the bottom to the pond and Kehukee swamp." His honor was of opinion that this line extended to the run of the swamp and did not stop at the edge of the pond. It is admitted that the pond called for is a well-known and long-established pond, known as "Smith's mill pond." Taking the deed by "its four corners," and reading it in the light of the facts agreed, we find ourselves unable to agree with his honor. We are of opinion that "the reason of the thing," as well as the authorities, sustain the defendant's contention that the aforesaid line stops at the edge of the pond.

188 It is unnecessary to discuss the case of Wall v. Wall, 142 N. C. 387, 55 S. E. 283, Brooks v. Britt, 15 N. C. 481, and other cases cited in the brief of the learned counsel for plaintiff. They do not militate at all against our conclusion. If the words "down the bottom to the pond" did not occur in this deed, the authorities cited would be in point. The insertion of those words in this deed, under the circumstances under which it was made, denotes the intention of the grantor to stop at the pond, and the use of the words "Kehukee swamp" serves only to indicate what waters flow into and make up the pond, and thus to locate it. If this were not so, there would have been no use in calling for the pond. Smith's pond appears to be an old-established pond, of large dimensions, which has existed "Since the time whereof the memory of man runneth not to the contrary." It appears

to us that the circumstances and facts of the case strongly support defendant's contention. Smith owned the land covered by the pond and swamp and the lands adjoining, including the lands described in the deeds to plaintiff and in the deed to Brinkley, through whom defendant claims. He was the owner and operator of the mill, which from time immemorial had been run by the waters of the pond. The pond covered one hundred acres or more, and had been maintained through generations. The margin, bank or edge of said pond is clearly marked by nature and well defined. The channel or run (to which plaintiff claims the call in said deed extends) of said pond and swamp had a well-known and specific name, separate and distinct from the pond and swamp, rising miles above the said swamp and pond. This was known as "Kehukee run," while the swamp—the low, boggy land on either side—was known as "Kehukee swamp," and the pond as "Smith's mill pond." With these patent facts before the parties when the deed was made, it is evident Smith intended to convey only to the pond and did not intend to convey the pond itself, which he would have done had he extended the call to the run of the swamp from which the [189] pond had been created. It is hardly to be presumed that Smith intended to destroy the value of his mill by selling its pond, for it appears that immediately after the execution of the Graffin deed Smith conveyed to Brinkley "the tract of land known as Smith's mill pond, including the mill pond, mill," etc. Ever since then Brinkley and those claiming under him have operated the mill by the power furnished by the waters of that pond. Our conclusion is supported by abundant authority. The two encyclopedias sum up the authorities by saying: "It is perhaps the prevailing doctrine, regarded as particularly applicable to the large lakes of this country and qualified in the case of artificial ponds, that, while a general grant of land on a river or stream which is non-navigable extends the line of the grant to the middle or thread of the current, a grant to a natural pond or lake extends only to the water's edge": 12 Am. & Eng. Ency. of Law, 1st ed., 642.

"Land bounded on a pond extends only to the margin, and the margin of the pond as it existed at the time of the conveyance is the limit, whether the pond was then in its natural state or raised above it by a dam": 5 Cyc. 901.

The American and English Encyclopedia (at page 653) states the true principle of construction, which differentiates this case from those cited by plaintiff: "The boundary upon

an artificial pond raised by a dam swelling a stream over its banks presumptively extends to the thread of the stream, unless the pond has been so long kept up as to have become permanent and to have acquired another well-defined boundary."

To the same effect and in practically the same language the rule is announced in Waterman v. Johnson, 13 Pick. (Mass.) 261, and afterward approved in Paine v. Woods, 108 Mass. 160. This rule of construction would not hold good in the case of a purely artificial pond temporarily maintained, the margin or banks of which had not been long established and [190] clearly marked. Smith's pond is a permanent body of water, which has existed in its present status for generations past, and its margin must necessarily be a landmark well known in the community. We think the principles herein laid down are fully supported by the following authorities among text-writers: Angell on Watercourses, 6th ed., sec. 41; 3 Washburn on Real Property, 5th ed., p. 443; Gould on Waters, sec. 203; Devlin on Deeds, sec. 1026; and also by many decided cases; West Roxbury v. Stoddard, 7 Allen, 158; Nelson v. Butterfield, 21 Me. 220; Hathorne v. Stinson, 12 Me. 183, 28 Am. Dec. 167; Diedrich v. Northwestern U. R. R., 42 Wis. 248, 24 Am. Rep. 399. It being admitted that the pond called for is known as Smith's mill pond, we have a definite and certain identification of the thing called for, amply sufficient to uphold a conveyance of the land covered by its waters, had the land under the pond been conveyed by that name. My Lord Coke says, in substance, that where a collection of water has by long existence and usage acquired a specific name, the land by which it is covered may be conveyed under that name, and illustrates it thus: "Stagnum or poole doth consist of water and land, and therefore by the name of stagnum or poole the water and land shall pass also": Coke's Littleton, 5b.

If land may be conveyed by describing it by a well-known name given to a collection of water covering it, we think that it is equally proper to hold that a boundary line might be located and terminated by calling for such body of water by name. The most interesting and well-considered case on the subject that we have examined is Boardman v. Scott, 102 Ga. 404, 30 S. E. 982, also reported with copious notes in 51 L. R. A. 178. In this case all the authorities are collected and carefully and elaborately reviewed by Mr. Justice Fish, who, in a headnote by himself, state the great weight of authority to hold: "Under a deed bounding the land therein conveyed

by an artificial pond which had been in existence for more than forty years, and which had thus become a permanent body of [191] water and was still being kept up and maintained as such, its waters, however, ebbing and flowing from time to time, so as to leave a margin of land between its high and low water marks, the line of the land so conveyed did not extend to the thread of the stream from whose waters the pond was formed, but only to the low-water mark of the pond at the date of the deed." In that case the collection of water called for was known as McCall's mill pond, and it was formed exactly in the manner as Smith's pond was formed, by constructing a dam across a swamp.

Smith's pond has existed for so long a period that it must have become a well-known landmark in the neighborhood, and may justly be considered a permanent body of water and to have acquired in the community as well-known and as well-defined boundaries as most natural lakes or ponds; and, under these circumstances, we think the rule is the same as that universally applied to natural lakes and ponds.

The judgment of the superior court is reversed and the action is dismissed.

A Deed Which Designates the margin of a lake as one of the boundaries of the grant ordinarily conveys only to the water's edge: City of Chicago v. Ward, 169 Ill. 392, 61 Am. St. Rep. 185; Fuller v. Shedd, 161 Ill. 462, 52 Am. St. Rep. 380; Lembeck v. Nye, 47 Ohio St. 336, 21 Am. St. Rep. 828; Carr v. Moore, 119 Iowa, 152, 97 Am. St. Rep. 292. But lands bounded by the edge of a pond, at the time raised to an unusual height by obstructions, will include the tract between the then edge and the actual, ordinary edge of the pond when the obstructions are removed: Hathorne v. Stinson, 12 Me. 183, 28 Am. Dec. 167.

WHITE v. CITY OF NEW BERN.

[146 N. C. 447, 59 S. E. 992.]

MUNICIPAL CORPORATIONS—Streets—Obstructions—Liability for Authorizing or Permitting.—If an obstruction by the projection of steps to a residence upon the sidewalk of a city is of a wrongful character and amounts to an actionable wrong, it cannot be rendered lawful by lapse of time, however great, and a city government can neither validate it by grant nor sanction it by acquiescence, and having the power, in the exercise of its ministerial functions of summary abatement, the city is responsible to an individual who is injured by its existence when the latter is himself in the exercise of due care. (p. 478.)

MUNICIPAL CORPORATIONS—Streets—Liability of City.—The governing authorities of a town are charged with the duty of keeping its streets in a reasonably safe condition, and their duty does

not end with putting them in a safe and sound condition originally, but extends to keeping them so, to the extent that this can be accomplished by proper and reasonable care and continuing supervision. (pp. 478, 479.)

MUNICIPAL CORPORATIONS—Streets—Obstructions—Presumed Knowledge of.—If a wrongful obstruction of a sidewalk of a city has been known to exist for a long period of time, the city is presumed to have knowledge thereof. (p. 479.)

MUNICIPAL CORPORATIONS—Streets—Duty to Light.—A city is under no legal obligation to light its streets, and such obligation does not arise or exist from the fact that the city has been given the power to light them. (p. 479.)

MUNICIPAL CORPORATIONS—Negligence—Failure to Light Streets.—Neither the absence of street lights nor defective lights is in itself negligence, but is only evidence on the principal question whether, at the time and place where an injury occurred, the streets were in a reasonably safe condition. (p. 479.)

D. L. Ward, for the plaintiff.

W. D. McIver, for the defendant.

[448] HOKE, J. There was evidence tending to show that, on the night of June 23d, plaintiff, going along Middle street, one of the public streets of the city of New Bern, struck his right foot against some steps which projected in front of a residence and into the sidewalk of said street. These steps extended about four feet onto the sidewalk, leaving something like five or six feet of passway between the bottom step and the driveway of the street, and they had existed so in this and other portions of the city for as much as thirty years; that it was a dark and drizzly night on this occasion, and the public lights were out at the time. Plaintiff testified that the lights were out on the night of the injury, and had been frequently going out for several months prior to that time; that the city owned the light plant and sold light to private persons for gain. There was no testimony that the streets were not reasonably safe, except as to the existence of the steps and the absence of, or defective, lighting.

On issues submitted, and under the charge of the court, the jury rendered a verdict that defendant was guilty of actionable negligence; that plaintiff was at the time in the exercise of proper care, and awarded substantial damages for the injury.

Judgment on the verdict for plaintiff, and defendant excepted and appealed, and assigned for error: "(4) That the court erred in its refusal to give the first prayer for in-instructions [449] of defendant, as follows: That a municipal corporation is not bound to light the streets at night; that, while its charter may confer the power, this power is of

a governmental and discretionary nature, and for the exercise of the same the city would not be liable. (5) That the court erred in its refusal to give the fourth prayer for instructions, as follows: That the city is not liable absolutely for defects in its streets and sidewalks, and that the mere existence of such defects, therefore, is not sufficient to constitute a cause of action; that the city is not held to guarantee safety but is only held to provide a reasonably safe way of travel, and the ground of liability to private parties for injury while passing over sidewalks or streets is only a liability for negligence or neglect, and the mere existence of an obstruction or defect is not in itself sufficient; but to constitute negligence it must be shown that the authorities of the city had notice of the defect or obstruction and had power to remedy the same and neglected to do so. (6) That the court erred in its refusal to give the fifth prayer for instructions, as follows: That if the jury shall find that, from its early days, steps and porches have been allowed upon the sidewalks of the streets, and that they have been used by the property holders from ancient times, the city should not be held liable for failure to compel the removal of the same."

Considering the defendant's assignments of error in reverse order, the position taken, that the projection of the steps upon the sidewalk was sanctioned by the continuous existence of such condition for twenty-five or more years, cannot be sustained. If this projection of the steps was such an obstruction of the street that it amounted to an actionable wrong, it cannot be rendered lawful by lapse of time, however great. As said in Elliott on [450] Roads and Streets, second edition, page 706: "No length of time will render a public nuisance, such as the obstruction of a highway, legal, or give the person guilty of maintaining it any right to continue it, to the detriment of the public. Each day's continuance of such a nuisance is an indictable offense." Where an obstruction is a wrong of this character, a city government can neither validate it by grant nor sanction it by acquiescence; and, having the power, in the exercise of its ministerial functions, of summary abatement, the city is responsible to an individual who is injured by its existence, when the injured person is himself in the exercise of due care: State v. Atlantic & N. C. Ry., 141 N. C. 736, 53 S. E. 228; Elliott on Streets and Roads, pp. 700, 705, 965.

As to the second position, we have held, in Fitzgerald v. Concord, 140 N. C. 110, 52 S. E. 309: "(a) The governing authorities of a town are charged with the duty of keeping their

streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so, to the extent that this can be accomplished by proper and reasonable care and continuing supervision. (b) The town does not warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and to establish such responsibility it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the town 'knew, or, by ordinary diligence, might have discovered the defect,' and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated." And the same doctrine has been announced in several other decisions of the court. As to the city's knowledge of these steps, the authorities must have had knowledge of them, or such knowledge will be imputed, for they had existed in like condition for as much as thirty years, and in the present case this portion of the prayer is not material; [451] but we think that the principle of these decisions is embodied in the prayer as a whole, and there was error, to defendant's prejudice, in not giving the same, or some substantially similar instructions.

Again, we think that the prayer indicated in defendant's fourth assignment of error is sound, as a general proposition, and is correct as applied to the facts of the case. In the absence of statutory requirement, a city is under no legal obligation to light its streets, and such obligation does not arise or exist from the fact that the city has been given the power to light them. And where a city or town has undertaken the duty, the placing and character of the lights must be allowed to rest very largely in the discretion of the authorities: Brown v. Durham, 141 N. C. 49, 53 S. E. 513; City of Columbus v. Simms, 94 Ga. 483, 20 S. E. 332; Canavan v. Oil City, 183 Pa. 611, 38 Atl. 1096; Macomber v. Taunton, 100 Mass. 255; Randall v. Eastern Ry. Co., 106 Mass. 276, 8 Am. Rep. 327; Freeport v. Isbell, 83 Ill. 440, 5 Am. Rep. 407; Elliott on Roads and Streets, sec. 623. Undoubtedly, temporary obstructions and hindrances on a highway, or permanent conditions, may be such that an absence of lights at the particular locality would import negligence, and to this principle possibly may be referred the decision in Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418. But when the streets of a municipality are otherwise reasonably safe, the

weight of authority and the better reason are to the effect that neither the absence of lights nor defective lights is in itself negligence, but is only evidence on the principal question, whether, at the time and place where an injury occurred, the streets were in a reasonably safe condition. As said by Mr. Justice Dean, delivering the opinion in Canavan v. Oil City, 183 Pa. 611, 38 Atl. 1096: "As to whether sufficient light was provided by the city on the night of the accident, we may briefly say that there is no legal obligation on a municipality to light its streets when their construction is reasonably safe for travel. That is solely a question for the municipal legislature. It may do many things not enjoined by law to promote the general [452] well-being and comfort of a citizen; but, in not doing that which no statute commands, negligence cannot be imputed to it. This, however, in no sense relieves it from the duty of that ordinary care which requires that temporary excavations for building purposes should be exposed by proper light, or that temporary obstructions of the streets by building material should be made conspicuous in the same way." There is nothing in our present decision which in any way conflicts with the case of Fisher v. New Bern, 140 N. C. 506, 111 Am. St. Rep. 857, 53 S. E. 342, 5 L. R. A., N. S., 542. That was an action for an injury caused directly by the negligence of defendant in the operation and management of its plant. A live wire had fallen and was negligently permitted to remain in a menacing condition, whereby one on the highway was hurt. The city was held responsible, chiefly because it appeared that the plant was being operated not only in the public lighting of the streets, but in selling lights to private persons for gain. The opinion, in express terms, excludes all consideration of the question as to how far the city could be held responsible for negligence when engaged solely in supplying lights to the public. As a matter of fact, that decision is not an apposite authority in the present case at all, for the primary and controlling question is whether the streets were in such a dangerous condition as to import negligence against the municipality, and whether such negligence was the proximate cause of plaintiff's injury; and the presence or absence of lights, or the condition of lights at the time, is only evidential on the issue.

For the errors indicated, the defendant is entitled to a new trial of the cause, and it is so ordered.

The Liability of Municipal Corporations to persons injured by reason of defective or dangerous streets is discussed in the notes to Dudley v. City of Flemingsburg, 103 Am. St. Rep. 257; Goddard v. Inhabitants of Harpswell, 30 Am. St. Rep. 384; Browning v. City of Springfield, 63 Am. Dec. 350. As to the liability of a city for a dangerous condition or obstruction of sidewalks created by abutting owners, see Hayes v. City of Seattle, 43 Wash. 500, 117 Am. St. Rep. 1062; Drake v. Kansas City, 190 Mo. 370, 109 Am. St. Rep. 759; Fischer v. City of St. Louis, 189 Mo. 567, 107 Am. St. Rep. 380; Earl v. Dlask, 126 Iowa, 361, 106 Am. St. Rep. 361; Teager v. City of Flemingsburg, 109 Ky. 746, 95 Am. St. Rep. 400; Robert v. Powell, 168 N. Y. 411, 85 Am. St. Rep. 673.

The Duty and Liability of a City in Respect to Lighting its streets are discussed in the note to Dudley v. City of Flemingsburg, 103 Am. St. Rep. 272; Fischer v. City of St. Louis, 189 Mo. 567, 107 Am. St. Rep. 380. In Spillane v. Fitchburg, 177 Mass. 87, 83 Am. St. Rep. 262, it is said that a city is not bound to light its streets.

TUTTLE v. TUTTLE.

[146 N. C. 484, 59 S. E. 1008.]

TRIAL—Submission of Issues.—If the issues submitted to the jury fully present every phase of the controversy, their form is immaterial if under them each party has an opportunity to present evidence of the facts relied upon. (p. 483.)

PARTITION—Purchaser at Sale—Fraud.—A commissioner appointed to sell land for partition cannot directly nor indirectly purchase for his own benefit. (p. 484.)

PARTITION—Purchasers—Fraud.—If persons, with knowledge of the trust relation of a commissioner appointed to sell lands for partition, aid and abet him in such purchase with a view to speculate upon it on their own account, they are guilty of fraud, and cannot become innocent purchasers, nor occupy any better position than the commissioner. (p. 484.)

FRAUD.—Circumstantial Evidence may support a finding of fraud if it is reasonably sufficient to satisfy the court or jury. (p. 484.)

PARTITION, DEEDS IN—Fraud—Burden of Proof.—To set aside a deed made by a defendant, as a commissioner to sell land in partition made to his codefendants, the burden of proof is upon the plaintiff to show fraud in the sale by a preponderance of the evidence only. (p. 486.)

PARTITION—Impeachment for Fraud—Remedy.—The remedy to impeach proceedings for fraud of a commissioner in collusion with the purchaser at a partition sale is by civil action to set aside the deed, and not by motion in the action. (pp. 486, 487.)

PARTITION—Fraud—Limitations.—If an action is commenced to set aside a sale, decree and deed, in partition, made by reason of a fraudulent agreement to deprive plaintiffs of their property, the action must be commenced within three years after actual discovery of the fraud, and if the statute of limitations is set up as a defense, the plaintiffs must reply, setting out, by way of avoidance, the time when they aver that the fraud was discovered, and the burden of proof is on them to prove the facts necessary to repel the statute. (p. 488.)

DEEDS—Recording—Notice of Fraud.—The recording of a deed does not put parties upon inquiry as to fraud not appearing on its face. (p. 488.)

TRIAL—Verdict on Sunday.—The rendition of a verdict on Sunday is valid. (p. 488.)

Avery & Avery, Zachary & Breese, W. A. Smith and R. Gash, for the plaintiffs.

G. A. Shuford and Shepherd & Shepherd, for the defendants.

[486] BROWN, J. The plaintiffs and the defendant, R. M. Tuttle, were tenants in common of five tracts of land in Transylvania county, containing some three thousand two hundred acres. R. M. Tuttle owned an interest of one-twenty-seventh and was the general agent of his cotenants, his brothers and other near relatives, in the management and control of the land. In April, 1901, R. M. Tuttle caused a special proceeding to be commenced in the superior court of Transylvania county for the purpose of [487] selling said lands for partition, to which his cotenants were made copetitioners and parties of record. A decree of sale was duly entered and R. M. Tuttle was appointed commissioner to make the sale. On August 7, 1901, the lands were sold, and bid off by Welch Galloway, Esq., for the sum of two thousand one hundred dollars, and, upon recommendation of the commissioner, the sale was confirmed. On September 10, 1901, said Galloway assigned his bid to E. H. and S. L. Tuttle, sons of R. M. Tuttle, who, in turn, transferred the bid to C. E. and L. E. Corpening, to whom the commissioner, R. M. Tuttle, executed a deed, in consideration of two thousand one hundred dollars purchase money, on December 22, 1902. On February 22, 1906, the plaintiffs commenced this action to set aside said special proceeding and the sale and deed made in pursuance thereof, upon the ground of fraud, and to convert the defendants Corpening into trustees for their benefit.

1. On the trial the defendants tendered certain issues and duly excepted to those submitted. We think the issues submitted fully present every phase of the controversy. The exact form of the issues is immaterial, if, under them, each party has opportunity to present evidence of the facts relied upon. The issues submitted in this case arise upon the pleadings and intelligibly present to the jury the contentions of the parties: Elizabethton Shoe Co. v. Hughes, 122 N. C. 296, 29 S. E. 339. The true test is, Did the issues afford

the parties opportunity to introduce all pertinent evidence and apply it fairly? Black v. Black, 110 N. C. 398, 14 S. E. 971; Pretzfelder v. Merchants' Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424. Measured by that test, the issues are sufficient. The form of the first issue rendered it unnecessary to submit the separate issue tendered by the defendants Corpening as to whether they were bona fide purchasers for value, and without notice of the alleged fraud. Under the first issue his honor submitted that contention clearly to the jury, when he charged them that, "If the bid was assigned to the Corpenings in good faith [488] on their part and they had no notice of the fact of the bid being by Galloway for R. M. Tuttle, then their title is good."

The theory upon which the plaintiffs rest their case against the Corpenings as embodied in that issue, is that they were participants in a legal fraud, perpetrated upon his cotenants, these plaintiffs, by R. M. Tuttle. Failing to establish that, they would not be entitled to recover.

It is not necessary, in order to set aside the deed and decrees of sale herein impeached, that the Corpenings should be convicted of a crime, or of a dishonorable transaction, as such terms are commonly understood. R. M. Tuttle occupied a fiduciary relation to his cotenants, both as their general agent in the control and management of the land, and, also, as a commissioner appointed by the court to make sale of it. It is elementary that he could not lawfully purchase at his own sale, nor procure anyone else to do it for him. He could not lawfully speculate in the land for his own benefit, nor do any other act detrimental to the interest of those whom he had undertaken to serve. His duty was to make the land bring the best price obtainable, and to act for plaintiffs and advance their interests. If the Corpenings, knowing the relation which Tuttle, as commissioner in the special proceeding, bore to the parties thereto, aided and abetted him in purchasing the land for himself and his sons, and for their joint benefit, with a view to speculate in it on joint account, they would be particeps criminis in a legal wrong, however ignorant they may have been of the unlawful character of such transactions. If such facts are true, they could not possibly be classed as "innocent purchasers," under any known definition of the term. They would be guilty, at least, of constructive fraud, such as the law infers from certain circumstances, regardless of actual dishonesty of purpose. In aiding and abetting the commissioner trustee

in committing such fraud upon his fiduciaries, they could not occupy any better position than the commissioner himself.

489 That brings us, naturally, to the consideration of the sufficiency of the evidence, a point raised by the motion to nonsuit, and argued with much earnestness by the learned counsel for defendants.

The nature of fraud is such that it can seldom be established by direct or positive proof. In the nature of things, resort must be had to the evidence of circumstances. It is now well settled that such evidence will support the finding of fraud, if it is sufficient to reasonably satisfy the mind of the judge or jury, as the case may be: Rea v. Missouri, 17 Wall. 532, 21 L. ed. 707; Reed v. Noxon, 48 Ill. 323; Sears v. Shafer, 6 N. Y. 268.

As to the evidence against the defendant R. M. Tuttle, there can hardly be a serious controversy as to its sufficiency. It is most plenary. It tends to prove that he was the trusted agent of his cotenants, in charge of these lands and fully acquainted with their character and value, and that, taking advantage of his position, he formed the design to acquire these lands for his own benefit, at much less than their real value; that, without consulting some of the owners, he caused the special proceeding to sell for partition to be instituted, and that he kept them in ignorance of the pending sale. He had himself appointed commissioner although a party to the proceeding so that he could control the sale and easily secure its confirmation if desirable in his own interest to do so. He procured Galloway (who in this matter appears to be innocent of any wrongful purpose) to bid off the land for his (Tuttle's) benefit, and he negotiated the transfer of the bid, through his two sons, to the Corpenings, in order that he and his sons might take advantage of a "good thing" and share in the profits, and, as a part thereof, he and his sons received a lot of machinery and the surrender of a thousand dollar note due by the father. The evidence offered by plaintiff tends, we think, to establish such facts.

490 While the evidence competent as against the Corpenings is not of the same probative force as that against Tuttle, it is fully sufficient to have warranted his honor in submitting the question to the jury as to their wrongful complicity with Tuttle, the commissioner. There is evidence tending to prove that they are nearly related by marriage and that the two sons of R. M. Tuttle are the nephews of the Corpenings. That they knew of the fiduciary relation which R. M. Tuttle

occupied toward plaintiffs can scarcely be denied, for they took their title deed from him as commissioner and paid him the sum for which the land was bid off. There are facts and circumstances in evidence from which a jury might well infer that Galloway had bid off the land for R. M. Tuttle's benefit and at his request, and that the Corpenings must have been aware of it. From these facts and circumstances a more important inference is warranted, to the effect that an understanding existed between the Corpenings and their two nephews, looking to a division of profits, in which they and their father were to share. There is evidence tending to prove that, on account of this venture, the Tuttles received from the Corpenings a lot of machinery and the note of R. M. Tuttle, which he owed, for one thousand dollars. Declarations of one of the Corpenings to M. H. Tuttle tend to show that R. M. Tuttle was believed by them to be guilty of some breach of trust in this matter, which might necessitate his leaving for Canada. The Corpenings employed to represent them the same attorney who bid off the land for Tuttle; and, in addition, there is some evidence of the withholding of certain deeds belonging to plaintiffs, and necessary to their chain of title, with a view to shutting off suit, indicating a purpose, if possible, to prevent investigation. There is evidence tending to prove that two thousand one hundred dollars is a very inadequate price for the land; that there is some three thousand two hundred acres of it, worth, in the estimate of some witnesses, from six to fifteen thousand dollars, and that the Corpenings were acquainted with its true value.

491 There was much evidence submitted by defendants in rebuttal and tending to prove that the Corpenings acted in good faith in the purchase of the land.

The charge of his honor appears to us to have put the issues before the jury fairly and clearly, and, while it may not be entirely free from error, it is of such a character as is evidently harmless, and does not constitute reversible error, so as to warrant us in granting a new trial upon the first issue.

In charging that the burden of proof was on the plaintiffs to satisfy the jury by a preponderance of the evidence, the judge committed no error. This is not an action to convert the defendants into trustees because they purchased the legal title in trust for plaintiffs, or to correct a mistake in a deed, or like the cases where the law requires much more than a preponderance of evidence. The plaintiffs seek to set aside

the sale, deed and decrees, upon the ground that they are fraudulent and were made at the instance of R. M. Tuttle, the commissioner, with purpose and intent to defraud plaintiffs of their property. "It is not, however, necessary, in order to establish the fraud, that direct, affirmative or positive proof of fraud be given. In matters that regard the conduct of men, the certainty of mathematical demonstration cannot be expected or required. Like much of human knowledge on all subjects, fraud may be inferred from facts that are established": Kerr on Fraud and Mistake, p. 384. The distinction between that class of cases wherein clear, cogent and convincing proof is required and that class where a preponderance of the evidence is sufficient is clearly drawn in the learned opinion of Mr. Justice Avery in Harding v. Long, 103 N. C. 1, 14 Am. St. Rep. 775, 9 S. E. 445. The Encyclopedia states that, according to the overwhelming weight of authority, fraud need not be established beyond a reasonable doubt, but that "a preponderance of the evidence, as in any other civil case, is sufficient, provided the proof is clear and strong enough to preponderate over the general presumption that men are honest and do not [492] ordinarily commit frauds, and reasonable enough to satisfy the understanding and conscience of the judge or jury." If it does, then it is sufficient, both at law and in equity.

2. The remedy of the plaintiffs is the one they have pursued, and not by motion in the cause, as contended by defendants. The Corpenings are no parties to the special proceedings, and, if they were, the proper method to impeach judicial proceedings for fraud is by civil action, and not by motion: Peterson v. Vann, 83 N. C. 118; McLaurin v. McLaurin, 106 N. C. 331, 10 S. E. 1056.

3. His honor charged the jury that, "If the said Corpenings took as trustees, the statute of limitations would not bar the plaintiffs from bringing action until ten years after the rendition of said decree in said special proceeding." In this we think his honor mistook the character of the action and the relation of the Corpenings to the plaintiffs. There was never any contractual relation between them, and the Corpenings have never voluntarily assumed any relation of trust or confidence toward plaintiffs. The legal title has never vested in them by the voluntary act of the plaintiffs, but solely in consequence of the defendant commissioner's own

wrongful and tortious acts. They are trustees ex maleficio, not ex contractu. The legal title which vested in the Corpenings by virtue of the sale, deed and decree of confirmation has been destroyed and made void, ab initio, by the finding of the jury and the decree of the court. Consequently, there is no legal title to attach a trust to, because, unless this action is barred by the statute, all those proceedings are void and the title never vested. The case therein differs materially from that class of cases where a trustee or mortgagee, holding the legal title, buys at his own sale, has the title conveyed through another to himself and takes possession. In such cases the legal title has never been out of him and he has continued to hold it in trust during his occupancy, and a mortgagor or [493] cestui que trust may bring him to account within ten years: Bruner v. Threadgill, 88 N. C. 361; Jones v. Pullen, 115 N. C. 465, 20 S. E. 624.

The gravamen of the complaint is that the sale, decree and the deed were made by reason of a fraudulent agreement to deprive the plaintiffs of their property, and are, therefore, void. It follows that the action must be instituted within three years after actual discovery of the fraud by plaintiffs: Revisal, sec. 395, subsec. 9; Day v. Day, 84 N. C. 408. This section originally applied to cases of fraud, cognizable only in a court of equity under the former system, which would embrace this case. By amendment, the scope of the section has been extended to all cases of fraud cognizable at law or in equity. The statute only runs against those not under disability, and as to those only from the date of the discovery of the fraud.

The fact that the commissioner made a deed to the Corpenings on December 22, 1902, if registered, would not even put the plaintiffs upon inquiry, much less fix them with notice that a fraud had been committed, as there is no evidence of that upon the face of the deed. The statute having been pleaded, the plaintiffs should reply, setting out by way of avoidance, the time when they aver the fraud was discovered, the burden being upon them to prove the facts necessary to repel the statute: Stubbs v. Motz, 113 N. C. 458, 18 S. E. 387. The plaintiffs will be allowed to file such replication, to the end that proper issues may be submitted to the jury bearing upon the plea of the statute of limitations.

4. The verdict in this case was rendered on Sunday morning, in open court, and recorded. By consent of counsel, the court continued the motion for judgment, to be heard at Asheville on September 14, 1906, when and where judgment was signed. Defendants excepted. There is no merit in the exception. The rendition of the verdict on Sunday was valid: Rodman v. Robinson, 134 N. C. 503, 101 Am. St. Rep. 877, 47 S. E. 19, 65 L. R. A. 682.

494 We have examined with care all the other assignments of error not herein commented on, and think that they are without merit.

As the two issues are distinct and not at all connected, we award a new trial on the one issue which relates to the statute of limitations.

Let the costs of this court be equally divided between the plaintiffs and defendants.

Partial new trial.

A Person Occupying a Fiduciary Relation to property or the owners thereof is disqualified from acquiring title thereto: Gilbert v. Hewetson, 79 Minn. 326, 79 Am. St. Rep. 486; Petrie v. Badenoch, 102 Mich. 45, 47 Am. St. Rep. 503; Chicago Hansom Cab Co. v. Yerkes, 141 Ill. 320, 33 Am. St. Rep. 315. Where a husband sells as trustee, his wife is excluded from purchasing at the sale directly from him: Bassett v. Shoemaker, 46 N. J. Eq. 538, 19 Am. St. Rep. 435. Trustees are not allowed to place themselves in a position in which it is difficult for them to be honest to their trust: Galbraith v. Tracy, 153 Ill. 54, 46 Am. St. Rep. 867.

If the Title of a Cestui Que Trust is Devested, and Invested in His Trustee, and this fact appears on the face of the instruments, there is no presumption of honesty in the transaction, and one who subsequently acquires title from the trustee is not entitled to protection as an innocent purchaser: Winter v. Truax, 87 Mich. 324, 24 Am. St. Rep. 160.

The Effect of Compulsory Partition is the subject of a note to Carter v. White, 101 Am. St. Rep. 864.

WARD v. COMMISSIONERS OF BEAUFORT COUNTY.

[146 N. C. 534, 60 S. E. 418.]

COUNTY OFFICERS—Breach of Duty—Remedy.—If county commissioners do not keep their county courthouse in good and sufficient repair, nor offer nor propose to do so, they are indictable for a breach of duty, and entitled to a trial by jury. (p. 489.)

MANDAMUS will not Lie to Compel County Commissioners to repair or build a courthouse. (p. 489.)

COUNTY OFFICERS—Breach of Duty—Remedy.—The building and keeping in proper repair of a county courthouse is part of the ministerial duties of the county commissioners, and is not subject to the supervision of the courts. (pp. 489, 490.)

MANDAMUS Lies Only to compel the performance of a specific act pointed out by law. (p. 490.)

Ward & Grimes, for the plaintiff.

H. C. Carter, Jr., for the defendants.

535 CLARK, C. J. This was a mandamus issued to county commissioners to "provide a sufficient courthouse for the county of Beaufort, and in good and sufficient repair." Whether the order thus given by the court is to be construed as an order to build a new courthouse, or to rent a building for that purpose, or to repair the old one, the court was without authority to make the order. The facts found by the court are that the defendants "have not kept and maintained in good and sufficient repair the courthouse in their county, and do not offer or propose to do so." If this is so, the defendants are indictable for a breach of duty. They are individually responsible, but they are not entitled to set up their defenses and have the facts as to the charge and the defense found by a jury, and not, as here, by the court. As individuals, they may be called on to answer criminally for a breach of duty, on the charge of the grand jury, which speaks for the whole people, but not to a civil action by one or more citizens.

A mandamus will not lie to compel the county commissioners 536 to repair or build a courthouse. The duty of providing a sufficient and proper courthouse is to be discharged by the county commissioners, subject to indictment, if there is a willful failure, and to supervision by the people of the county in the election of another board of commissioners, should the voters see fit. It is not a duty resting for enforcement with the judge of the superior court, nor subject

to supervision by this court. The plaintiff has no specific legal right for the enforcement of which he can invoke an order of the judicial branch of the government to supervise and control the administrative branch. The building a new courthouse or repairing an old one is not a mere ministerial matter, admitting of no debate, but is one of discretion, committed to the county commissioners, in regard to which their judgment and discretion must prevail, and not the opinion of a judge. Only when a grand jury and jury have found a criminal abuse of duty can the court intervene, and then only to punish the individuals, not to compel them, as officials, to do any specific act not required by statute to be done in a specific way or to a prescribed extent.

In Brodnax v. Groom, 64 N. C. 244, Pearson, C. J., discussed this subject, and said: "The case before us is within the power of the county commissioners. How can this court undertake to control its exercise? Can we say such a bridge does not need repairs, or that, in building a new bridge near the site of an old bridge, it should be erected, as heretofore, upon posts, so as to be cheap, but warranted to last some years, or that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have stone pillars, at a heavier outlay at the start, but such as will insure permanence and be cheaper in the long run?

"In short," the court continued, "this court is not capable of controlling the exercise of power on the part of the General Assembly or of the county authorities, and it cannot assume to do so without putting itself in antagonism as well to the [537] General Assembly as to the county authorities and erecting a despotism of five men, which is opposed to the fundamental principles of our government and the usages of all times past. For the exercise of powers conferred by the constitution the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places in trust in the several counties. This court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the constitution upon the legislative department of the government or upon the county authorities."

We can add nothing to the discussion and the decision in that case, which has been repeatedly followed: See cases cited in the annotated reprint of 64 N. C. 250. One of the latest of these sustaining cases is Glenn v. Moore County Commrs., 139 N. C. 412, 52 S. E. 58, which held that a man-

damus could not issue commanding county commissioners to repair a bridge.

It is certain, upon the facts admitted and found, that some improvement is much needed in the courthouse of Beaufort county. But the power to order such improvement, under the statute, rests with the county commissioners and not with the courts.

Indeed, it may well be that a large, commodious, up-to-date courthouse, even one costing possibly one hundred thousand dollars, would not be too good for the prosperous, progressive county of Beaufort, with its intelligent population. It may be that such a building, aside from its usefulness, would be such a proof of public spirit as would attract a large influx of population and wealth. In Texas and other progressive states there are counties no larger than Beaufort which have county courthouses larger and more commodious, and more costly, some of them, than the capitol of this state, which was built seventy-five years ago. It may also be that it is good judgment and just to issue bonds for erecting suitable, even costly, public buildings, since posterity, which will use such buildings, [538] will be far more numerous and wealthy, and hence far better able to pay off the bonds, payment of the interest on which may be a sufficient return to be made by the present generation for the use by it of the buildings. It may also be wisdom to issue bonds to put up permanent iron bridges instead of wooden ones, and to build better public roads, and to install other improvements of a public nature, but all these matters rest with the people of each county, acting through their authorities chosen by themselves to administer their county affairs, subject to such authorization as they may obtain from the legislature, when required by the constitution.

The courts possess no function to command or control the exercise of such power, when any discretion in regard thereto is reposed by the statute in the county authorities. A mandamus lies only to compel the performance of a specific act pointed out by the statute, as in Tate v. Commissioners, 122 N. C. 812, 30 S. E. 352.

It is much to the credit of the plaintiff that he possessed the public spirit to wish to procure courthouse facilities more suitable and more creditable to his county. But the remedy (other than by indictment of county commissioners for neglect of duty) must be sought in an appeal to the better judgment of the county authorities or by arousing the sound public

opinion of a self-governing people, and not by application to the courts.

No cause of action being stated in the complaint, we must order action dismissed.

WHAT DUTIES THE PERFORMANCE OF WHICH MAY BE COMPELLED BY MANDAMUS.

I. Scope of Note, 492.
II. Necessity for an Existing Duty of a Clear, Positive and Legal Nature, 493.
III. Necessity for the Duty to be Specific and not Complicated nor Involving a Continuous Series of Acts, 496.
IV. Necessity for Public Interests to have Suffered Where the Duty is a Public One, 497.
V. The Right to Compel the Act is Dependent upon Its Character and not the Official Position of the Person Who is to Perform It, 498.
VI. What Kinds of Duties the Performance of Which are Compellable by Mandamus.
a. Duties of a Ministerial Character, 499.
b. Duties Involving the Exercise of Judgment or Discretion.
1. The General Rule, 502.
2. Effect Where the Refusal is a Gross Abuse of Discretion or Arbitrary and Capricious, 505.
3. Effect Where the Refusal is Based on an Erroneous Conception of Law or on False Information, 507.
c. Duties Resulting from an Office, Trust or Station, 509.
d. Duties of a Political or Governmental Character, 509.
e. Effect Where the Duty is One Arising from a Contractual Relation, 511.
f. Duties of Corporations Arising by Reason of Their Franchises and Right to Exercise Eminent Domain, 513.
VII. Application of the Rule to Specific Duties.
a. Granting or Refusal of Licenses, Permits, and Certificates, 515.
b. Elections, Canvassing of Votes and Right to Office, 517.
c. Approval of Official Bonds, 518.
d. Management of Schools, 518.
e. Public Improvements, 519.
f. Payment of Debts and Claims by Public Officers, 520.
g. Levying of Taxes and Assessments, 521.
h. Courts and Court Proceedings, 521.

I. Scope of Note.

This note is intended to be supplemental to the exhaustive note on the law of mandamus attached to Dane v. Derby, 89 Am. Dec. 728. We shall confine the note to a discussion of those cases in which the writ of mandamus was allowed or refused because of the nature of the duties the performance of which was sought to be enforced by means of the writ. The general subject of mandamus has been frequently considered in the series, and many of the notes on the subject have necessarily discussed the reasons for the granting or refusing of the writ. In connection with this note, see the note on the issuance of mandamus to control the exercise of discretion: Weeden v. Town Council of Richmond, 98 Am. Dec. 375; mandamus to private corporation to compel the performance of duties: Potwin Place v. Topeka Ry.

Co., 37 Am. St. Rep. 317; mandamus to compel the awarding of bids to the lowest bidders: State v. Rickards, 50 Am. St. Rep. 489; mandamus to compel the restoration to membership of members of a voluntary association: Robinson v. Templar Lodge, 59 Am. St. Rep. 200; when mandamus is the proper remedy against public officers: State v. Gardner, 98 Am. St. Rep. 863.

II. Necessity for an Existing Duty of a Clear, Positive and Legal Nature.

Before one can be compelled by means of a writ of mandate to perform a duty, it must be shown that there is an existing duty to perform: Meyer v. City and County of San Francisco, 150 Cal. 131, 88 Pac. 722, 10 L. R. A., N. S., 111. The office of the writ is not to create duties, but to require the performance of duties already existing: State v. Wilson, 123 Ala. 259, 26 South. 482, 45 L. R. A. 772; Territory v. Board of Supervisors, 9 Ariz. 405, 84 Pac. 519. A writ of mandamus neither creates new duties nor requires of a public officer more than the law has made it his duty to do. The writ lies merely to compel a person to do only that which it is his duty to do without it. In order to be coerced, he must have the power to perform the act. Thus the mere fact that he has assumed certain official duties which he has no legal power to perform does not subject him to mandamus proceedings to complete their performance, for in such a case he stands in the same relation as a private individual with respect to the writ: Page v. McClure, 79 Vt. 83, 64 Atl. 451. "Mandamus lies to compel a party to do that which it is his duty to without it. It confers no new authority, and the party to be coerced must have the power to perform the act": Brownsville v. Loague, 129 U. S. 493, 9 Sup. Ct. Rep. 327, 32 L. ed. 780.

Mandamus does not lie to compel the performance of an act unless the party applying for the writ shows a clear legal right to have the act performed: Knopf v. Corcoran, 112 Ill. App. 320; Harrison v. People, 124 Ill. App. 519; Olds v. Commissioner, 150 Mich. 134, 112 N. W. 952; State v. Weston, 67 Neb. 175, 93 N. W. 182; Vreeland v. Jacobus, 26 N. J. L. 135. The duty must be positive, not discretionary, and the right must be so clear as not to admit of any reasonable controversy: State v. Anderson, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239. It should not compel an official to do an act which would involve him in a litigation the result of which would be doubtful: Roll v. Perrine, 34 N. J. L. 254. Thus, in Park v. Candler, 113 Ga. 647, 39 S. E. 89, it was sought to compel the state treasurer to pay out certain moneys on a warrant from the governor, and the attorney general of the state had advised the treasurer that he could lawfully do so, but the court said: "Even if it be conceded that the opinion of the attorney general, though erroneous, would have protected the treasurer and his bondsmen from liability if the treasurer had paid the warrants presented to him out of the public property fund, an entirely different question is presented when it is sought by means of a writ of mandamus to compel the treasurer to act on this advice. Whether the treasurer would have been protected

if he had voluntarily paid out, on the advice of the attorney general, a portion of the public property fund, is a question not involved in the present case. But certain it is that the courts should not by mandamus compel the custodian of the public funds of the state to pay out a portion thereof when such payment would be a violation of the fundamental law of the state."

The various decisions on the necessity for the duty to be clear and positive were discussed quite fully in the case of State v. Wilson, 123 Ala. 259, 26 South. 482, 45 L. R. A. 772, the court saying: "The rule as to the duty and the right to its performance is variously, and not always accurately, expressed in the adjudged cases. The right must be 'certain and positive': Beaman v. Board, 42 Miss. 237. The duty must be 'clear, and if there be doubt, involving the necessity for litigation,' the writ will not lie: Townes v. Nichols, 73 Me. 515. There must be 'a specific legal right and a positive duty': State v. Burnside, 33 S. C. 276, 11 S. E. 787. 'Duty must be specifically enjoined by law': Freon v. Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794. Right 'must be clearly established. If right doubtful, writ will be refused': Mobile & O. R. Co. v. People, 132 Ill. 559, 22 Am. St. Rep. 556, 24 N. E. 643. 'Writ will not issue where there is a substantial doubt of respondent's duty': State v. Buhler, 90 Mo. 560, 3 S. W. 68. 'Will not be awarded when there is a doubt of the relator's right to the relief sought': People v. Solomon, 46 Ill. 415. 'Duty must be clearly enjoined by law': Draper v. Noteware, 7 Cal. 276. 'It must be clearly commanded by law': Puckett v. White, 22 Tex. 559. 'When the legal right is doubtful, writ will be denied': State v. Appleby, 25 S. C. 100. Issued when there is a failure to perform 'plain official duty' (Maddox v. Neal, 45 Ark. 121, 55 Am. Rep. 540), not 'when well-founded doubt as to the alleged duty arises' (People v. Johnson, 100 Ill. 537, 39 Am. Rep. 63; People v. Hatch, 33 Ill. 9). 'Where the validity of a judgment of conviction is doubtful, writ will not issue to enforce it': Rex v. Broderip, 5 Barn. & C. 239, 7 Dowl. & R. 861, 29 R. R. 229; Regina v. Ray, 44 U. C. Q. B. 17. The act sought to be compelled must be 'clearly defined and enjoined by law': Glasscock v. Commissioner of General Land Office, 3 Tex. 51. 'The writ does not lie to compel a county judge to perform an act which the law does not specifically enjoin upon him as a duty resulting from his office': State v. Napier, 7 Iowa, 425. The duty must be either imposed upon the officer 'by some express enactment, or necessarily result from the office he holds': Pond v. Parrot, 42 Conn. 13. Officer must be 'expressly authorized by law' to do the act: Chisholm v. McGehee, 41 Ala. 192. 'A clear, specific legal right' to have the act performed must be shown: 3 Brickell's Digest, p. 625.

"As we have said, some of the foregoing expressions are inaccurate or misleading. A doubt that may arise in the mind of the court in matter of law, as to the existence of the duty, will not, as some of the cases seem to hold, require or justify the denial of the writ. It is the court's province and duty to solve all such doubts, and declare the duty as it finds it to be, after its misgivings as to the

intent and meaning of the statute involved, or as to any other question of law, have been eliminated. Substantial doubt as to whether the facts of the particular case present the conditions upon which the officer is bound to act may, it would seem, justify or require a refusal of the writ. Of course, the doubts of the officer as to his duty are of no consequence: State v. Tarpen, 43 Ohio St. 311, 1 N. E. 209. Again, the duty need not be 'specifically enjoined' or 'expressly prescribed' by law. The true rule in this connection, we apprehend, is that the duty must be imposed in terms by the statute, in cases like the one in hand, or must result therefrom by fair and reasonable construction or interpretation. It must appear from the statute in terms or by fair implication: Mobile & O. R. R. Co. v. Wisdom, 5 Heisk. 125; Brown v. Duane, 14 N. Y. Supp. 450; Hambleton v. Town of Dexter, 89 Mo. 188, 1 S. W. 234; Pond v. Parrott, 42 Conn. 13."

The duty must be a plain one imposed by law: Kimberlin v. Commission to Five Civilized Tribes, 104 Fed. 653, 44 C. C. A. 109. It should be both plain and unambiguous: Caven v. Coleman, 100 Tex. 467, 101 S. W. 199. So, also, it has been stated that a clear and specific legal right may be enforced by the writ: State v. Associated Press, 159 Mo. 410, 81 Am. St. Rep. 368, 60 S. W. 91, 51 L. R. A. 151. And that the writ will only issue where the duty is clear and unequivocal: State v. Colorado etc. R. Co., 120 La. 9, 44 South. 905. Or that mandamus will lie to compel the performance of a specific act pointed out by the statute: Ward v. Commissioners of Beaufort County, 146 N. C. 534, ante, p. 489, 60 S. E. 418; State v. Coufal (Neb.), 95 N. W. 362. And that it lies to compel the constitutional executive officers of the state to perform the duties required of them by law: State v. Houston, 40 La. Ann. 393, 8 Am. St. Rep. 532, 4 South. 50.

But it will not issue to determine an empty and barren technical right on behalf of the relator: State v. Associated Press, 159 Mo. 410, 81 Am. St. Rep. 368, 60 S. W. 91, 51 L. R. A. 151. Nor will it lie to compel the discharge of duties imposed by a statute which has been repealed: Browne v. State (Ala.), 41 South. 407. Nor where the performance of the duty has been rendered impossible of performance: Ex parte Shawdies, 66 Ala. 134; Ackerman v. Desha County, 27 Ark. 457; Rice v. Walker, 44 Iowa, 458; Benton Harbor v. St. Joseph etc. Ry. Co., 102 Mich. 386, 47 Am. St. Rep. 553, 60 N. W. 758, 26 L. R. A. 245; People v. Greene County Supervisors, 12 Barb. 217; State v. Lehre, 7 Rich. 234.

Mandamus will not lie to compel a public official or tribunal to perform any act not within his or its official duty: State v. Dunn, Minor, 46, 12 Am. Dec. 25; Sapp v. De Lacy, 127 Ga. 659, 56 S. E. 754; State v. Napier, 7 Iowa, 425; Bangor v. County Commissioners, 87 Me. 294, 32 Atl. 903; O'Brien v. Tallman, 36 Mich. 13; Board of Chosen Freeholders v. Vanarsdale, 42 N. J. L. 536. Nor will mandamus compel the performance of an act which, without its command, would not be lawful: State v. Judge of Orphans' Court, 15 Ala. 740; Hall v. Steele, 82 Ala. 562, 2 South. 650; Rosenthal v. State Canvassers, 50 Kan. 129, 32

Pac. 129, 19 L. R. A. 157; Clark v. Buchanan, 2 Minn. (Gil. 298) 346; State v. United States Express Co., 95 Minn. 442, 104 N. W. 556; Ross v. Lane, 3 Smedes & M. 695; Johnson v. Lucas, 11 Humph. 306.

Where the allowance of the writ of mandamus, though compelling a technical compliance with a law, violates the spirit of the law itself, the court may refuse to issue it: Wredwold v. Dodson, 95 Cal. 450, 30 Pac. 580; State v. Commissioners of Phillips County, 26 Kan. 419.

III. Necessity for the Duty to be Specific and not Complicated nor Involving a Continuous Series of Acts.

"The remedy by mandamus is one which is allowed to compel the performance of some duty owing to an individual or to the public. The duty must be specific in its nature, and of such character that the court can prescribe a definite act or series of acts which will constitute a performance of the duty, so that the respondent may know what he is obliged to do, and may do the act required, and the court may know that the act has been performed and may enforce its performance. It is not necessary, in all cases, that the performance of the duty should consist of a single act. It may be a succession of acts, if the duty is specific, and the acts are of such a nature that the court can supervise the performance of the duty and the execution of the mandate. For example, the court may require a railroad company to relay a portion of its track which has been taken up, and operate it; to operate its railway as a continuous line; to deliver freight to a certain elevator; to run a daily passenger train for the accommodation of passengers over its road, in place of a mixed stock and passenger train; or to stop all its passenger trains at a certain station. But the writ has never been made use of, and does not lie, in this state, at least, for the purpose of enforcing the performance of duties generally. It will not lie where the court would have to control and regulate a general course of official conduct and enforce the performance of official duties generally. In such a case the court would not prescribe the particular act to be performed and enforce its performance. It is plain that in this case, where the court is asked to require the defendant to adopt a course of official action, although it is a course required by the statute and imposed upon him by the law, it would be necessary for the court to supervise generally his official conduct, and to determine in very numerous instances whether he had persistently, and to the extent of his power and the force in his hands, carried out the mandate of the court and performed his official duty. It is manifest that where there are about seven thousand saloons in a city, which are kept open on the Sabbath day, in violation of law, as is alleged in this case, the court would not only have to enforce a general course of official conduct on the part of the mayor, but must also determine, in numerous instances, whether ground existed for the revocation of licenses, whether there had been violations of law, and to what extent he had endeavored to perform his duty with the force and facilities at his command for doing it. The writ will not lie for any such purpose": People v. Dunne, 219 Ill. 346, 76 N. E. 570.

The writ was refused in State v. Brewer, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 1001, under facts similar to the above case from Illinois.

But in Goodell v. Woodbury, 71 N. H. 378, 52 Atl. 855, mandamus was allowed to issue to compel the chief of police and commissioners of police to prosecute certain persons who were violating the laws relating to the sale of intoxicating liquors, notwithstanding that it was urged that the relators had an adequate remedy at law by removal from office, and that the prayer of the petition called for a continuous course of action consisting of many acts.

And in Moores v. State, 71 Neb. 522, 115 Am. St. Rep. 605, 99 N. W. 249, the court allowed mandamus to issue against the mayor, chief of police, and the board of police commissioners, commanding them to arrest all persons found violating the laws relating to gambling at a specified place which was openly conducted as a gambling-house, at which the buying and selling of pools on horseraces was carried on.

Mandamus is not a remedy to compel the making of a contract, and particularly where the performance of the contract involves and requires, for a long time, the exercise of judgment, continuous supervision, and business discretion, such as a daily news service to a publishing company by an association engaged in the business of gathering news: State v. Associated Press, 159 Mo. 410, 81 Am. St. Rep. 368, 60 S. W. 91, 51 L. R. A. 151. Likewise mandamus will not lie to compel the performance of a series of complicated duties requiring the exercise of judgment and discrimination, such as the duties of the President and Secretary of War under the act of Congress providing for the increase and reorganization of the army, unless there be a very plain and unmistakable departure from its provisions: United States v. Root, 22 App. D. C. 419.

IV. Necessity for Public Interests to have Suffered Where the Duty is a Public One.

As has been shown in the preceding subdivisions, mandamus lies to compel the performance of a duty imposed by law. The court in State v. Milwaukee Medical College, 128 Wis. 7, 116 Am. St. Rep. 21, 106 N. W. 116, said: "It is granted usually for public purposes to compel the performance of a public duty imposed by law. It has been said that 'it is used only in extraordinary cases, and where the usual and ordinary modes of proceeding and forms of remedy are powerless to afford redress to the party aggrieved, and where without its aid there would be a failure of justice': High on Extraordinary Legal Remedies, 3d ed., sec. 5. The writ of mandamus lies to compel the performance of a public duty prescribed by statute, and to keep subordinate and inferior bodies and tribunals exercising public functions within their jurisdiction, and to compel, in proper cases, the performance of specific duties imposed by law; State v. Janesville St. R. Co., 87 Wis. 72, 41 Am. St. Rep. 23, 57 N. W. 970, 22 L. R. A. 759; State v. Kellogg, 95 Wis. 672, 70 N. W. 300; State v. Polk Co., 88 Wis. 355, 60 N. W. 266; State v. Milwaukee Chamber of Commerce, 47 Wis.

670, 3 N. W. 760; State v. Wisconsin C. R. Co., 123 Wis. 551, 102 N. W. 16; State v. Bergenthal, 72 Wis. 314, 39 N. W. 566; State v. Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33; State v. Chittenden, 112 Wis. 569, 88 N. W. 587; Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042; People v. Nash, 47 Hun, 542; Shortt on Mandamus, 228; Wood on Mandamus, 5; High on Extraordinary Legal Remedies, 3d ed., sec. 320f."

But unless the public interests have been injuriously affected, a private individual cannot insist by mandamus that a public right or duty be enforced. It is not sufficient that he has suffered private damage: Crane v. Chicago etc. Ry. Co., 74 Iowa, 330, 7 Am. St. Rep. 479, 37 N. W. 397.

In England, the writ of mandamus was originally what is called a "prerogative writ," but in this country it is simply a writ, devested of all its prerogative features, for the enforcement of a remedy by a person having a legal right against another person withholding that right: Swift v. Richardson, 7 Houst. 338, 40 Am. St. Rep. 127, 32 Atl. 143.

V. The Right to Compel the Act is Dependent upon Its Character and not the Official Position of the Person Who is to Perform It.

In the famous case of Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60, the question arose whether mandamus was the proper remedy to compel the Secretary of the State to deliver a certain commission which had been signed by the outgoing President, and Chief Justice Marshall, observed: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised—in which he is the mere organ of executive will—it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation.

"But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular discretion of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden—as, for example, to record a commission, or a patent for land, which has received all the legal solemnities, or to give a copy of such record—in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."

In other words, where the law in positive terms enjoins upon an executive officer a mere ministerial duty, leaving him no choice or discretion in the matter, and no judgment to exercise whether he will or will not act, the writ of mandamus will lie, since it is the character of the act itself, and not the official position, which determines the propriety of the writ: State v. Crawford, 28 Fla. 441, 10 South.

118, 14 L. R. A. 253; State v. Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557. Thus the duty of a mayor or other presiding officer of a legislative body to sign bills or ordinances regularly passed by such body is a ministerial duty not involving the exercise of discretion, and hence enforceable by mandamus: Dreyfus v. Lonergan, 73 Mo. App. 336; State v. Meier, 143 Mo. 439, 45 S. W. 306. The duties of a Secretary of State in attesting to the signature of the governor to a pardon and affixing the seal of the state to the same are merely ministerial acts, regardless of the fact that he is a member of one of the executive branches of the government, and hence he may be compelled to perform such acts by means of mandamus proceedings: State v. Jenkins, 20 Wash. 78, 54 Pac. 765.

VI. What Kinds of Duties the Performance of Which are Compellable by Mandamus.

a. **Duties of a Ministerial Character.**—The general rule is that mandamus will lie to compel the performance of duties which are merely ministerial in character: Tennessee etc. R. Co. v. Moore, 36 Ala. 371; Hempstead v. Underhill's Heirs, 20 Ark. 337; Stuart v. Haight, 39 Cal. 87; Pond v. Parrott, 42 Conn. 13; American Casualty etc. Ins. Co. v. Fyler, 60 Conn. 448, 25 Am. St. Rep. 337, 22 Atl. 494; United States v. Bayard, 5 Mack. 428; United States v. Windom, 19 D. C. 54; State v. Crawford, 28 Fla. 441, 10 South. 118, 14 L. R. A. 353; State v. Richards, 50 Fla. 284, 39 South. 152; Bonner v. State, 7 Ga. 473; People v. State Board of Dental Examiners, 110 Ill. 180; People v. Van Cleave, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795; Van Dorn v. Anderson, 219 Ill. 32, 76 N. E. 53; State v. Engle, 127 Ind. 457, 22 Am. St. Rep. 655, 26 N. E. 1077; Savage v. Holmes, 15 La. Ann. 334; State v. Shakespeare, 41 La. Ann. 156, 6 South. 592; Magruder v. Swann, 25 Md. 173; Minnesota etc. R. Co. v. Sibley, 2 Minn. 1 (Gil. 13). State v. Chase, 42 Mo. App. 343; State v. Toole, 26 Mont. 22, 91 Am. St. Rep. 386, 66 Pac. 496, 55 L. R. A. 644; State v. Thayer, 31 Neb. 82, 47 N. W. 704; State v. Blasdel, 4 Nev. 241; Cotten v. Ellis, 52 N. C. 545; Morton v. Comptroller General, 4 S. C. 430; Kuechler v. Wright, 40 Tex. 600; Newton v. Leal (Tex. Civ. App.), 56 S. W. 209; Caven v. Coleman, 100 Tex. 467, 101 S. W. 199; Taylor v. Salt Lake County Court, 2 Utah, 405; Robinson v. Rogers, 24 Gratt. 319; State v. Brewer, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 1001; Mann v. Mercer County Court, 58 W. Va. 651, 52 S. E. 776; State v. Bare (W. Va.), 56 S. E. 390.

The nature of acts or duties which are to be classed as ministerial is well shown by the opinion of Mr. Justice Brannon in Marcum v. Ballot Commissioners, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296, wherein he said: "I admit the doctrine laid down in State v. County Court, 33 W. Va. 589, 11 S. E. 72, that mandamus will not lie to control the exercise of the discretion of any court, board, or officer when the act complained of is either judicial or quasi-judicial in its nature; that the inferior tribunal may be compelled to act in such case if it unreasonably neglects or refuses to do so, but, if it does act, the propriety of its action, however erroneous, cannot be questioned or con-

trolled by mandamus—followed in Miller v. County Court, 34 W. Va. 285, 12 S. E. 702, and State v. Herrald, 36 W. Va. 721, 15 S. E. 974. But it is equally well settled that if the act to be performed is not one of legal discretion—that is, judicial in nature—but is merely ministerial, mandamus will lie: Board of Supervisors of Minturn, 4 W. Va. 300; Doolittle v. County Court, 28 W. Va. 158; full note to Dane v. Derby, 89 Am. Dec. 732. It turns, then, on the character of the act. The board of ballot commissioners is not a court, but a merely ministerial body. But is its function of admitting the names of nominees to a place on the official election ballots in nature one of discretion, judicial in nature, or merely ministerial?

"A ministerial act is one which a person performs in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment upon the propriety of the act being done: Merrill on Mandamus, sec. 30; Flournoy v. Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468, and note; American etc. Security Co. v. Fyler, 60 Conn. 448, 25 Am. St. Rep. 337, 22 Atl. 494; Chapter 3 of the Code of 1891 provides how nominations for public office shall be made and certified to be put on the ballots, and, in section 33, says, that it shall be the duty of the ballot commissioners to provide ballots for every election, 'and cause to be printed on the ballot the name of every candidate whose name has been certified to or filed with the clerk of the circuit court in the manner provided in this chapter.' Now, I confidently assert that, when a name of a candidate for office so certified comes before this board, it is its bounden duty to put it on the ballot, and that this duty is ministerial, because the board has no discretion as to putting it on. Ministerial is the nature of the duty of the board when but one certificate of nomination is before it. But, when a second certificate of nomination comes before the board, does it at once change the nature of the duty from what it was before, simply ministerial, into one of judicial nature? Here the question is close and difficult. Notice that the above definition of a ministerial act says it is ministerial when the officer or tribunal has no discretion as to the propriety or impropriety of doing the act, but must do it; that is, when he has no power to say whether he will or will not do the act, it is ministerial; but when he has power or discretion to do or not to do the act, as his judgment on the facts directs him, the act is judicial in nature, not ministerial: Merrill on Mandamus, secs. 30, 33. Clearly, this board had no discretion to say it would put no name on the ballot, and therefore the general nature of its function was ministerial. But this does not dispose of our trouble, for, though the general nature of making up election ballots by these commissioners be ministerial, yet it does not follow that mandamus inevitably lies; for 'it is not the office of the writ to control discretion even in the act of performing ministerial duties,' says Spelling on Mandamus, section 1395. If, to discharge that ministerial duty, it becomes necessary for the tribunal to decide on law and facts between contesting claims or rights, it becomes judicial in nature. When the two contestant nominees were both before the board, the matter became a lis, a contro-

versy between two parties upon their respective rights, which called on the board to investigate facts, and upon them say which, in the eye of this election law, was entitled to the Democratic place on the ballot. This was, then, a prejudicial question, called quasi judicial when the matter is before an officer or a tribunal, not a court; and such a question cannot be made the basis of a mandamus at common law."

And in American Casualty etc. Co. v. Fyler, 60 Conn. 448, 25 Am. St. Rep. 337, 22 Atl. 494, the court, after citing numerous authorities, said: "The principle set forth in these authorities is, that a writ of mandamus may issue where the duty which the court is asked to enforce is the performance of some precise, definite act, or is one of a class of acts purely ministerial and in respect to which the officer has no discretion whatever, and the right of the party applying for it is clear and he is without other adequate remedy; and that the writ will not issue in a case where the effect of it is to direct or control an executive officer in the discharge of an executive duty involving the exercise of discretion or judgment. The rule is stated very clearly by Mr. Justice Bradley in United States v. Black, 128 U. S. 40, 9 Sup. Ct. Rep. 12, 32 L. ed. 354. He says: 'The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require the interpretation of the law, the court having no appellate power for that purpose; but where they refuse to act in a case at all, or where, by a special statute or otherwise, a mere ministerial duty is imposed upon them—that is, a service which they are bound to perform without further question—then, if they refuse, a mandamus may be issued to compel them.' The same rule is given in High on Extraordinary Legal Remedies, section 42, where that author adds: 'Indeed, so jealous are the courts of encroaching in any manner upon the discretionary powers of public officers, that, if any reasonable doubts exist as to the question of discretion or want of discretion, they will hesitate to interfere, preferring rather to extend the benefit of the doubt in favor of the officer.' 'A ministerial act is one which a person performs in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done': Flournoy v. City of Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468."

In almost every mandamus case, the question arises whether the act is of a ministerial or judicial character as those terms have been defined and limited by the courts, since there is no ministerial act to which the writ would be applicable that does not in some measure and to some extent involve the exercise of judgment and discretion: Payne v. United States, 20 App. D. C. 581. The character of ministerial duties is fixed by the nature of the act. Thus, the character of ministerial duties of a county superintendent of schools cannot be changed by an appeal to and a decision of the state board of education so as to prevent their enforcement by mandamus: People v. Vanhorn, 20 Colo. App. 215, 77 Pac. 978.

b. Duties Involving the Exercise of Judgment or Discretion.

1. The General Rule.—The general rule is, that mandamus does not lie to compel the performance of an act which involves the exercise of judgment or discretion: Collins v. Hawkins, 77 Ark. 101, 91 S. W. 26; McCoy v. State, 2 Marv. (Del.) 543, 36 Atl. 81; State v. Barnes, 25 Fla. 298, 23 Am. St. Rep. 516, 5 South. 722; People v. Church, 103 Ill. App. 132; Kinzer v. Directors etc. School Dist., 129 Iowa, 441, 105 N. W. 686, 3 L. R. A., N. S., 496; State v. Bolte, 151 Mo. 362, 74 Am. St. Rep. 537, 52 S. W. 262; Oliver v. Wilson, 8 N. D. 590, 73 Am. St. Rep. 784, 80 N. W. 757; Sansom v. Mercer, 68 Tex. 488, 2 Am. St. Rep. 505, 5 S. W. 62. Hence, mandamus will not issue to compel a court, board or tribunal to do any act involving the exercise of judgment or judicial discretion: Ex parte South. etc. R. Co., 44 Ala. 564; Ex parte Hutt, 14 Ark. 368; Kerr v. Superior Court, 130 Cal. 183, 62 Pac. 479; Reddick v. People, 82 Ill. App. 85; Wilson v. Louisiana Purchase Exp. Com., 133 Iowa, 586, 119 Am. St. Rep. 646, 110 N. W. 1045; Commonwealth v. Boone Co. Court, 82 Ky. 632; State v. Judge, 43 La. Ann. 826, 9 South. 640; Duvall v. Swann, 94 Md. 608, 51 Atl. 617; State v. Megown, 89 Mo. 156, 1 S. W. 208; State v. Lincoln, 68 Neb. 597, 94 N. W. 719; State v. Curler, 26 Nev. 347, 67 Pac. 1075; Sinnickson v. Corwine, 26 N. J. L. 311; Ex parte Bailey, 2 Cow. 479; Commonwealth v. Philadelphia, 211 Pa. 85, 60 Atl. 549; Taylor v. Salt Lake County Court, 2 Utah, 405; Marcum v. Ballot Commissioners, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296; Ex parte Denver etc. Ry. Co., 101 U. S. 711, 25 L. ed. 872. The remedy in such a case is by an appeal: Board of Commissioners v. Johnson, 124 Ind. 145, 19 Am. St. Rep. 88, 24 N. E. 148, 7 L. R. A. 684.

Where a subordinate body is vested with the power to determine a question of fact, the duty is judicial, and it cannot be compelled to decide in any particular way, however clearly it may be made to appear what the decision ought to be: Board of Commissioners v. People, 78 Ill. App. 586.

A judicial officer or court may be compelled to exercise his discretion: Ex parte Shaudies, 66 Ala. 134; McCreary v. Rogers, 35 Ark. 298; People v. Hubbard, 22 Cal. 34; Citizens' Bank v. Webre, 44 La. Ann. 1081, 11 South. 706; People v. Judges, 1 Mich. 359; State v. Lafayette Co. Court, 41 Mo. 221; Roberts v. Holsworth, 10 N. J. L. 57; People v. Steele, 2 Barb. 397; Commonwealth v. Judges of Common Pleas, 3 Binn. 273; Commonwealth v. McLaughlin, 120 Pa. 518, 14 Atl. 377. Where a duty involves the exercise of judgment or discretion, although mandamus will issue to compel its exercise, it will not issue to direct in what particular way such judgment or discretion shall be exercised: State v. Williams, 69 Ala. 311; Ex parte Redd, 73 Ala. 548; McBride v. Hon, 82 Ark. 483, 102 S. W. 389; Greenwood Cemetery etc. Co. v. Routt, 17 Colo. 156, 31 Am. St. Rep. 284, 28 Pac. 1128, 15 L. R. A. 369; People v. Board of Commissioners, 176 Ill. 576, 52 N. E. 334; People v. Chytraus, 183 Ill. 190, 55 N. E. 666; State v. Judge of Second District Court, 32 La. Ann.

1306; Duvall v. Swann, 94 Md. 608, 51 Atl. 617; Miltenberger v. St. Louis County Court, 50 Mo. 172; State v. Churchill, 37 Neb. 702, 56 N. W. 484; Squier v. Gale, 6 N. J. L. 157; People v. Superior Court, 20 Wend. 607; People v. Scannel, 63 App. Div. 243, 71 N. J. Supp. 383. It cannot be used for the purpose of correcting errors of judgment in the exercise of discretion: Ex parte Campbell, 130 Ala. 171, 30 South. 385; State v. Walker, 85 Mo. App. 247.

The court in Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766, in a very interesting opinion stated that it is not universally true that mandamus will not issue to control judicial action, and cited numerous instances in support of the statement. The court, in the course of its opinion, said: "There are innumerable cases in which it has been laid down that mandamus cannot issue to control discretion. The rule—which is undoubtedly correct when properly understood—has been expressed in various forms. It has been repeatedly said that the writ cannot perform the functions of a writ of error; that it cannot issue to revise judicial action, but can only compel the performance of ministerial functions; and that it will issue to compel a tribunal to act in some way, but not in any particular way. These formulas undoubtedly express a truth, but they express it in an inaccurate and misleading manner, and by reasoning from them as if literally, and in all cases, true, courts have sometimes been led into error, and have frequently been forced to call acts 'ministerial,' which are plainly not so. An examination of the authorities will demonstrate the inaccuracy of the above phrases." The court, after referring to cases in which mandamus was issued to correct abuses of discretion, to compel a court to issue an attachment for contempt in disobeying an injunction, to compel a judge to sign a bill of exceptions, and the compelling of judges to perform various acts incidental to the trial of a case, continued: "In view of the foregoing cases, it seems a mere perversion of language to say that the writ will never issue to control judicial action, or to compel a tribunal to act in a particular way. It is by no means intended to assert that the writ could issue in this state in all the cases above referred to. The propriety of the issuance of the writ in any case must depend upon whether, under the law of the state where the litigation arises, the determination was intended to be final; and if not, upon whether the system of practice furnishes any other adequate remedy. These things might be different in different states; but the cases cited serve to show that the formulas above mentioned are not universally and literally true, and that it is dangerous to reason from them as if they were so.

"In every case the tribunal that is to act must determine, in the first instance, whether this case is a proper one for its action. And in our opinion, the true tests are whether its determination is intended by law to be final, and, if not, whether there is any other 'plain, speedy and adequate remedy.' If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on mandamus or in any other way. If it was not intended to be final, but there is another 'plain, speedy and adequate

remedy,' the writ cannot issue; for it was not designed to usurp the place of other remedies. But if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue. Otherwise, there would be an admitted wrong without a remedy. The writ issues in such case to prevent a failure of justice. And this is its ancient office. In the language of Lord Mansfield: 'It was introduced to prevent disorder from a failure of justice and defect of police. Therefore, it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one': Rex v. Barker, 3 Burr. 1268. See, also, 3 Blackstone's Commentaries, 110; Taffing on Mandamus, 9; Commonwealth v. Justices of Court of Sessions of Hampden, 2 Pick. 414."

The question whether an act is a judicial duty is not determined by the status of the person who is to perform it. The mere fact that a judge is called on by statute to execute a certain function does not make the function a judicial function. The character of the act, as far as the question whether mandamus will lie or not, is dependent on its qualities and not on the mere accident as to the person who has been designated to perform it: Robey v. Commissioners of Prince George's County, 92 Md. 150, 48 Atl. 48.

The court in Ex parte Candee, 48 Ala. 386, in speaking on this question said: "It by no means follows that a duty is judicial because it is to be performed by a judge. If, in its performance, he does not exercise the powers that appropriately appertain to his judicial office, it is ministerial, and not judicial, although its performance requires the exercise of his judgment."

The gist of the law of mandamus was well stated by Judge Sanborn in Kimberlin v. Commission to Five Civilized Tribes, 104 Fed. 653, 44 C. C. A. 109. He said: "The writ of mandamus issues to compel the performance of a plain duty imposed by law. Where that duty is the exercise of judgment or discretion by an officer in the decision of a question of law or fact, or both, it may issue to compel a decision, but it may not command him in what particular way that decision shall be rendered. When a question has been decided by the officer or person to whose judgment or discretion the law has intrusted its determination, the writ of mandamus may not issue to review or reverse that decision or to compel another. It may issue to command judicial officers to hear and decide a question within their jurisdiction, but courts have no power by writ of mandamus to direct such officers how they shall decide such a question, or in whose favor they shall render their judgment, because such action would result in the substitution of the judgment and opinion of the commanding court for that of the judicial officers to whose judgment and discretion the law intrusted the decision of the issue. For the same reason it cannot be invoked to compel a court or a judicial officer to reverse a decision already rendered, to correct an erroneous conclusion, or to render another decision, even though there may be no other method provided by the law for the review or correction of the error."

The mere fact that a judicial question arises incidentally will not, however, prevent the issuance of mandamus: Sinclair v. Young, 100 Va. 284, 40 S. E. 907. The court in State v. Barnes, 25 Fla. 298, 23 Am. St. Rep. 516, 5 South. 722, observed: "The rule long established and governing this state is thus given by Mr. High: 'In all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion or to determine upon the decision which shall be finally given. And wherever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or in reaching a given result of official action, they are required to exercise any degree of judgment. While it is proper by mandamus to set them in motion and to require their action upon the matters officially intrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion, nor attempt by mandamus to control or dictate the judgment to be given': High on Extraordinary Legal Remedies, sec. 42. See Towle v. State, 3 Fla. 202; State v. Van Ness, 15 Fla. 317; McWhorter v. Pensacola etc. R. R. Co., 24 Fla. 417, 12 Am. St. Rep. 220, 5 South. 129, 2 L. R. A. 904.

"While the rule is admitted by relator's counsel, he claims that there are exceptions to it; but the authority he quotes says: 'Perhaps the exceptions are more apparent than real, and involve only cases where the discretion required to be exercised, while to some extent involving the examination of questions of fact and the drawing of conclusions therefrom, is regarded as ministerial rather than judicial': Note to Weeden v. Town Council of Richmond, 98 Am. Dec. 375. The purport of this may be better understood when the author, instancing a case where the law confers a right upon a person in performing certain acts, and designates another person or some tribunal to concede the right or issue evidence of it, when shown that the acts were done, proceeds to say that if the examining person or tribunal should 'capriciously determine that the acts have not been performed,' and there is no appeal, the court should 'compel the requisite action by mandamus.' This is scarcely different from the rule that where the thing to be done is merely ministerial, if the party whose duty it is to do it refuses, the court will compel him to act—a capricious determination being equivalent to a refusal to act."

2. **Effect Where the Refusal is a Gross Abuse of Discretion, or Arbitrary and Capricious.**—One of the apparent exceptions to the general rule that mandamus will not lie to compel the performance of an act involving the exercise of discretion is the rule that mandamus will lie in respect to a discretionary duty where such discretion has been grossly or palpably abused: Wood v. Strother, 76 Cal. 549, 9 Am. St. Rep. 249, 18 Pac. 766; State v. Rickards, 16 Mont. 145, 50 Am. St. Rep. 476, 40 Pac. 210, 28 L. R. A. 298; State v. Scott, 60 Neb. 98, 82 N. W. 320; Ex parte Virginia, 100 U. S. 313, 25 L. ed. 667. Likewise mandamus issues where there has been such an evasion of positive duty or abuse of discretion as amounts to a

virtual refusal to perform a required duty: Illinois State Board of Health v. People, 102 Ill. App. 614; People v. Board of Commissioners, 176 Ill. 576, 52 N. E. 334. Mandamus will lie for a discretionary act where the refusal to act is arbitrary, or from a motive to accomplish personal or selfish ends: People v. Van Cleave, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795.

The requirement that an officer shall act to the best of his knowledge and judgment in the exercise of discretionary power is one which he cannot arbitrarily set aside. He must act in good faith, and cannot set up as an excuse and as a cover for his disobedience of the law a mere pretense of action. Courts will not allow remedies to be defeated by mere pretexts or evasions of duty. Hence, where such parties have acted in bad faith or corruptly in reaching their decisions, the courts hold that their conclusions may be reviewed by the writ of mandamus: State v. Bare (W. Va.), 56 S. E. 390.

This rule is illustrated by the case of Glencoe v. People, 78 Ill. 382, which arose over a petition to call an election. The court said: "The petition being in conformity with the statute, it was the plain duty of the council to act upon it at the earliest convenient moment, fix the time and place of holding the election, select the judges therefor, and give the required notice thereof. But, inasmuch as no time is designated by the statute when the election shall be held, there was some discretion, necessarily, in the council, in this regard. The implication of law, however, is, that the time fixed should be within a reasonable period, in view of all the circumstances. Precisely what would be a reasonable period might, in many instances, be of extremely difficult solution; instances of what would be an unreasonable period can more readily be imagined, which will serve the present purpose for illustration. Had the election been postponed for ten years, or even five years, it would need no argument to show that it would amount practically, to a denial of the right guaranteed to the petitioners. No one would pretend the discretion vested in the council could justify this. So it would seem to be equally clear that any postponement, not authorized by some public necessity, would be unjustifiable. The discretion vested in the council cannot be exercised arbitrarily, for the gratification of feelings of malevolence, or for the attainment of merely personal and selfish ends. It must be exercised for the public good, and should be controlled by judgment, and not by passion or prejudice. When a discretion is abused and made to work injustice, it is admissible that it shall be controlled by mandamus."

In other words, where the performance of duties involving the exercise of discretion has been done with manifest injustice, the courts are not precluded from commanding its proper performance by means of mandamus: State v. Board of President and Directors, 134 Mo. 296, 56 Am. St. Rep. 503, 35 S. W. 617.

Likewise, where the exercise of discretion has been arbitrary, capricious, or oppressive, mandamus will lie to compel its proper performance: Ex parte Trafuall, 6 Ark. 9, 42 Am. Dec. 676; United States v. Hitchcock, 19 App. D. C. 333; Payne v. United States, 20 App. D. C. 581; State v. Barnes, 25 Fla. 298, 23 Am. St. Rep.

516, 5 South. 722; People v. Board of Trustees, 122 Ill. App. 449; Van Dorn v. Anderson, 219 Ill. 32, 76 N. E. 53; Barry v. State, 57 Neb. 464, 77 N. W. 1096; People v. State Racing Commission, 190 N. Y. 31, 82 N. E. 723.

In United States v. Macfarland, 28 App. D. C. 552, which was a petition for a mandamus to the commissioners of the District of Columbia to restore a plumber's license, the court said: "Whilst it is true that matters calling for discretion on the part of executive officers are beyond the control of the courts through the writ of mandamus, it is equally true that in cases where there is no room for the exercise of discretion, their acts may be controlled by mandamus. 'The acts of all its officers' (P. O. Dept.), said Mr. Justice Peckham, in American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. Rep. 33, 47 L. ed. 90, 'must be justified by some law, and in case an official violates the law to the injury of an individual, the courts generally have jurisdiction to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual': See, also, United States v. Cortelyou, 26 App. D. C. 298. We think the present cases within the rule laid down in these cases, and that the relator, having a clear right to the license which the commissioners attempted without authority to revoke, is entitled to the relief prayed for."

It has, however, been urged that the use of mandamus where the discretion reposed in an official has been arbitrarily or capriciously exercised in a more apparent than real exception to the general rule in such cases, since the exercise of the power in an arbitrary or capricious manner amounts, in a legal sense, to no exercise, and that the use of the writ under such circumstances may be said to merely set the officer in motion: Atlanta v. Wright, 119 Ga. 207, 45 S. E. 994; State v. Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33. A willful abuse of discretion by election commissioners in refusing to act as required by law where the facts are undisputed is controllable by mandamus: State v. Higgins, 76 Mo. App. 319. But where abuse of discretion is made the basis for the mandamus, it should be shown that such abuse was extreme and clearly indefensible: Lamb v. Webb, 151 Cal. 451, 91 Pac. 102, 646.

3. **Effect Where the Refusal is Based on an Erroneous Conception of Law or on False Information.**—Mandamus will not lie to control discretionary acts of officers for wrong decisions on the ground that wrong reasons are given therefor, except where the reasons relate to matters of law not within their discretion: State v. Barnes, 25 Fla. 298, 23 Am. St. Rep. 516, 5 South. 722. The court, in the case first cited, said: "If official discretion cannot be controlled or overridden by mandamus, except for abuse of it, what matters it in any given case that the discretion has been guided by a mistaken reason? The prohibition to interfere does not lose its force because a wrong reason has led to a wrong conclusion. The books abound in cases where the

courts refuse mandamus notwithstanding the mistake or error of the officer whose discretion is sought to be controlled, and it would be an anomaly to hold that refusal is proper where only a wrong conclusion is reached without giving the reason for it, but not proper if the reason be given and it is found not a good one.

"Looking to the authorities quoted to sustain the contention for relator, the first—State v. Lafayette County Court, 41 Mo. 221—must be discarded, because the writ was granted there to relieve against abuse of discretion. Nelson v. Edwards, 55 Tex. 389, was a case in which the court said that if the bond offered by Edwards was rejected by the commissioners to approve, because, in their opinion, Nelson was entitled to the office, mandamus would lie,—evidently because the commissioners went outside of their discretion in at all considering the controversy between the parties as to which of the two was entitled to the office. Gulick v. New, 14 Ind. 93, 77 Am. Dec. 49, was a case where the clerk whose duty it was to approve sheriff's bonds, refused, because another was in the office claiming title to it. Like the last case, the discretion exercised extended to a question of contested title to office, and the court held that mandamus was proper, as a prima facie showing of title was sufficient to entitle the applicant to approval of his bond—otherwise sufficient. In re Prickett, 20 N. J. L. 134, was another similar case of disputed title to office, as was also the case of Beck v. Jackson, 43 Mo. 117. Daniels v. Miller, 8 Colo. 542, 9 Pac. 18, was a case where the clerk refused to approve an appeal bond, because the court held that appeal did not lie. The supreme court, holding that the law did not allow appeal in the case, ordered mandamus. State v. Lewis, 10 Ohio St. 128, was a case where the officers, to approve sheriff's bond, refused because, in their opinion, the bond was not presented within the time for approval required by law. The court, holding that the commissioners mistook the law as to the time for presenting bonds, granted mandamus. Mobile Mut. Ins. Co. v. Cleveland, 76 Ala. 321, was a case where the clerk refused to approve an attachment bond because the sureties were nonresidents of the county. The law of the state not requiring sureties to be residents of the county, the court, to relieve against the mistake of the clerk, granted mandamus.

"The last two cases resting on mistake of law, it is important to observe that it was law not connected with the sufficiency of the bond, as to its form, legality and sureties, and therefore law outside of the discretion given for the approval of bonds. The use of mandamus in such cases does not conflict with the general rule. And in regard to all these cases, it will be seen that what appears to be a departure from the rule is not so in fact. They only check the exercise of discretion when assumed in regard to matters not properly within it or when mistake is made in law not germane to the discretion."

Mandamus will lie to compel a court to proceed with a trial where it refuses arbitrarily or on an erroneous view that it has no jurisdiction: State v. Steiner, 44 Wash. 150, 87 Pac. 66. And where the action of a board or commission is arbitrary, tyrannical and unrea-

sonable, or is based upon false information, the relator may have a remedy through means of the writ of mandamus: People v. Department of Health, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A., N. S., 894; People v. State Racing Commission, 190 N. Y. 31, 82 N. E. 723. And where a judge refused to exercise his discretion in granting an injunction on the ground that he considered the opinions of the supreme court on the subject to be erroneous, but that if such opinions were to be followed, the injunction should be granted, mandamus was allowed: Dodge v. Van Buren, Circuit Judge, 118 Mich. 189, 76 N. W. 315.

c. **Duties Resulting from an Office, Trust or Station.**—Another general rule in regard to the issuance of mandamus is that the writ will lie to compel the performance of an act or duty resulting from an office, trust or station: Territory v. Board of Supervisors, 2 Ariz. 248, 12 Pac. 730; Stanley-Taylor Co. v. Board of Supervisors, 135 Cal. 486, 67 Pac. 783; Meyer v. San Francisco, 150 Cal. 131, 88 Pac. 722, 10 L. R. A., N. S., 111; State v. Napier, 7 Iowa, 425; State v. New Orleans Gaslight Co., 108 La. 67, 32 South. 179; Cincinnati Valksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732; Finley v. Territory, 12 Okl. 621, 73 Pac. 273; Eberle v. King (Okl.), 93 Pac. 748; Sears v. Kincaid, 33 Or. 215, 53 Pac. 303; San Antonio v. Routledge (Tex. Civ. App.), 102 S. W. 756.

d. **Duties of a Political or Governmental Character.**—The legislative, executive and judicial departments of the government are distinct from each other, and, so far as any direct control or interference is concerned, are independent of each other; but the power of either department is not absolute, and may be incidentally affected by another department. Each department is a check upon the exercise of arbitrary power by another department. Hence, mandamus will not lie to control the exercise of political or governmental powers: Greenwood etc. Land Co. v. Routt, 17 Colo. 156, 31 Am. St. Rep. 284, 28 Pac. 1125, 15 L. R. A. 369. Thus, mandamus does not lie to compel the President or Secretary of State to present and urge a claim of a citizen against a foreign government to redress a wrong committed against him in such foreign country, since the duty is a political one: United States v. Hay, 20 App. D. C. 576.

The action of the presiding officer of a state Senate in ruling that a bill was not passed, upon the confirmation, by that body, of the report of a conference committee thereon, and in putting the question of the final passage of the bill to a vote, comes strictly within the line of his duties as president of the Senate; and a court will not by mandamus compel him to sign the bill: State v. Bolte, 151 Mo. 362, 74 Am. St. Rep. 537, 52 S. W. 262. The court in the case just cited said: "Where the action of the legislature is within its legislative power, it cannot be controlled by the judiciary by mandamus, or in any other way, for to do so would be the usurpation of a power which does not belong to the latter.

"Ex parte Echols, 39 Ala. 698, 88 Am. Dec. 749, was a proceeding by mandamus to compel the speaker of the House to send to the

Senate a bill which was alleged to have passed the House, and which he refused to send to the Senate, because of an alleged erroneous construction placed by him, and by the House on appeal from his decision, on a constitutional provision requiring a vote of two-thirds in each House to pass the bill, and the supreme court refused to award a mandamus or any other legal process on the application of a member to compel him to do so. The court said: 'This was a question certainly within the jurisdiction of the speaker of the House to pass upon, and not a mere ministerial duty, but one that pertains to their legislative functions, and is one over which the House has exclusive jurisdiction. No other department of the government can revise its action in this respect, without a usurpation of power. This court will not interfere with either of the co-ordinate departments of the government in the legitimate exercise of their jurisdiction and powers, except to enforce mere ministerial acts, required by law to be performed by some officer thereof; and not then, if the law leaves it discretionary with the officer or department. It seems to be held by all the authorities that the writ of mandamus can only issue to some officer required by law to perform some ministerial act, or to a judicial officer to require him to take action; but not in a matter requiring judgment or discretion, to direct or control him in the exercise of either. Among all the cases and text-books on this subject, none go to the length of laying down the doctrine that the speaker of the House of Representatives, of a legislative body, in a matter arising in the regular course of legislation, upon which he is called to decide, can be controlled by this or any other tribunal, except by the one over which he presides; and that, having sustained his opinion and action, this court cannot review it.'"

The duties of a board of trustees in respect to enlarging or contracting the boundaries of a municipality are legislative in character, and hence the board cannot be compelled by mandamus proceedings to pass an ordinance severing certain territory where the board has decided against doing so: Young v. Carey, 80 Ill. App. 601.

A town council constitutes the legislative branch of the town government, and as long as it acts within the statutory authority given to it in the management of the town's affairs, it cannot be controlled by mandamus. It cannot be required to act in any particular manner upon any subject with which it has a right to deal, unless it refuses to act at all, or acts arbitrarily beyond the scope of its statutory authority: Clay City v. Roberts, 30 Ky. Law Rep. 820, 99 S. W. 651.

In People v. Best, 187 N. Y. 1, 116 Am. St. Rep. 586, 79 N. E. 890, the court said: "Under the common law the writ of mandamus issued in the king's name to inferior courts, officers, corporations or persons, requiring them to do that which was particularly specified. It did not issue to the king himself, to parliament, nor the judiciary, except such inferior courts as the higher courts had the power to review. Under the provisions of the Code of Civil Procedure the writ issues as an order of the court in the cases in which it was authorized at common law, and, therefore, it cannot issue to the executive, the

legislative or judicial branch of the government, except to such inferior courts as are subject to review by the judicial branch of the government having such jurisdiction.

In State v. Meier, 72 Mo. App. 618, the question arose whether the president of the city council could be compelled by mandamus to sign a bill which had passed the council, It was claimed that the duty to sign the bill was a legislative one, and exempt from the operation of the writ. The court, in allowing the writ, said: "Acts of legislation and acts of authentication are essentially distinct. All the legislative faculty of the council was spent when the bill was passed after its third reading upon a yea and nay vote of the House. What remained to be done thereafter was the duty imposed on the defendant as the presiding officer of that body to attest by his signature that the bill in question was the one adopted by the House. Such attestation was no part of the enacting force; it merely certified that the bill upon which it was placed was the one which had been subjected to that force. In other words, it recorded an antecedent fact which it in nowise caused. This being so, how can it be rationally urged that the speaker of the House exercises legislative discretion when a condition arises in the transaction of the business of the House requiring him to append his signature to a bill. The charter of the city specifies the conditions under which he shall perform this act. These are that no objections shall be made and sustained by the House. It will be noted that no power whatever is given to him to pass upon such objections. Their consideration is exclusively reserved for the House. If it fails to sustain them, he is still required by the charter to sign the bill."

The question frequently arises whether the governor of a state can be compelled to perform duties of either a ministerial or discretionary character, but inasmuch as the decision of such cases is not dependent upon the character of the duties sought to be compelled, but upon the point whether the nature of the office of governor exempts it from mandamus, we will not consider that question in this note. Mandamus against governor is the subject of an exhaustive note attached to Greenwood etc. Land Co. v. Routt, 31 Am. St. Rep. 294.

e. **Effect Where the Duty is One Arising from a Contractual Relation.**—"Regularly, the writ of mandamus lies against a public officer to comped the performance of a public duty: American Asylum v. Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112. Hosmer, C. J., says, in that case: 'It never lies to restore a private office or to execute a private right.' It being a prerogative writ, there can be no doubt that at common law it was thus limited. In Fuller v. Plainfield Academic School, 6 Conn. 532, the writ was held to lie against an incorporated school,—'a corporation established by the supreme power of the state for public and beneficial purposes.' The question we are now considering was not made in that case. It was claimed that the defendant was an eleemosynary corporation of private endowment, and that the court had no power to review the action of the trustees. But it was held that, being a corporation with a special charter from

the General Assembly, it was controllable by the laws of the land, to be administered by competent tribunals. It seems to have been tacitly conceded that the object of the corporation was for the public good, and that the office of trustee was of a public nature. In Duane v. McDonald, 41 Conn. 517, this court said: 'We see no necessity for extending the common-law remedy of mandamus beyond its original and well-established limits.' In Parrott v. City of Bridgeport, 44 Conn. 180, 26 Am. Rep. 439, it again said: 'But the writ of mandamus has never been considered as an appropriate remedy for the enforcement of contract rights of a private and personal nature, and obligations which rest wholly upon contract, and which involve no questions of public trust or official duty'": Tobey v. Hakes, 54 Conn. 274, 1 Am. St. Rep. 114, 7 Atl. 551. Hence the general rule is that mandamus does not lie to compel the performance of mere contractual obligations: Florida etc. Ry. Co. v. State, 31 Fla. 482, 34 Am. St. Rep. 30, 13 South. 103, 20 L. R. A. 419; Excelsior Whit. Aid Assn. v. Riddle, 91 Ind. 84; Vandalia R. Co. v. State, 166 Ind. 219, 117 Am. St. Rep. 370, 76 N. E. 980; New Orleans etc. Sanitary Assn. v. Liquidation, 105 La. 172, 83 Am. St. Rep. 230, 29 South. 337; State v. Paterson etc. R. Co., 43 N. J. L. 505; Mt. Vernon v. State, 71 Ohio St. 428, 104 Am. St. Rep. 783, 73 N. E. 515; State v. Washington Irr. Co., 41 Wash. 283, 111 Am. St. Rep. 1019, 83 Pac. 308; Miller v. State Board of Agriculture, 46 W. Va. 192, 76 Am. St. Rep. 811, 32 S. E. 1007.

In State v. Milwaukee Medical College, 128 Wis. 7, 116 Am. St. Rep. 21, 106 N. W. 116, the court, in stating the general rule stated above, said: "It seems, however, to be well settled that duties imposed upon corporations, not by virtue of express law or by the conditions of their charters, but arising out of contract relations, will not be enforced by mandamus. The authorities in England and this country appear to be quite uniform to this effect: King and Wheeler, Cas. temp. Hardw. 99; Ex parte Robins, 7 Dowl. Pr. 566; King v. Mayor, 2 Term Rep. 259; King v. Bank of England, 2 Barn. & Adol. 620; Queen v. Orton, 14 Q. B. 139; Benson v. Paull, 6 El. & Bl. 273; High on Extraordinary Legal Remedies, 3d ed., secs. 25, 321; People v. Nash, 47 Hun, 542; State v. Republican R. B. Co., 20 Kan. 404; People v. Dulaney, 96 Ill. 503; Tobey v. Hakes, 54 Conn. 274, 1 Am. St. Rep. 114, 7 Atl. 551; State v. Trustees, 114 Ind. 389, 16 N. E. 808; State v. Paterson etc. R. Co., 43 N. J. L. 505; State v. Einstein, 46 N. J. L. 479; State v. New Orleans etc. R. Co., 42 La. Ann. 138, 7 South. 226; Shortt on Mandamus, 231; Merrill on Mandamus, sec. 16; State v. Zanesville & M. T. Co., 16 Ohio St. 308; State v. County Court, 39 Mo. 375; Storer Post No. 1 v. Page, 70 N. H. 280, 47 Atl. 264; People v. Trustees, 21 Hun, 184. In High on Extraordinary Legal Remedies, third edition, section 25, in speaking of mandamus, it is said: 'It is not, therefore, an appropriate remedy for the enforcement of contract rights of a private or personal nature; and obligations which rest wholly upon contract, and which involve no question of trust or of official duty, cannot be enforced by mandamus. A contrary doctrine would necessarily have the effect of substituting

the writ of mandamus in place of a decree for specific performance, and the courts have, therefore, steadily refused to extend the jurisdiction into the domain of contract rights.'"

Where, however, a contract places the relator within a certain class of persons entitled to certain privileges, mandamus will lie to compel the according of such privileges, such as the issuance of transfers by a street railway company: Richmond R. & Electric Co. v. Brown, 97 Va. 26, 32 S. E. 775.

f. **Duties of Corporations Arising by Reason of Their Franchises and Right to Exercise Eminent Domain.**—Where a corporation accepts a public franchise imposing certain duties toward the public in return for rights conferred on it, the performance of the duties so imposed is a public one, which may be compelled by mandamus: South Pasadena v. Pasadena etc. Water Co., 152 Cal. 579, 93 Pac. 490; Connolly v. Woods, 13 Idaho, 591, 92 Pac. 573; People v. Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Chicago v. Chicago Tel. Co., 230 Ill. 157, 82 N. E. 607, 13 L. R. A., N. S., 1084; Potwin Place v. Topeka Ry. Co., 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309; Railroad Commissioners v. Portland etc. R. Co., 63 Me. 269, 18 Am. Rep. 208; State v. Joplin Waterworks, 52 Mo. App. 312; In re Webster Telephone, 17 Neb. 126, 22 N. W. 237; Atwater v. Delaware etc. R. Co., 48 N. J. L. 55, 57 Am. Rep. 543, 2 Atl. 803; People v. Rochester etc. R. Co., 76 N. Y. 294; Oklahoma City v. Oklahoma Ry. Co. (Okl.), 93 Pac. 48; Haugen v. Albina L. & Water Co., 21 Or. 411, 28 Pac. 244, 14 L. R. A. 424; McCann v. South Nashville St. R. Co., 2 Tenn. Ch. 773. The duties which a public service corporation owe to the public arise from its trust or station, and are hence compellable by means of mandamus: State v. New Orleans Gaslight Co., 108 La. 67, 32 South. 179.

"When a corporation undertakes to operate a railroad franchise, it assumes all the duties and obligations which spring by law from the character of its business, and from the customs incidental to it. It tenders a continuing offer to the general public that it will perform these duties for the benefit of each and every one of them, when demanded at their hands.

"When any member of the public makes a demand upon it under the general offer, there immediately results a civil obligation on the part of the company in favor of the parties, making the demand enforceable through the usual legal remedies by which contracts are enforced. Were it not so, there would be a right without a remedy, for it could not be pretended that the state officers could be called upon to bring actions in the name of the state for the enforcement of the performance of duty by the company to all the private individuals with whom they have business relations.

"It is said that these various parties have an action for damages against the company for nonperformance of duty, and that that is their remedy, and that they cannot proceed by mandamus to force the specific performance of the duty itself. There is nothing in this

claim. The party owing the duty cannot drive the other party to an action for damages, and, by payment of money, resist the performance of duty. What the plaintiff in this suit asks for, and is entitled to is the transportation of his freight, and not the payment of money to him. The latter would furnish no adequate remedy.

"It is said that the mandamus cannot be granted, because the court would be called upon to make itself a contract between the parties, and this it is not authorized to do. The court is not called upon to make a contract between the parties, but to order the performance by the company of the duties as a carrier, which it refuses absolutely to recognize as incumbent upon it, under any terms or conditions": Cumberland Tel. etc. Co. v. Morgan's etc. R. Co., 51 La. Ann. 29, 72 Am. St. Rep. 442, 24 South. 803.

But where the duties of a public service corporation arise wholly out of contract obligations, and are not imposed by express law or by the conditions of its charter, they cannot be enforced by mandamus: Vandalia R. Co. v. State, 166 Ind. 219, 117 Am. St. Rep. 370, 76 N. E. 980.

Thus, mandamus has been allowed against a railroad company to compel it to put its roadbed in a safe condition: State v. Atlantic Coast Line R. Co., 53 Fla. 689, 44 South. 223; to furnish a separate train for passengers: People v. St. Louis etc. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656; to construct or repair viaducts: Chicago etc. R. Co. v. State, 47 Neb. 549, 53 Am. St. Rep. 557, 66 N. W. 624, 41 L. R. A. 481; to maintain suitable farm crossings: State v. Wisconsin Central Ry., 123 Wis. 551, 102 N. W. 16; to restore highway to its former condition at a railway crossing: Chicago etc. Ry. Co. v. State, 158 Ind. 189, 63 N. E. 224; and to resume operation of its road; State v. Spokane St. Ry. Co., 19 Wash. 518, 67 Am. St. Rep. 139, 53 Pac. 719, 41 L. R. A. 515. And a railroad company holding itself out to do public switching may be compelled to resume such switching for a shipper whose switching it has unlawfully refused to perform: Larabee Flour Mills Co. v. Mo. Pac. Ry., 74 Kan. 808, 88 Pac. 72. A traction company may be compelled to pave a street under the terms of an ordinance granting it the right to use the street: Rutherford v. Henderson River Traction Co., 73 N. J. L. 227, 63 Atl. 84. But in order to compel a railroad company to do a particular act in constructing its road or in running its trains, there must be a specific legal duty to do the act and clear proof of its breach: People v. Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788. Mandamus has also been allowed to enforce freight rates fixed by a state railroad commission: State v. Atlantic Coast Line R. Co., 48 Fla. 146, 37 South. 657, 40 South. 875; Southern Ry. Co. v. Atlantic Stove Works, 128 Ga. 207, 57 S. E. 429. It has been allowed to compel the furnishing of gas at rates prescribed by a rate-fixing body: Richman v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. Supp. 81. But the fixing of any specified rate itself, as, for instance, for water for irrigation, cannot be compelled by mandamus, because such an act requires the exercise of discretion: Berger v. Justice, 4 Cal. App. 532, 88 Pac. 591. Likewise express companies may be compelled by manda-

mus to discharge their duties in regard to receiving and carrying goods: Southern Express Co. v. Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A., N. S., 619; Attorney General v. Am. Express Co., 118 Mich. 682, 77 N. W. 317.

Telephone companies, being quasi-common carriers of news, and as such bound to supply all alike with similar facilities under reasonable limitations and without discrimination, may be compelled to do so by mandamus: State v. Citizens' Tel. Co., 61 S. C. 83, 85 Am. St. Rep. 870, 39 S. E. 275, 55 L. R. A. 139; Central U. Tel. Co. v. Falley, 118 Ind. 194, 10 Am. St. Rep. 114, 19 N. E. 604.

The furnishing of water may be compelled by means of mandamus: Price v. Riverside Land etc. Co., 56 Cal. 431; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Combs v. Agricultural Ditch Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966. Mandamus lies to compel a water company to extend its mains in a city where, under a contract between it and the city, it is its duty to do so: Topeka v. Topeka Water Co., 58 Kan. 349, 49 Pac. 79. But mandamus will not issue against an irrigation company to compel the furnishing of water as provided in a private contract between the petitioner and the irrigation company, since there is an adequate remedy at law on the contract: State v. Washington Irrigation Co., 41 Wash. 283, 111 Am. St. Rep. 1019, 83 Pac. 308. In this connection, see, also, the notes on the use of mandamus to compel the performance of duties by corporations, attached to Buck Mountain Coal Co. v. Lehigh etc. Co., 88 Am. Dec. 537; Crane v. Chicago etc. Ry. Co., 7 Am. St. Rep. 484; Thompson v. Reno Savings Bank, 3 Am. St. Rep. 807; and Potwin Place v. Topeka Ry. Co., 37 Am. St. Rep. 317.

VII. Application of the Rule to Specific Duties.

a. Granting or Refusal of Licenses, Permits and Certificates.— Where the granting of a license is a matter of discretion, mandamus will not lie to compel its issuance: People v. Scully, 23 Misc. Rep. 732, 53 N. Y. Supp. 125. Where a city charter provides that the police department is "authorized and empowered" to grant theatrical licenses, the power is discretionary and will not be controlled by mandamus: People v. Murphy, 65 App. Div. 123, 72 N. Y. Supp. 473. The granting of liquor licenses, being, as a general rule, a matter within the discretion of the body which has the granting, is not a matter which can be controlled by mandamus unless the discretion has been arbitrarily or capriciously exercised: Ramagnano v. Crook, 85 Ala. 226, 3 South. 845; Ex parte Whittington, 34 Ark. 394; Eve v. Simon, 78 Ga. 120; Zanone v. Mound City, 103 Ill. 552; State v. Board of Commissioners, 45 Ind. 501; Heblich v. Judge, etc. (Ky.), 10 S. W. 465; Devin v. Belt, 70 Md. 352, 17 Atl. 375; McCrea v. Roberts, 89 Md. 238, 43 Atl. 39, 44 L. R. A. 485; State v. Carver Co. Commrs., 60 Minn. 510, 62 N. W. 1135; State v. Hudson, 13 Mo. App. 61; Hamilton County v. Bailey, 12 Neb. 56, 10 N. W. 539; People v. Norton, 7 Barb. 477; Jones v. Moore Co. Commrs., 106 N. C. 436, 11 S. E. 514; In re Collarn, 134 Pa. 551, 19 Atl. 755. The same gen-

eral rule naturally holds in respect to revoking such a license: Harrison v. People, 124 Ill. App. 519.

Where, however, a market-stand permit is assigned with the approval of the proper authorities, the reissuance of it to the assignor is a mere ministerial act, and enforceable by mandamus: People v. Metz, 123 App. Div. 269, 107 N. Y. Supp. 970. Where the refusal of a license to conduct racing during the legal season is capricious, unreasonable and arbitrary, mandamus will lie: People v. State Racing Commission, 190 N. Y. 31, 82 N. E. 723.

The issuance of building permits is regarded as a ministerial act, the compelling of which may be had by mandamus: Macfarland v. United States, 18 App. D. C. 554; Bostick v. Sams, 95 Md. 400, 93 Am. St. Rep. 394, 52 Atl. 665, 59 L. R. A. 282.

The issuance of a license allowing physicians and dentists to practice their profession is an act involving the exercise of discretion, and the writ will not issue to control its exercise: State v. McIntosh, 205 Mo. 589, 103 S. W. 1078; Hart v. Folsom, 70 N. H. 213, 47 Atl. 603; Kenney v. State Board of Dentistry, 26 R. I. 538, 59 Atl. 932; Rosenkrans v. State Board (R. I.), 67 Atl. 367; State v. Coleman, 64 Ohio St. 377, 60 N. E. 568, 55 L. R. A. 105. But, of course, the examining board cannot arbitrarily refuse to issue the license for in that event the writ will issue: State v. Adcock, 206 Mo. 550, 121 Am. St. Rep. 681, 105 S. W. 270. And where a board of pharmaceutical examiners have adjudged the applicant entitled to a certificate, its issuance may be compelled, since that act, under such circumstances, is merely ministerial: Dean v. Campbell (Tex. Civ. App.) 59 S. W. 294. See, also, note to State v. Gardner, 98 Am. St. Rep. 876. Where a license as an architect is allowed in an examination to the "satisfaction" of the board of architecture, mandamus will not lie, since the matter is discretionary: Illinois State Board v. People, 93 Ill. App. 436.

With respect to whether the writ lies to compel the issuance of a certificate of incorporation, the question depends upon the statute in force, and whether the act of certifying involves discretion or is merely a ministerial act. The writ has been allowed: McChesney v. Batman, 28 Ky. Law Rep. 281, 89 S. W. 198; and also disallowed: State v. Nichols, 40 Wash. 437, 82 Pac. 741. And the writ has issued where the duty of the Secretary of State was merely to ascertain whether a certain amount of the capital of a banking institution had been paid in: State v. Cook, 174 Mo. 100, 73 S. W. 489. But it has been refused where the Secretary of State was charged with the duty of ascertaining whether the name desired was in conflict with that of any other corporation doing business in the state, and be found that the name desired was in fraud of the rights of a well-established joint stock company doing business in the state: People v. Rose, 219 Ill. 46, 76 N. E. 42. The discretion of the insurance commissioners in issuing a license to an insurance company to do business is not reviewable by mandamus: Provident etc. Soc. v. Cutting, 181 Mass. 261, 92 Am. St. Rep. 415, 63 N. E. 433; Cole v. State, 91 Miss. 628, 124 Am. St. Rep. 701, 45 South. 11. The writ will not issue to com-

pel a foreign corporation to comply with the law prerequisite to doing business, since quo warranto or imposition of a fine are the proper remedies: Secretary of State v. National Salt Co., 126 Mich. 644, 86 S. W. 124. The duty of the attorney general to commence proceedings for forfeiture of a charter of a corporation is discretionary and not compellable: Lewright v. Bell, 94 Tex. 556, 63 S. W. 623. Mandamus lies to compel a notary to make a proper certificate of acknowledgment where he has neglected to do so: People v. Kempner, 49 App. Div. 121, 63 N. Y. Supp. 199. The writ also lies to compel a clerk of a board of supervisors to certify a certain newspaper to publish the session laws where it is his duty to do so on conceded facts: In re Troy Press Co., 179 N. Y. 529, 71 N. E. 1141, affirming 94 App. Div. 514, 88 N. Y. Supp. 115.

b. **Elections, Canvassing of Votes and Right to Office.**—The subject of this subdivision was exhaustively discussed in the note to State v. Gardner, 98 Am. St. Rep. 886; hence we will consider only the cases since that time.

The ministerial duties of election boards may be compelled by mandamus proceedings: State v. Smith, 129 Mo. App. 49, 107 S. W. 1051. The writ has been allowed to call an election in some cases: Good v. Common Council of San Diego, 5 Cal. App. 265, 90 Pac. 44; O'Neal v. Ulinary, 30 Ky. Law Rep. 888, 101 S. W. 951; while in another case it was refused for the purpose of calling a special election to fill a vacancy: Rizer v. People, 18 Colo. App. 40, 69 Pac. 315. And where the refusal to call a special election for the removal of a county seat was arbitrary and capricious, the writ was allowed: Barry v. State, 57 Neb. 464, 77 N. W. 1096.

The duty of placing the names of the candidates upon the ballot is often considered as a ministerial act: Rose v. Bennett, 25 R. I. 405, 56 Atl. 185; Marcum v. Ballot Commissioners, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296. But where the convention made no return of the persons nominated, the board of election commissioners cannot be compelled to certify nominations: Jennings v. Board of Election Commissioners, 137 Mich. 720, 100 N. W. 995. Where the law provides that the registrar of elections "shall be satisfied upon examination or otherwise," as to the qualifications of an elector, mandamus does not lie to compel registration: Hastings v. Henry, 1 Mass. 287, 40 Atl. 1125. But where a board of election inspectors denies the elector's right to vote on the ground that another had voted in his name, mandamus lies: People v. Doe, 109 App. Div. 670, 96 N. Y. Supp. 389. The making and signing of the statutory result of an election may be compelled: Freeman v. Board of Registry etc. (N. J.), 67 Atl. 713. An election board may be compelled to do its duty, but not to certify any particular number of votes in favor of one or the other party: Metz v. Maddox, 189 N. Y. 460, 121 Am. St. Rep. 909, 82 N. E. 507; Carlson v. People, 118 Ill. App. 592. But the act of canvassing the result is a judicial act which cannot be controlled by mandamus: Orman v. People, 18 Colo. App. 302, 71 Pac 430; Booe v. Kenner, 105 Ky. 517, 49 S. W. 330; Cannon v. Board of Canvassers, 24 R. I. 473, 53 Atl. 637. But where only one set of re-

turns from each precinct is made to a board of canvassers, the board may be compelled to count the returns in accordance therewith and issue certificates accordingly: Lehman v. Pettingell, 39 Colo. 258, 89 Pac. 48. And the writ lies to compel a board of canvassers to count votes in favor of the sole candidate for an office: Morris v. Glover, 121 Ga. 751, 49 S. E. 786. A recount of the ballots may be compelled by mandamus: Hearst v. Woelper, 183 N. Y. 274, 76 N. E. 28; Hebb v. Cayton, 45 W. Va. 578, 32 S. E. 187. But the determination of the result of the recount is a judicial act which cannot be compelled: Cannon v. Board of Canvassers, 24 R. I. 473, 53 Atl. 637; Bach v. Spencer, 24 Ky. Law Rep. 354, 68 S. W. 442.

In case of an election contest for a seat in a municipal legislative body, that body may be compelled to hear competent testimony: Sheehan v. Manchester (N. H.), 68 Atl. 872; but where it is the sole judge of the qualifications of its members, its judgment in that respect is not controllable: State v. Bersch, 83 Mo. App. 657.

Mandamus is not the proper proceeding to try title to office but it is to reinstate an officer wrongfully discharged: Hill v. City of Boston, 193 Mass. 569, 79 N. E. 825; People v. Cahill, 188 N. Y. 489, 81 N. E. 453. Under civil service acts giving veterans a preference over other persons of equal qualifications, mandamus will not lie to control the decision as to his qualifications, but will lie to compel a determination whether they are equal to that of other applicants; Ross v. Sioux City, 136 Iowa, 125, 113 N. W. 474; Robertson v. Alberson (Iowa), 114 N. W. 885. Where the appointing officer has a discretion whether an office shall be filled or left vacant, the writ will not lie to compel an appointment: People v. Palmer, 9 App. Div. 252, 41 N. Y. Supp. 494. Mandamus will lie to compel the registration of an applicant for examination for employment in the navy yard, where the refusal is based on his being a resident of Porto Rico: United States v. Bowyer, 25 App. D. C. 121. Where it does not appear that the removal from an office is clearly illegal, mandamus has been refused: Kimball v. Olmstead, 20 Wash. 629, 56 Pac. 377.

c. **Approval of Official Bonds.**—The discretion of members of a commissioners' court as to the approval of an official bond cannot be controlled by mandamus, but they may be compelled to exercise their discretion: Gouhenour v. Anderson, 35 Tex. Civ. App. 569, 81 S. W. 104. But, where indorsements of approval by some officials on such a bond are contingent merely upon certain formalities having taken place, mandamus will lie to compel such indorsements: Hertel v. Boismenne, 229 Ill. 474, 82 N. E. 298.

d. **Management of Schools.**—This subdivision is very fully considered in the note to State v. Gardner, 98 Am. St. Rep. 878. A teacher in a public school is not a public officer. Mandamus will not lie to compel a school board to permit him to take charge of a school under his contract of employment: State v. Smith, 49 Neb. 755, 69 N. W. 114. While the particular grade certificate to a school teacher is not subject to mandamus, still where the teacher has been examined and his grade fixed the writ will lie to issue the certificate:

Northington v. Sublette, 24 Ky. Law Rep. 835, 69 S. W. 1076. The making of lists of holders of teacher's certificates eligible to promotion is a ministerial duty which may be compelled: Brooklyn Teachers' Assn. v. Board of Education, 85 App. Div. 47, 83 N. Y. Supp. 1, affirmed in 176 N. Y. 564, 68 N. E. 1114. The permission of a school board to allow the child of a resident of the school district to attend the school may be compelled by the writ of mandamus: State v. Penter, 96 Mo. App. 416, 70 S. W. 375. A student who has been wrongfully expelled from school may be reinstated by mandamus proceedings regardless of whether the school is organized for profit or not: Baltimore University v. Colton, 98 Md. 623, 57 Atl. 14, 64 L. R. A. 108. And where the reinstatement is arbitrarily or capriciously refused, it may be compelled by mandamus: Jackson v. State, 57 Neb. 183, 77 N. W. 662, 42 L. R. A. 792.

But mandamus will not lie to compel a school board to furnish transportation to a pupil, since that involves discretion: Queeny v. Higgins, 136 Iowa, 513, 114 N. W. 51. The discipline of a school is a matter not subject to control; consequently the writ will not issue to compel the reinstatement of a pupil who was expelled for violating a rule prohibiting participation in football games under the auspices of the school: Kinzer v. Directors of Independent School Dist., 129 Iowa, 441, 105 N. W. 686, 3 L. R. A., N. S., 496. The issuance of a diploma is another matter which will not be compelled by mandamus proceedings: Niles v. Orange Training School for Nurses, 63 N. J. L. 528, 42 Atl. 846.

e. **Public Improvements.**—In the principal case mandamus was refused to compel the county commissioners to repair or build a courthouse, on the ground that the duty of providing a sufficient and proper courthouse and keeping it in repair is not a mere ministerial duty, but one involving the exercise of discretion: Ward v. Commissioners of Beaufort County, 146 N. C. 534, ante, p. 489, 60 S. E. 418. For the same reason, mandamus has been refused in respect to compelling the building or repairing of bridges: Patterson v. Taylor, 98 Ga. 646, 25 S. E. 771; Leonard v. Wakeman, 120 Iowa, 140, 94 N. W. 281; Clay City v. Roberts, 30 Ky. Law Rep. 820, 99 S. W. 651; State v. Switzer (Neb.), 112 N. W. 297; Glenn v. Moore Co. Commrs., 139 N. C. 412, 52 S. E. 58; State v. Justices of Wayne Co., 108 Tenn. 259, 67 S. W. 72. The writ has been refused for the same reason, to compel a city to construct a sewer: State v. City of Phillips, 134 Wis. 437, 114 N. W. 802; or to extend water mains and electric light lines: Moore v. Harrodsburg (Ky.), 105 S. W. 926; or to change the grade of a street: People v. Clark, 40 App. Div. 214, 58 N. Y. Supp. 12. In State v. Kammah, 151 Ind. 407, 51 N. E. 483, the court said: "If a highway is out of repair, the statutes require that he place the same in good repair. The plan and manner of making the repairs, and the material used in making the same, may rest in his discretion; but his duty to put the same in good repair is a public duty, and is imperative, and not discretionary. Under such circumstances, if the law furnishes no other adequate remedy, mandamus will lie; and any person having an interest in the matter can, as relator, main-

tain the action: Henderson v. Henderson, 53 Ind. 60, and cases cited; Holliday v. Henderson, 67 Ind. 103; Hamilton v. State, 3 Ind. 452; Wampler v. State, 148 Ind. 557, 47 U. S. 1068, 38 L. R. A. 829; Minor v. State, 149 Ind. 310, 49 S. E. 160, and cases cited; Larkin v. Harris, 36 Iowa, 93; Patterson v. Vail, 43 Iowa, 142; People v. Bloomington, 63 Ill. 207; Hammar v. City of Covington, 3 Met. (Ky.) 494; People v. Thompson, 32 Hun, 93; Borough of Uniontown v. Commonwealth, 34 Pa. 293; 14 Am. & Eng. Ency. of Law, 166; 7 Lawson's Rights, Remedies and Practice, sec. 4031; note to Dane v. Derby, 89 Am. Dec. 733."

Mandamus lies to compel a traction company to macadamize a street in accordance with an ordinance under which it occupies the street: Rutherford v. Hudson River Traction Co., 73 N. J. L. 227, 63 Atl. 84; Pleasantville v. Atlantic City etc. Co. (N. J. L.), 68 Atl. 60.

The duty of a board or municipal body to award a contract for public improvements to the lowest responsible bidder involves the exercise of a discretion which cannot be controlled by the writ: Board of Commissioners v. People, 78 Ill. App. 586; State v. Smith, 23 Mont. 44, 57 Pac. 449; Brown v. Houston (Tex. Civ. App.), 48 S. W. 760. The same is true in respect to the sufficiency of bids and bonds in the awarding of such contracts: Vincent v. Ellis, 116 Iowa, 609, 88 N. W. 836.

f. **Payment of Debts and Claims by Public Officers.**—The cases on the question whether mandamus lies to compel the payment of public debts are in apparent conflict, but it will generally be found that the line of demarcation is simply whether the approval of the claim, the issuance of the warrant for its payment, and its final payment involve the exercise of discretion or are mere ministerial acts. Where an officer or board obliged to examine claims before allowing them, and determine their correctness, or where the amount of compensation to be awarded is not fixed by law, mandamus will not lie to compel the auditing or payment of the claim: Dorrington v. Board of Supervisors, 68 Ariz. 4, 68 Pac. 541; Keefe Mfg. etc. Co. v. Board of Education, 33 Colo. 513, 81 Pac. 257; State v. Gentry, 112 Mo. App. 589, 87 S. W. 68; People v. Mathies, 179 N. Y. 242, 72 N. E. 103; State v. Albright, 11 N. D. 22, 88 N. W. 729; Sawyer v. Mayhew, 10 S. D. 18, 71 N. W. 141; Richmond v. Epps, 98 Va. 233, 35 S. E. 723; Simons v. Military Board, 99 Va. 390, 39 S. E. 125; State v. Cheetham, 20 Wash. 64, 54 Pac. 772. But where no appropriation has been made for the purpose of paying the salary of an employé, mandamus will not lie: Smith v. McCutchen, 146 Ala. 455, 41 South. 619; Fitzsimmons v. O'Neil, 214 Ill. 494, 73 N. E. 797; Board of Supervisors v. People, 222 Ill. 9, 78 N. E. 13; Commonwealth v. Foster, 215 Pa. 177, 64 Atl. 367. Where the statute prescribes the amount of the claim, so that it is a definitely ascertained demand, the auditing of the demand and issuance of a warrant for the same is regarded as a ministerial duty, even though same degree is exercised in the matter, and mandamus will issue: Smith v. McCutchen, 146 Ala. 455, 41 South. 619; Graham v. Tuscumbia, 146 Ala. 449, 42 South. 400; Pipper v. Superior Court, 3 Cal. App. 626, 86 Pac. 904;

Board of Co. Commrs. v. Board of Pilot Commrs., 52 Fla. 197, 120 Am. St. Rep. 196, 42 South. 697; Roberts v. Consaul, 24 App. D. C. 551; Phelps v. Lodge, 60 Kan. 122, 55 Pac. 840; Cochrane v. Beckham, 28 Ky. Law Rep. 370, 89 S. W. 262; State v. Mason, 153 Mo. 23, 54 S. W. 524; State v. Coufal (Neb.), 95 N. W. 362; Von Forel v. State (Neb.), 96 N. W. 648; Wilson v. Swain, 60 N. J. L. 115, 36 Atl. 778; State v. Morris, 67 S. C. 153, 45 S. E. 178; Times Pub. Co. v. White, 23 R. I. 334, 50 Atl. 383; Altgelt v. Campbell (Tex. Civ. App.), 78 S. W. 967; San Antonio v. Routledge (Tex. Civ. App.), 102 S. W. 756; Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117; State v. Daggett, 28 Wash. 1, 68 Pac. 340; American Bridge Co. v. Wheeler, 35 Wash. 40, 76 Pac. 534; State v. McQuade, 36 Wash. 579, 79 Pac. 207; State v. Grant, 14 Wyo. 41, 116 Am. St. Rep. 982, 81 Pac. 795, 82 Pac. 2, 1 L. R. A., N. S., 588; Roberts v. United States, 176 U. S. 221, 20 Sup. Ct. Rep. 376, 44 L. ed. 443. Where the validity of a claim has been determined by the court, an auditor of public accounts acts in a ministerial capacity in passing on it and is subject to mandamus: State v. Weston (Neb.), 99 N. W. 520.

g. **Levying of Taxes and Assessments.**—A city council in determining the amount of the appropriations for its fire and police boards acts in a quasi-judicial manner and cannot be controlled by mandamus: Hover v. People, 17 Colo. App. 375, 68 Pac. 679. Unless a duty to levy a tax is imposed, expressly or impliedly, by some statute, mandamus is not the appropriate remedy to compel such a levy: Bromwell v. Flowers, 217 Ill. 174, 75 N. E. 466; Robey v. Commissioners, 92 Md. 150, 48 Atl. 48; Austin v. Cahill, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552; Espy Estate Co. v. Pacific County, 40 Wash. 67, 82 Pac. 129; Cleveland v. United States, 111 Fed. 341, 49 C. C. A. 383. Where the right to have an assessment made has been determined by the courts, a city council may be compelled to exercise their legal discretion by confirming it or spreading the reasons for refusing on the records: State v. Springer (N. J.), 52 Atl. 996. Where a statute requiring a corporation commission to assess for taxation the physical property and franchises of railroads, prescribes the manner in which it is to be done, and allows them no discretion in the matter, they may be compelled to do so by mandamus: Jackson v. North Carolina Corp. Com., 130 N. C. 385, 42 S. E. 123.

h. **Courts and Court Proceedings.**—The use of mandamus proceedings to compel various acts of judges and courts in the progress of the trial of a case was exhaustively considered in the note to State v. Gardner, 98 Am. St. Rep. 890. A court may be compelled by mandamus to exercise jurisdiction, but the writ will not compel a decision in any particular way: De La Beckwith v. Superior Court, 146 Cal. 496, 80 Pac. 717; State v. Young, 31 Fla. 594, 34 Am. St. Rep 41, 12 South. 673, 19 L. R. A. 636; Connolly v. Woods, 13 Idaho, 591, 92 Pac. 573; Raleigh v. First Judicial Dist., 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991; State v. Yakey, 43 Wash. 15, 85 Pac. 990. And where a decision is delayed unreasonably, the judge may

be compelled to render a decision, but the writ will not undertake to direct what the decision shall be: Wyatt v. Arnot (Cal. App.), 94 Pac. 86; People v. Chytraus, 183 Ill. 190, 55 N. E. 666.

Where the act or proceeding, the performance of which is sought to be enforced by mandamus, is one in which the court exercises judicial discretion or judgment, the writ will not be allowed to issue: Birmingham etc. Power Co. v. Tanner (Ala.), 40 South. 58; Buford v. Christian, 149 Ala. 343, 42 South. 997; People v. District Court, 26 Colo. 399, 58 Pac. 142; Shreve v. Pendleton, 129 Ga. 374, 58 S. E. 880; Board of Commissioners v. Mayhew, 5 Idaho, 572, 51 Pac. 411; People v. Chytraus, 183 Ill. 190, 55 N. E. 666; St. Louis & S. F. R. Co. v. Shinn, 60 Kan. 111, 55 Pac. 346; Monroe v. Berry, 29 Ky. Law Rep. 602, 94 S. W. 38; State v. Sommerville, 110 La. 953, 34 South. 953; State v. St. Paul, 110 La. 722, 34 South. 750; State v. Reid, 119 La. 884, 44 South. 689; Gorman v. Calhoun Circuit Judge, 140 Mich. 230, 103 N. W. 567; Jones v. Mandell, 141 Mich. 408, 104 N. W. 692; State v. Second Judicial Dist. Ct., 25 Mont. 202, 64 Pac. 352; State v. District Court, 26 Mont. 372, 68 Pac. 465; People v. Woodbury, 70 App. Div. 416, 75 N. Y. Supp. 236; Harding v. Garter (Okl.), 93 Pac. 539; Aycock v. Clark, 94 Tex. 375, 60 S. W. 665; State v. Yakey, 43 Wash. 15, 85 Pac. 990; United States v. Judges etc., 85 Fed. 177, 29 C. C. A. 78.

But where the act is one of a ministerial character, such as entering a judgment in accordance with a verdict or award, or issuing execution, or of a judge certifying to his own disqualification, the writ will issue: Crook v. Newborg, 124 Ala. 479, 82 Am. St. Rep. 190, 27 South. 432; State v. Pitts, 139 Ala. 152, 36 South. 20; People v. District Court, 33 Colo. 77, 79 Pac. 1014; Scott v. Bedell, 108 Ga. 205, 33 S. E. 903; Bishop v. Valley Falls Mfg. Co., 78 S. C. 312, 58 S. E. 939; Texas Trans. etc. Co. v. Hightower, 100 Tex. 126, 123 Am. St. Rep. 794, 96 S. W. 1071.

Mandamus has been allowed to compel a judge to recognize the right of an attorney to practice in the court presided over by him, since a clear, legal duty rests upon him to do so unless the attorney has been deprived of the right by proper proceedings: People v. Kavanagh, 220 Ill. 49, 110 Am. St. Rep. 223, 77 N. E. 107. And the writ has been allowed to compel a judge to certify certain copies of lost or stolen indictments on very strong proof of their authenticity: State v. Circuit Court, 20 S. D. 122, 104 N. W. 1048.

BRADDY v. ELLIOTT.

[146 N. C. 578, 60 S. E. 507.]

ESTATES UPON CONDITION—Right of Re-entry.—A recital in a deed that in consideration thereof the grantee is to convey to the grantor a tract of land and erect certain buildings thereon, does not constitute the estate of the grantee one upon condition, in the absence of an express reservation in the deed of a right of re-entry of the grantor upon failure to perform the agreement. (pp. 524, 525.)

ESTATES—Failure of Consideration—Damages.—If persons exchange lands under an agreement and for the consideration that one shall build for the other certain houses, and he fails to do so, in the absence of fraud in procuring the contract, the other is left to his remedy in damages, when they afford adequate compensation. (p. 525.)

CONTRACTS—Rescission for Fraud.—If one person takes advantage of another by making a promise upon a sufficient consideration which he does not intend fully and faithfully to perform, it is such a fraud as entitles the latter to cancel the contract and recover the property given up under it with interest thereon. (pp. 525, 526.)

CONTRACTS—Rescission—Fraud—Evidence.—In an action for the rescission for fraud of a contract making promises not intended to be performed by the promisor, his subsequent acts may be submitted to the jury as some evidence of his original intent, when they tend to indicate it. (p. 526.)

ESTATES—Condition—Breach—Damages.—Upon failure of a person to an exchange of lands to comply with his agreement to erect buildings on the property exchanged, and which was the consideration for the exchange, the opposite party is entitled to recover as damages the value of the buildings which were to have been erected, with interest thereon from the date of the exchange. (p. 526.)

ESTATES—Exchange of Land—Breach of Condition.—If structures placed upon land by a grantee in consideration of land deeded to him are not fit for dwellings when completed, as agreed, they cannot be regarded as even a partial compliance with the terms of the agreement. (p. 526.)

Small, McLean & McMullan, for the plaintiffs.

Nicholson & Daniels, for the defendant.

[580] BROWN, J. The plaintiffs owned a lot in Washington, two persons named Lee owning the reversion. The parties agreed to sell to defendant for eight hundred dollars, taking in payment a tract of land in the country, upon which the defendant agreed to erect two dwellings suitable for plaintiffs to live in, and also the necessary and proper outhouses, which, according to the pleadings and evidence, were not to exceed five hundred and fifty dollars in cost. Under proper proceedings, the interests of a minor, as well as of the other plaintiffs, were duly conveyed to the defendant. The jury have practically found that the defendant has failed to erect the

buildings in accordance with the terms of the exchange. His honor set aside the third issue and gave judgment canceling the contract between the parties and restoring them to their original properties.

It is contended, first, that the defendant took an estate upon condition subsequent, and, having failed to perform it, the plaintiffs have a right of re-entry and stand seised of their original estate in the town lot. This position is hardly tenable. An estate upon condition may be created by deed, but only where the terms of the instrument admit plainly of such construction: 2 Washburn, 5th ed., 5. It is a qualification annexed to an estate whereby it is to arise or is to be defeated: Bacon's Abridgment, "Conditions," 2 Th. Co. Lit., 2. When the condition is relied upon to work a forfeiture, it must appear plainly in the deed or arise by clear implication. Construing the decree in the special proceeding and the deed from plaintiffs to defendant together as one instrument we find none of the requisites of an estate upon condition. The recitals [581] therein that the terms of the contract are that the defendant is to convey to plaintiffs the tract of land and build thereon two dwellings and suitable outhouses as a consideration for the conveyance of the town lot will not serve to create an estate upon condition in the defendant, in the absence of an express reservation in the deed of a right of re-entry in favor of the plaintiffs. Such recitals are only an expression of the consideration for the deed, and could only create an estate upon condition by express reservation of the right of re-entry upon failure to perform the agreement: Sheppard's Touchstone, 123; Rawson v. Uxbridge, 7 Allen (Mass.), 125, 83 Am. Dec. 670; 2 Washburn, 5.

It is contended, secondly, that the plaintiffs are entitled, upon the findings of the first and second issues, to a rescission or cancellation of the entire transaction, and that the judgment of his honor can be supported upon that ground. The rulings on this subject are very numerous and not at all harmonious, as few cases turn on greater niceties than those which involve the question as to whether a contract ought to be delivered up to be canceled or whether the parties should be left to their legal remedies. In England the jurisdiction exists in all cases of fraud generally, without much regard to the adequacy or inadequacy of any legal remedy, and the courts are largely governed by the particular circumstances of each case: 6 Pomeroy's Equity Jurisprudence, sec. 685, note. In the absence of fraud in procuring the execution of a con-

tract the parties are generally left to pursue their remedy for damages for its breach, where, in the nature of the transaction, they afford adequate compensation: 6 Pomeroy's Equity Jurisprudence, sec. 685; 2 Beach on Modern Equity, 636. The underlying principle is the practicability or impracticability of a sufficient and adequate legal remedy. Tested by this general rule, the findings on the first and second issues do not, standing alone, warrant the decree rendered. The plaintiffs, in their complaint, allege fraud upon the part of defendant in procuring the execution of the 582 contract of exchange, but no issue was submitted embodying such allegation. If the jury should find, in addition to their findings on the first and second issues, that the defendant fraudulently induced plaintiffs to agree to the exchange by falsely representing and pretending that he would build two suitable dwellings and necessary outhouses on the tract of land, such finding would be an ample basis for the decree canceling the entire transaction. The principle is clearly stated by Mr. Justice Connor in Hill v. Gettys, 135 N. C. 373, 47 S. E. 449: "A false and fraudulent representation or promise we understand to be one made with the intention in the mind of the promisor not to perform the promise." Under such circumstances, equity will relieve the promisee. If a jury should find that this defendant took advantage of the plaintiffs by making promises which he did not intend fully and faithfully to perform, it is such fraud in law as entitles plaintiffs to cancel the contract and deeds, to recover their original property and the rents and profits of the same, together with the interest thereon. The subsequent acts and conduct of a party may be submitted to the jury as some evidence of his original intent and purpose, when they tend to indicate it. In the absence of such finding of fraud, and letting the first and second issues and the responses thereto stand as they are, the plaintiffs are entitled to recover as damages the balance of the purchase money, to wit, five hundred and fifty dollars, and the interest thereon, in case the defendant has failed to erect the two dwelling-houses and necessary outhouses, as required by the terms of the exchange and as embodied in the special proceeding, and to have the sum awarded charged upon the town lot.

There is no evidence that the plaintiffs have ever accepted the structures placed on the land as a compliance with the terms of the exchange. The defendant has had more than a reasonable time within which to erect the two dwelling-houses

and necessary outhouses called for by the contract, and if he has failed or refused to do so, the plaintiffs are entitled to recover [583] the five hundred and fifty dollars due on the purchase price of their town lot, together with interest thereon from the date of their deed.

If the character of the structures is such as is testified to by some of the witnesses for the plaintiffs, and they are not fit for dwellings even when completed, they cannot be regarded as even a partial compliance with the terms of the agreement.

In excluding evidence as to personal advances made by defendant to his sister, Wealthy, his honor did not err. Such evidence is irrelevant to any issue that arises on the pleadings.

The decree in the special proceedings by which defendant acquired the title of the minor, Edward Lee, requires the construction of both dwellings and the necessary outhouses. To permit the defendant to use any personal account he may have against his sister as a setoff or discharge of his obligation is not permissible.

While his honor had an irreviewable discretion to set aside the finding of the third issue as inadequate, we think he erred in disregarding the issue entirely. The character of the controversy is such that it is unnecessary to disturb the first and second issues. The cause is remanded, to the end that the third issue be submitted to the jury, and, also, if desired, that the issue of fraud be submitted

Let the costs of this court be paid, one-half by plaintiffs and one-half by defendant, each party paying his own cost of printing.

Partial new trial.

Conditions Precedent in wills and deeds are discussed in the note to Brennan v. Brennan, 102 Am. St. Rep. 366; conditions subsequent are discussed in the notes to Ecroyd v. Coggeshall, 79 Am. St. Rep. 747; Gettysburg Nat. Bank v. Brown, 93 Am. St. Rep. 372; Wakefield v. Van Tassell, 95 Am. St. Rep. 214.

Future Promises or Representations as to future events cannot ordinarily be made the basis of a charge of fraud: Knowlton v. Keenan, 146 Mass. 86, 4 Am. St. Rep. 282; Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29; Dawe v. Morris, 149 Mass. 188, 14 Am. St. Rep. 404; Taylor v. Commercial Bank, 174 N. Y. 181, 95 Am. St. Rep. 564.

LAKE DRUMMOND CANAL AND WATER COMPANY v. BURNHAM.

[147 N. C. 41, 60 S. E. 650.]

WATERS—Right to have Artificial Conditions Continued.—Where an upper proprietor by any structure has created on his own premises an artificial condition affecting the flow of water, which condition invades no right of lower proprietors and gives indication that it is for a temporary purpose, or for a purpose that may at any time be abandoned, no obligation rests on him in favor of the lower proprietors to maintain the structure or condition, although its incidental effect has been to benefit them; and they can acquire no right by prescription to have the condition continued, for an easement arising in that way can be established only through adverse possession or continuous invasion to another's rights. (p. 531.)

Pruden & Pruden, and Aydlett & Ehringhaus, for the plaintiff.

Ward & Grimes and W. A. Worth, for the defendants.

[42] HOKE, J. The action was instituted by plaintiff to restrain a number of defendants from alleged wrongful injury to plaintiff's canal, and there was evidence offered tending to show: "The plaintiff owns the canal formerly known as the 'Dismal Swamp canal,' extending from the Elizabeth river, in Virginia, to the Pasquotank river, in North Carolina, and it is a highway of public travel for steamboats, barges, tugs and other craft plying between the waters of North Carolina and the waters of Virginia. There is another canal, called the 'Cross canal,' which runs at right angles from a point about [43] thirty feet from the other canal westwardly into Gates county, about twenty miles. The defendants own, in severalty, valuable lands which lie from three to seven miles below the said 'Cross canal,' none of which drain in or toward the 'Cross canal.' In 1897 the plaintiff company enlarged and deepened the 'Dismal Swamp canal,' and, for the protection and improvement of the same, thus enlarged, the plaintiff widened and raised the banks of that canal, and the banks, so raised and widened, remained as they were from 1897 to June, 1906. In June, 1906, the defendants, claiming to be injured by the raising and broadening of the said banks at the 'Cross canal,' cut through the same, between the head of the 'Cross canal' and the 'Dismal Swamp canal,' a distance of thirty feet or more, and turned the water from the said 'Cross canal,' and the swamps which drain into it, into the

'Dismal Swamp canal,' and, as a result of such cutting, turned into it sand, mud and debris to such an extent as, after twelve hours, to so fill it that one could walk out into the canal forty-three feet from its banks, dry shod, for a distance of about seventy-two feet along the banks. The plaintiff filled up the cut which had been made, and dredged out the said filling, but the defendants threatened at once to open the same again, and were about to do so when enjoined by the court."

Defendants answered, making denial of some of the material allegations of plaintiff, and, by way of counterclaim, made further answer, as follows:

"1. That they are the owners and in possession of large quantities of land and growing crops lying on what is known as 'Corapeake' or 'Cross canal,' which empties into the 'Dismal Swamp canal' about five miles northwest of the town of South Mills, in Camden county.

"2. That said 'Cross canal' is twelve miles long and between ten and twenty feet wide, and is the main and only drain for their said lands, and has been for the past seventy-five [44] or one hundred years, long before the plaintiff herein acquired any interest whatever in the 'Dismal Swamp canal.'

"3. That during the latter part of March or first of April, 1906, the Lake Drummond Canal and Water Company, by its agents and servants, went to the mouth of said 'Cross canal' and, with a steam shovel, did willfully and unlawfully fill up the mouth of said 'Cross canal,' thereby stopping all flow through said 'Cross canal' and ponding the water on the lands and crops of the defendants herein, utterly and entirely destroying the crops of the defendants and greatly damaging the lands herein mentioned, paying nothing to the defendants by way of condemnation or otherwise.

"4. That defendants herein were preparing to reopen said 'Cross canal,' when the general superintendent of the plaintiff, one J. B. Baxter, through the captain of the plaintiff's dredge, requested that they not reopen said 'Cross canal'; that he would have his company do so immediately and place a culvert there; upon which promise defendants refrained from opening said 'Cross canal,' and were later served with a restraining order forbidding them from reopening it at all.

"5. That plaintiff has never made any attempt whatever to put in said culvert or otherwise open said 'Cross canal,' and that the lands and crops of the defendants are and have been for many weeks past entirely covered with water, because of the damming of said 'Cross canal' by the plaintiff herein.

"6. That by reason of such unlawful damming of 'Cross canal' by the plaintiff, and the consequent ponding of water on defendants' lands, the crops of the defendants have been injured to the extent of fifteen thousand dollars; that the lands have already been greatly damaged, and that, if said 'Cross canal' is not opened immediately, the ponded water on the defendants' lands will cause said lands to sour and to become absolutely worthless for any use whatever, which lands, before the ponding of the water thereon by the plaintiff, as herein set out, were worth not less than thirty-seven thousand dollars.

[45] "7. That the cause of action set out in this answer in the defendants' cross-bill arose prior to the bringing of this action."

Plaintiff made formal reply, denying material allegations of the counterclaim. Various issues were submitted as determinative of the rights of the parties and as to the amount of damages suffered by defendants. The court set aside a verdict for defendants on the issue as to damages, and on the other issues gave judgment restraining defendants from further interference with plaintiff's canal, and restraining plaintiff from "maintaining the banks of its canal at the point between said 'Cross canal and the canal of plaintiff at a greater height than in 1897, before same was increased." From this judgment plaintiff, having duly excepted, appealed.

The fifth issue and the response of the jury thereto are as follows:

"5. Have the defendants, or either of them, the right and easement to drain into the canal of plaintiff or into the 'Cross canal'?" Answer: "No."

There is no fact or finding of the jury which in any way changes or impairs the force and effect of this verdict, and the court is of opinion that it is thereby conclusively determined that the defendants are not entitled to the relief awarded them, and to this extent the judgment of the court below must be reversed. The company known as the Dismal Swamp Canal Company was chartered by act of the legislature at the session of 1790 (2 Rev. Stats., p. 217). By section 12 of this act it was provided: "And whereas it is represented that the waters of the lake in the Dismal Swamp, commonly called 'Drummond Pond,' may be useful for a supply of water to the said canal: Be it enacted, that the said lake, so far as the water thereof shall be necessary [46] for the purpose aforesaid, shall be and is hereby vested in the proprietors of said canal;

and it shall and may be lawful for the said president and directors, or a majority of them, to open, if they shall find it expedient, a cross canal from the lake to the principal canal, for the purpose of drawing from thence a supply of water; and for executing this work they shall have the same powers which they are authorized to exercise in opening the principal canal." It was, no doubt, under and by virtue of this section, and for the purposes therein indicated, that the "Cross canal," referred to in the present proceedings, was constructed. The present owners of the main canal, having ascertained or concluded that the waters of the lake, here tofore conveyed by the "Cross canal," are no longer required for purposes of navigation, determined to abandon it, and in widening and deepening the main canal they have thrown the sand and mud produced by their additional excavation on the bank, and so as to stop up the mouth of the "Cross canal" and obstruct the flow of water therein; the result being that the waters of the lake, which by this canal have heretofore been drained into the main canal, now flow in their natural direction toward the river, and a portion of them affect the lands of defendants, causing the damage complained of. While, however, the evidence of defendants tends to show that these lands have been damaged by stopping up this "Cross canal," and the verdict of the jury seems to have established it, it is an injury for which the law cannot afford redress.

It will be noticed that the canal is an artificial drain, made by the predecessors of plaintiff for their own convenience and advantage, and in the exercise of a right of property and an easement conferred upon them by the statute for a specific purpose. The lands of the defendants do not abut upon this "Cross canal," and the verdict finds that the defendants had no right or privilege of drainage into either one of the canals. On the contrary, the testimony shows that they are situated [47] several miles from the "Cross canal," and their natural drainage is in an entirely different direction, toward the Pasquotank river; and, while this "Cross canal" has existed for many years, forty or more, and has operated to some extent to protect the lands of defendants by diverting the overflow waters of the lake from their natural direction into the main canal, on the facts presented here there is no principle that requires that the plaintiff should keep this "Cross canal" open for defendants' benefit, or that its conduct concerning it should subject it to an action. As to defendants, it is

damnum absque injuria. If it should be conceded that defendants, as owners of lands which lie in the general direction that the overflow waters of the lake naturally take towards the river, are lower proprietors in reference to such waters—and this is the strongest position that can be taken in their behalf—their right to relief on this verdict cannot be sustained, The doctrine is—certainly it is the position supported by the great weight of authority—that where the proprietor of an upper tenement constructs and maintains on his own premises, and for his own convenience and advantage, an artificial waterway, or any artificial structure affecting the flow of water, and such structure invades no right of the lower proprietor and gives indication that it is for a temporary purpose, or a specific purpose which may at any time be abandoned, the upper proprietor comes under no obligation to maintain the structure and the conditions produced by it from lapse of time, though the incidental effect has been to confer a benefit on the lower tenant. Nor in such case does the lower proprietor acquire any right which rests only on prescription. An easement arising in that way can only be established by reason of adverse possession or continuous invasion of another's right: Gould on Waters, 3d ed., secs. 161, 340; 3 Farnham on Waters and Water Rights, pp. 2400, 2435-2437; Arkwright v. Gell, 5 Mees. & W. 202; [48] Mason v. Shrewsbury & H. Ry. Co., 6 L. R. Q. B. 577; Greatrex v. Hayward, 8 Ex. 290.

And the decisions of our own court are to like effect: Felton v. Simpson, 33 N. C. 84; Mebane v. Patrick, 46 N. C. 23. In Felton v. Simpson, 33 N. C. 84, the plaintiff owned land on a stream below defendant's dam, and the incidental effect of this dam was to protect the plaintiff's land from "sudden inundations in heavy falls of rain, by ponding the water until it could be drained off by ditches." The plaintiff had been in the uninterrupted enjoyment of the benefit of this protection for more than twenty years, when defendant cut through the dam to relieve it from a large body of water collected from recent rains, causing plaintiff's land to overflow and injure the crops. Recovery was denied, and it was held: "In order to raise the presumption of the grant of an easetent, two things are necessary: There must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant." And Pearson, J., delivering the opinion of the court, said: "When one continues in the uninter-

rupted possession of land for thirty years, or enjoys the use of a franchise for twenty years, a grant is presumed. So, if one erects a dam and ponds back water upon the land of another, and is allowed to keep it there for twenty years, a grant of the easement or privilege of doing so is presumed; and so in many similar cases. But, to make this doctrine applicable, two things are necessary: There must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant; for it is the fact of his being thus exposed to an action, and the neglect of the opposite party to bring suit, that is seized upon as the ground for presuming a grant in favor of long possession and enjoyment, upon the idea that this adverse state of things would not have been submitted to if there had not been a grant. Where one erects a dam on his [49] own land, and another who owns lands below incidentally derives a benefit by availing himself of the protection which the dam enables him by means of ditches to give to his land, which is our case, neither of these essentials for presuming a grant has an existence."

Speaking to this same question, in Mason v. Shrewsbury & H. Ry. Co., L. R. 6 Q. B. 577, Cockburn, C. J., concurring, said: "It is the essence of an easement (to divert a stream by an artificial way) that it exists for the benefit of a dominant tenement alone. Being in its very nature a right created for the benefit of a dominant owner, its exercise by him cannot operate to create a new right for the benefit of a servient owner. Like any other right, its exercise may be discontinued if it becomes onerous or ceases to be beneficial to the party entitled." The position is discussed at some length, and very satisfactorily, in Farnham on Waters and Water Rights, supra, under the doctrine of reciprocal easements; and the citation, after stating different methods by which such reciprocal easements may be established, continues as follows: "Having established the fact that there may be reciprocal easements existing in favor of adjoining property owners, the question arises as to how far such a condition may be established by prescription. Put in a concrete form, the question may be propounded thus: If the owner of a mill on a stream acquires, by prescription, the right to flow the water back upon the land of an upper proprietor, does the latter acquire a reciprocal right to have the flowage maintained, and can he compel the mill owner to maintain his dam for that purpose? To the question in this form the answer seems plain

that there is no such reciprocal right. The equitable doctrine of prescription depends upon the presumption of a grant, and equity will only presume a grant when certain well-defined conditions are present, one of which is an adverse claim to the property out of which the right is alleged to have arisen. In the case supposed, there is no adverse claim on the part of the owner of the submerged land [50] to have the dam maintained, and, therefore, nothing upon which a grant can be presumed." And, further: "The doctrine applicable in case of the damming of the water back on the upper property is equally applicable in case of drainage over lower property. In Greatrex v. Hayward, 8 Ex. 290, the court held that the flow of water from a drain made for the purpose of agriculture, for a period of twenty years, does not give a right to the lower proprietor to its continued flow, so as to prevent the alteration of the drain for the improvement of the upper estate. This is put upon the ground that the character of the watercourse is temporary merely, depending upon the mode which the upper owner had adopted for draining his land; also, that the user by the lower owner had not been adverse." The author then proceeds to criticise a decision of the Minnesota court (Kray v. Muggli, 77 Minn. 231, 79 N. W. 964, 1026, 1064, 45 L. R. A. 218), which asserts a position contrary to that upheld in the text, and also certain expressions of the chancellor to same effect in Belknap v. Trimble, 3 Paige, 577, and declares that the Minnesota decision, and some others of like tendency, are not in accord with the weight of authority.

In what is here said we do not intend to question the decision of Belknap v. Trimble, 3 Paige, 577, and other cases of like import, to the effect that, where an upper proprietor, by an artificial structure on his premises, has caused a change of a stream in which they both had riparian rights from the original to a new channel, under circumstances which give indication that the change is to be a permanent one, and the lower proprietor, accepting the change, has built mills and made improvements dependent on the flow of the stream in its new course, the enjoyment and user of these improvements will, under certain circumstances, be protected by injunctive relief or other efficient action of the courts. These decisions can well be upheld under the doctrines of dedication and estoppel, as in Delaney v. Boston, 2 Harr. (Del.) 489; Farnham on Waters and Water Rights, 2437, 2438. But this principle has no application here. The former proprietors [51] of the "Dismal Swamp canal," acting under a charter

from the state, in the exercise of proprietary rights and privileges therein granted, constructed this "Cross canal," an artificial way, as a feeder to the main canal and as an aid to navigation. And the present owners, having concluded that this additional supply of water is no longer required for the purpose, and that its continued flow into the main canal, in its present condition, will cause damage to their property and act as a hindrance to their enterprise, have determined to abandon the "Cross canal" and obstruct its further flow. It was originally constructed for the advantage and convenience of plaintiff's predecessors, and for a definite purpose, and defendants have acquired no right to enforce its maintenance for their protection.

The exact case is stated by Gould on Waters, supra, as follows: "When a company was authorized, but not required, by statute to divert the waters of a stream, which they did for a period of forty years, it was held that riparian proprietors below on the stream had no right to insist that the diversion should be continued for their benefit."

The court, being of the opinion that, on the facts presented, defendants are not entitled to any redress against the plaintiff, has deemed it best to place the decision on that ground, as it may serve to end the matter at issue. But we must not be understood as deciding that, if it were otherwise, defendants would be entitled to the injunctive relief awarded them by the judgment below. It appears that plaintiff is engaged in carrying on an enterprise for the benefit of the public, under a quasi-public charter, and it is ordinarily true that, if an adjacent property owner suffers injury in his proprietary rights by reason of such an undertaking, he is restricted to an action for damages, or some statutory method of redress.

There is error in the judgment below, in so far as it enjoins plaintiff from obstructing the flow of the "Cross canal," and to that extent the judgment below is reversed.

An Owner may Abandon His Water Rights and Easement to Maintain a lake at an artificial level, so as to escape all liability at law, for consequential damages to riparian owners around the lake, unless he is bound by law or agreement to maintain the higher level of the waters of the lake. The owners on the shore of a lake kept above the natural level by means of a dam until the owner thereof has acquired a prescriptive right to maintain it, and until the lands of such owners have become valuable as summer resorts by reason thereof, while they have made valuable improvements relying on the continued maintenance of the dam, have an easement on their part, and may prevent the owner of the dam from lowering the level of the lake to their injury: Smith v. Youmans, 96 Wis. 103, 65 Am. St. Rep. 30. Where the flow of a stream has been diverted from its

natural channel, or obstructed by a permanent dam, and this has continued for the time necessary to establish a prescriptive right, the riparian owners along such stream, who have improved their property with reference to the change and in reliance on the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed: Kray v. Muggli, 84 Minn. 90, 87 Am. St. Rep. 332. If a person artificially raises the level of the waters of a navigable lake, and maintains such condition for a length of time sufficient to confer title by prescription, during which time the public use and enjoy such lake, the title to his lands thereunder vests in the state by dedication, and he is estopped to revoke such dedication: Pewaukee v. Savoy, 103 Wis. 271, 74 Am. St. Rep. 859.

Prescriptive Title to Water is the subject of a note to Oregon etc. Co. v. Allen Ditch Co., 93 Am. St. Rep. 711.

SMITH v. JOHN L. ROPER LUMBER COMPANY.

[147 N. C. 62, 60 S. E. 717.]

PHYSICIAN AND PATIENT.—Communications Between Patients and Their Physicians were not regarded as privileged at the common law. (p. 537.)

PHYSICIAN AND PATIENT.—Communications Between a Patient and His Physician are not privileged under the North Carolina statute, unless the information they impart is necessary to enable the physician to prescribe, which question is within the discretion of the court to determine. (pp. 537, 538.)

PHYSICIAN AND PATIENT—Communication Between as to Happening of an Accident.—In an action for personal injuries received by reason of an alleged defective jackscrew, a statement made by the plaintiff in answer to his physician's inquiry as to how he received the injury, that "he was raising the engine with a jackscrew and he kicked it or wrung it out, he could not tell which, causing the engine to roll back and crush his arm," etc., cannot be excluded as a privileged communication. (p. 538.)

D. L. Ward and Simmons, Ward & Allen, for the plaintiff.

W. W. Clark and Moore & Dunn, for the defendant.

[62] HOKE, J. There was evidence on the part of plaintiff tending to show that plaintiff, an employé of the defendant company, was engaged in moving a heavy engine of the defendant company from their mills to the cars, and, at the time of the injury, was raising the engine by means of a jackscrew, when the engine fell, catching plaintiff's arm between the engine and a [63] brick wall near by and crushing same so that amputation was necessary; and that the injury was caused by reason of a defective jackscrew negligently furnished by defendant company.

The defendant claimed, and offered evidence tending to show, that there was no defect in the screw, and, further, that the injury was caused by fault of plaintiff in negligently kicking or jerking the screw from its proper placing. In support of defendant's position they introduced one Dr. Jones, who testified that he was called to attend plaintiff, and, before treating him, asking him how he had received the injury, and plaintiff replied that he was raising the engine with a jackscrew, and he kicked it or wrung it out—he could not tell which—causing the engine to roll back and crush his arm, etc.

Plaintiff in apt time objected to this testimony, but it was admitted, the court stating that it was admitted, not as a matter of discretion, but as a matter of law and plaintiff excepted. There was a verdict for defendant, and plaintiff appealed, assigning for error the ruling of his honor in admitting the testimony of Dr. Jones.

At common law, communications between patients and attending physicians were not regarded as privileged, and the matter has been very generally made the subject of statutory regulation. Our own statute, which substantially accords with the form more usually adopted in such legislation, provides as follows (Revisal, sec. 1621): "No person duly authorized to practice physic or surgery shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of
64 a superior court may compel such disclosure if, in his opinion, the same is necessary to a proper administration of justice." It is the accepted construction of this statute that it extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe: Gartside v. Connecticut Mut. L. Ins. Co., 76 Mo. 446, 43 Am. Rep 765; Dilleber v. Home Life Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182. And it is further held, uniformly, so far as we have examined, that the privilege established is for the benefit of the patient alone, and that same may be insisted on or waived

by him in his discretion, subject to the limitations provided by the statute itself:

"1. That the matter is placed entirely in the control of the presiding judge, who may always direct an answer, when in his opinion same is necessary to a proper administration of justice.

"2. That the privilege only extends to information acquired while attending as physician in a professional capacity, and which information is necessary to enable him to prescribe for such patient as a physician": 14 Wigmore, sec. 2286c.

In the present instance, the court having declined to exercise the discretion conferred by the statute, and having admitted the answer of the witness as a matter of right in defendant, the correctness of the ruling will depend upon the interpretation put upon the second limitation stated: "That the privilege only exists as to information which is necessary to enable the physician to prescribe for such patient as a physician." Many of the courts have been very liberal in construing this statute in favor of the protection afforded the patient, some of them going to the extent of holding that, whenever a question has been asked by an attending physician with a view of prescribing, the answer is privileged, however unimportant [65] or irrelevant such answer may prove to be, but we do not think that such a position can be sustained.

It must be remembered that the privilege did not exist at all at common law. It only arose by reason of the statute, and, this statute having provided as a condition that the communication, to come within its terms, shall be necessary to enable the physician to prescribe, we think this limitation must be given effect, and that it must rest in the legal discretion of the court to determine, from all the facts and attendant circumstances, including the answer itself, whether the information given was necessary for the purpose indicated. There are, no doubt, many occasions when an answer to the question usually asked by a physician, "How were you hurt?" could and should be regarded and held as necessary to intelligent treatment. And when this is true, both the substance of the answer and the incidental details would come within the protection provided by the law. But we do not think, by any fair or reasonable intendment, the statute

could be construed as extending to the answer admitted in the present instance. There was no dispute between the parties that the plaintiff's arm had been crushed by reason of having been caught between the falling engine and the brick wall, and it could make no possible difference in the treatment whether this falling of the engine was occasioned by a defective jackscrew or by plaintiff's conduct in negligently kicking the screw out of place at an inopportune time.

We are of opinion that his honor correctly ruled that defendant was entitled to have the answer of the witness admitted in evidence as a matter of right, and that his construction of the statute is in accord with the weight of authority: Green v. Metropolitan St. Ry. Co., 171 N. Y. 201, 89 Am. St. Rep. 807, 63 N. E. 958; People v. Cole, 113 Mich. 83, 71 N. W. 455; In re Will of Bruendl, 102 Wis. 45, 78 N. W. 169; Kansas City etc. Ry. v. Murray, 55 Kan. 336, 40 Pac. 646. The decision of the Indiana courts relied upon by plaintiff (Pennsylvania Co. v. Marion, 123 Ind. 415, 18 Am. St. Rep. 330, 23 N. E. 973, 7 L. R. A. 687) is based on an interpretation of an Indiana statute (Rev. Stats., sec. 497), which is much broader in its terms and permits a different construction.

There is no error, and the judgment below is affirmed.

Privileged Communications Between Physicians and Their Patients are discussed in the note to Thompson v. Ish, 17 Am. St. Rep. 565. A statute excluding the testimony of a physician, as to information acquired by him while attending a patient in a professional capacity, which was necessary to enable him to act in that capacity, will not exclude testimony as to how an accident happened, where such information was acquired while attending the plaintiff, but it did not appear that it was necessary for purposes of professional treatment: Green v. Metropolitan Street Ry. Co., 171 N. Y. 201, 89 Am. St. Rep. 807. Compare Pennsylvania Co. v. Marion, 123 Ind. 415, 18 Am. St. Rep. 330.

HARRELL v. HAGAN.

[147 N. C. 111, 60 S. E. 909.]

WILLS—Estates, When Determinable.—Where a testator gives to his daughters an estate of remainder in fee, after the life estate of their mother, determinable as to each daughter's share on her dying without leaving a lawful heir, the event by which the interest of each is to be determined must be referred, not to the death of the devisor, but to that of the several takers of the estate in remainder, respectively, without leaving a lawful heir. (p. 540.)

WILLS—Estates, When Determinable.—Where a will gives an estate to a mother for life, and at her death or marriage to certain daughters, and if either or all of the daughters die without leaving a lawful heir, then to certain sons, the estate does not become absolute in the other daughters on the death of one of them without leaving such heir, but the determinable quality of each interest continues to affect such interest until the event occurs by which it is to be determined or the estate becomes absolute. (pp. 540, 541.)

WILLS—Illegitimate Children.—Where a will gives an estate to a mother for life and at her death to her daughters, and if either of the daughters dies without leaving a lawful heir, then to certain sons, two illegitimate children of one daughter who dies without ever having been married fill the description "if she should die without leaving a lawful heir," and meet the condition on which their mother's estate becomes absolute. (p. 541.)

WILLS.—The Word "Lawful" Prefixed to the Word "Heir" is ordinarily used in wills without special meaning, and, as a rule, should not be allowed any controlling significance; it may be stricken out as meaningless, for there is no such anomaly in law as an unlawful heir. (p. 542.)

SUCCESSION—Inheritance by Illegitimate from Mother.—The effect of the statutes of North Carolina has been to legitimatize an illegitimate child as to his mother, where there has been no legitimate issue, and to make him the heir of her body, or her issue or child. (p. 542.)

WILLS—Legitimate Children.—Courts Readily Extend the Term "Children" to include illegitimate children where such an intent can be gathered from the words of the will and the condition of the parties, and more especially when, from the operation of the statute, the illegitimate children come clearly within the descriptive words of the devise. (p. 543.)

Kitchen & Allsbrook and G. M. T. Fountain, for the plaintiffs.

W. O. Howard, for the defendants.

112 HOKE, J. From the facts agreed, it appeared that Elisha Harrell died domiciled and resident in Edgecombe county, seised and possessed of the land in controversy, and leaving him surviving his widow, Anne Eliza Harrell, and several sons and daughters; that item 2 of the will of Elisha Harrell, duly executed and admitted to probate in said county, contained the following devise: "I lend unto my wife, Anne Eliza Harrell, 290 acres of land during her nat-

ural life or widowhood; at the death or marriage of my said wife, I give and bequeath unto my four youngest children, Armitha Harrell, Opperlina Harrell, Rebecca Harrell and Louisa Harrell, the above-named 290 acres of land, known as follows: And, if either or all of the above girls die without leaving a lawful heir, my will and desire is that the said lands be equally divided between my two sons, John Harrell and Jesse Harrell."

2. That during the life of the widow, Anne Eliza Harrell, the two hundred and ninety acres of land were actually and equally parceled out among the four daughters mentioned in item 2 of the will, and each of said daughters was put in possession of her respective share.

3. That Anne Eliza Harrell, widow of Elisha, died on March 5, 1903, not having remarried.

4. That Louisa Harrell, one of the four daughters mentioned in item 2 of the will, intermarried with one Richard Webb, in January, 1898, and died September 12, 1902, intestate and without ever having had a child; that John and Jesse Harrell, mentioned in item 2 of the will, are dead, and plaintiffs are their descendants and only heirs at law; that Opperlina Harrell died domiciled in said state and county, in October, 1906, leaving two illegitimate children, who are defendants; that said Opperlina was never married and had no children at her father's death.

[113] The action is to recover that portion of the two hundred and ninety acres of land devised by item 2 of Elisha Harrell's will which was set apart to Opperlina Harrell the plaintiffs being, as stated, the descendants and only heirs of John and Jesse Harrell, and defendants the illegitimate children of Opperlina.

On the facts stated, the court being of the opinion that plaintiffs were the owners of the land in controversy, judgment was entered in their favor, and defendants excepted and appealed.

The clause of the will here in question conveyed to the four daughters named an estate of remainder in fee, after the life estate of their mother, and determinable as to each holder's share on her dying without leaving a lawful heir: Sessoms v. Sessoms, 144 N. C. 121, 56 S. E. 687; Whitfield v. Garris, 134 N. C. 24, 45 S. E. 904. Under several of the more recent decisions of the court, the event by which the interest of each is to be determined must be referred, not to the death of the devisor, but to that of the several takers

of the estate in remainder, respectively, without leaving a lawful heir: Kornegay v. Morris, 122 N. C. 199, 29 S. E. 875; Williams v. Lewis, 100 N. C. 142, 6 Am. St. Rep. 574, 5 S. E. 435; Buchanan v. Buchanan, 99 N. C. 308, 5 S. E. 430. And by reason of the terms in which the contingency is expressed, "that if each or all of the girls die without leaving a lawful heir, then the land," etc., and other indications which could be referred to, the estate does not become absolute in the other daughters on the death of one of them without leaving such heir, but the determinable quality of each interest continues to affect such interest until the event occurs by which it is to be determined or the estate becomes absolute: Galloway v. Carter, 100 N. C. 111, 5 S. E. 4; Hilliard v. Kearney, 45 N. C. 221. The application of these authorities and their [114] effect on the terms of the devise are not more fully stated, for the reason that, on the hearing below, the right of the respective parties to the share of Opperlina Harrell, which is the subject matter of the present suit, was properly made to depend on the question whether the death of this devisee, leaving two illegitimate children and without ever having been married, would terminate the contingent quality of her estate, and cause the same to pass by descent in absolute ownership to these children, who are defendants and in present possession of the property.

Our statute on this subject (Revisal, c. 30, rule 9) provides: "That when there shall be no legitimate issue, every illegitimate child of the mother, and the descendants of such child deceased, shall be considered an heir, and as such shall inherit her estate." By the express words and plain import of the statute, therefore, these two children of the devisee fill the description required by the terms of the devise, "if she should die without leaving a lawful heir," and meet the condition on which their mother's estate should become absolute; and there is direct authority with us upholding this position: Fairly v. Priest, 56 N. C. 383. In that case it was held: "Where a testator by his will gave property to a son and three daughters, with provision that, on the death of either of them intestate or without heirs of his or her body, his or her share should go over, it was held that the intention was not that it should go over on the death of the mother of an illegitimate child, but that the latter was entitled to his mother's share." And Judge Battle, delivering the opinion of the court, speaking to this question, said: "The property given by the will to the testator's son and three

daughters is given to them absolutely, but with an executory bequest over to the survivors upon the death of either intestate without heirs of his or her own body. The expression, 'without heirs of their own body,' manifestly means without issue or children. Now, it is clear that, if the plaintiff had been legitimate, his mother's [115] portion would not have been subject to the limitation over to the surviving brother and sister, but would have remained her absolute property, and, of course, would have devolved upon her personal representative and then have gone to the plaintiff as her next of kin. But, being illegitimate, he could not, at common law, have been regarded as the heir of her body—that is, her issue or child—and she would have been deemed to have died without any such heir, issue or child. This rule of the common law has been altered by the section and chapter of the Revised Statutes to which we have referred, and which was taken from the act of 1799 (chapter 522 of the Revised Code of 1820). The effect of that act has been to legitimate the plaintiff as to his mother, and to make him, in law, the heir of her own body, or her issue or child: See Kimbrough v. Davis, 16 N. C. 71; Coor v. Starling, 54 N. C. 243."

We do not understand that plaintiffs urgently insist that the court should attach any great importance to the use of the word "lawful," prefixed to "heir" in the devise. In the absence of a contrary intent clearly indicated in the will, the term does not at all mean "legitimate," but simply the person designated by law to take by descent. It is more frequently used in wills without special meaning, being intended, and as a rule should not be allowed any controlling significance. Thus Montgomery, J., in Francks v. Whitaker, 116 N. E. 518, 21 S. E. 175: "The word 'lawful' may be stricken out as meaningless, for there is no such anomaly in law as an unlawful heir." And Walker, J., in Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 85, 67 L. R. A. 444, says: "There can be no such thing as an unlawful heir. The term 'lawful' heirs means the heirs designated by law to take from their ancestor." But the position of plaintiffs was made to rest chiefly on several decisions of this court, notably Rollins v. Keel, 115 N. C. 68, 20 S. E. 209, and Francks v. Whitaker, 116 N. C. 518, 21 S. E. 175, in which the limitation over was expressed in terms not dissimilar to those of the present devise, and in which the words [116] "lawful heir," by reason of certain other provisions, were held to mean "issue" (this chiefly because the ulterior limitation

was to persons who would be included among the heirs general of the first taker); and, assuming that this word "issue" is equivalent to children, the plaintiffs seek to apply to the present devise the principle, more rigidly enforced in some former decisions of the court, that under the term "children" illegitimate children do not take unless clear indication of such intent can be gathered from the will and the condition of the parties.

We do not think this is a permissible construction from the cases cited, and for the reason, among others, that the term "issue," in Rollins v. Keel, 115 N. C. 68, 20 S. E. 209, and in Francks v. Whitaker, 116 N. C. 518, 21 S. E. 175, was not used in the sense of children simply, but in its primary and more usual meaning: "An indefinite succession of lineal descendants who are to take by inheritance, and hence 'heirs of the body' ": 23 Cyc. 359, 17 Am. & Eng. Ency. of Law, p. 543; Underhill on Wills, sec. 669; Abbot v. Essex Co., 59 U. S. 202, 15 L. ed. 352. This being the sense in which the words were used in the decisions referred to, they bring the children of the devisee within the clear meaning of the descriptive words of the devise. Even if the word "issue" was used in the sense of children in the authorities referred to, we doubt if it would aid the plaintiffs. While the general principle for which plaintiffs contend has prevailed with us, the strictness with which this "rigid rule" of the common law was applied in some of the older cases has been commented on in later decisions, and, while the older cases have not been expressly overruled, it seems that the courts will readily extend the term "children" to include illegitimate children where such an intent can be gathered from the words of the will and the condition of the parties, and more especially when, from the operation of the statute, the illegitimate children come clearly within the descriptive words of the devise: Sullivan v. Parker, 113 N. C. 301, 18 S. E. 347; Howell v. Tyler, 91 N. C. 207; Doggett v. Mosely, 52 [117] N. C. 587. If the word "child" should be required from the effect of other provisions of the will, it should be considered a child which more nearly fits the language and clear import of the devise. "If either die without lawful heir," is the language used, and if the word "child" is substituted it should be held to include any child capable of being an heir of the first taker in remainder.

It is earnestly contended by the learned counsel for plaintiffs that the decision of Fairly v. Priest, 56 N. C. 383, is only authority where the illegitimate child was in existence at the making of the will, and where, from other portions of the will, it was clear that the devisor contemplated that the illegitimate child should take. But, while these facts existed in the case cited, and are referred to in the opinion, they are only given as supporting the conclusion, which was made to rest mainly on the fact that, by the operation of the statute making the illegitimate child an heir of the mother, the claimant filled the description of the devise and came within its terms.

The decision is, we think, a direct authority sustaining the position of defendants, and should control the construction of the devise upon which their title rests. There is error, and on the facts agreed judgment should be entered for defendants.

Reversed.

The Words "Child" or "Children," when used in a statute, will or deed are usually held prima facie to mean legitimate child or children only: Robinson v. Georgia R. R. etc. Co., 117 Ga. 168, 97 Am. St. Rep. 156; Lavigne v. Ligue Des Patriotes, 178 Mass. 25, 86 Am. St. Rep. 460; note to Thomas v. Thomas, 73 Am. St. Rep. 415.

An Illegitimate Child could not inherit even from its mother at the common law, but this rule has been changed by statute in many jurisdictions: Orthwein v. Thomas, 127 Ill. 554, 11 Am. St. Rep. 159; Hayden v. Barrett, 172 Mass. 472, 70 Am. St. Rep. 295; Alabama etc. Ry. Co. v. Williams, 78 Miss. 209, 84 Am. St. Rep. 624.

GULLEDGE v. SEABOARD AIR LINE RAILWAY COMPANY.

[147 N. C. 234, 60 S. E. 1134.]

DEATH—Time Limited for Bringing Action.—A provision in a statute giving a right of action for wrongful death "to be brought within one year," is not a statute of limitations which must be pleaded, but it is a condition annexed to the cause of action which the plaintiff must prove in order to make out a prima facie case. (p. 545.)

DEATH—Time Limited for Bringing Action.—The fact that no administrator was appointed for the estate of one whose death has been caused by negligence is no excuse for not bringing an action therefor within the one year prescribed by statute. (p. 546.)

Robinson & Caudle, H. H. McLendon, J. T. Bennett and J. A. Lockhart, for the plaintiff.

John D. Shaw and Murray Allen, for the defendant.

[234] BROWN, J. The defendant moved to dismiss the action because the evidence of plaintiff disclosed that the action had not been commenced within one year from the death of plaintiff's intestate. The intestate died April 16, 1902, and the action was not commenced until January 26, 1906. The plaintiff contends that the statute of limitations has not been pleaded in the answer, and, further, that there was a prolonged contest over letters of administration upon the intestate's estate, begun June 7, 1902, and ended in June, 1905, which time should not be counted, under Revisal, section 369. This action is brought under section 59 of the Revisal of [235] 1905: "Whenever the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their administrators, executors, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default causing the death amount in law to a felony."

Unfortunately for the plaintiff's case, this court has heretofore interpreted the words "to be brought within one year," contained in the statute, as a condition annexed to the cause of action, and not as a statute of limitation which must be pleaded. Before the plaintiff can make out a prima facie case he must offer evidence tending to prove that the action was commenced within one year after death.

In Taylor v. Cranberry I. & C. Co., 94 N. C. 525, Justice Merrimon, speaking for the court, says: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate. It must be accepted in all respects as the statute gives it."

In Best v. Kinston, 106 N. C. 205, 10 S. E. 997, it is held that the fact that no administrator was appointed does not vary the rule, as no explanation why the action was not brought within one year can avail. These cases are cited with approval in the more recent case of Hartness v. Pharr, 133 N. C. 566, 98 Am. St. Rep. 725, 45 S. E. 901.

The old law prohibiting usury contained a similar clause, requiring that the action must be commenced within two

years. It was held not to be a statute of limitation and that the statute need not be pleaded; for, says the court, "Unless he commences his action within two years from the usurious transaction, he has no cause of action": Roberts v. Life Ins. [236] Co. of Virginia, 118 N. C. 429, 24 S. E. 780; Tayloe v. Parker, 137 N. C. 418, 49 S. E. 921. The present statute in respect to usury is different, and creates a statute of limitation. This condition which the legislature has annexed to the cause of action works no hardship upon the next of kin, for whose benefit the statute was enacted, for the statute provides that the action may be brought by a collector as well as an executor or administrator. Doubtless the General Assembly wisely intended to compel the commencement of such actions before time had obliterated the evidence relating to the cause of death. The fact that a controversy over the administration was pending could not prevent the next of kin of plaintiff's intestate from having a collector appointed, who could have brought the action within the statutory time. By reason of their failure to do so they have now no cause of action which the administration can assert. The motion to nonsuit is allowed.

Reversed.

As to the Time Limited Within Which an Action for wrongful death may be maintained, see Atlantic etc. R. R. Co. v. McDilda, 125 Ga. 468, 114 Am. St. Rep. 240; Nelson v. Galveston etc. Ry. Co., 78 Tex. 621, 22 Am. St. Rep. 81. The requirement of the statutes of North Carolina that an action for wrongful death must be brought within one year is not a statute of limitations; a failure to commence an action in that state within that time extinguishes not only the remedy, but the right, so that thereafter an action cannot be maintained in South Carolina: Dennis v. Atlantic Coast Line R. R. Co., 70 S. C. 254, 106 Am. St. Rep. 746.

KING v. RALEIGH AND PAMLICO SOUND RAILROAD COMPANY.

[147 N. C. 263, 60 S. E. 1133.]

CONTRACTS—Purchase of Editorial Columns.—A contract whereby a newspaper agrees to devote its editorial columns to promote the interests of a railroad company is against public policy, and not enforceable. (p. 549.)

CONTRACTS—Agreement to Aid Election.—A contract to aid in carrying an election for a bond issue is against public policy, and not enforceable. (p. 549.)

J. L. Fleming, for the plaintiff.

Moore & Long, for the defendant.

264 CLARK, C. J. The complaint alleges that the plaintiff was editor of a newspaper, and "(2) that during February, 1902, the defendant company, then trying to secure aid in building a line of railroad from Raleigh to some point on Pamlico sound, applied to the plaintiff to secure the columns of his paper and his personal service in trying to carry elections along the route of the proposed road by which bonds were to be issued for the use and benefit of said road, and to gain for said road the goodwill of the citizens along said road, and in other ways assist the managers and directors of said road in their undertaking; and under the promise from the manager and one of the directors of said defendant company that he should be 'taken care of,' well paid for his services, he agreed to serve the defendants as best he could in the manner suggested, and did serve it in the ways indicated by defendant through the columns of his paper, by advertisements and by personal services at elections and in other ways well known to defendant. For such services the defendant agreed and promised to pay, but when demand was made the defendant admitted his right to compensation, but only offered him three hundred dollars in second mortgage bonds of its railroad company for his services; (3) that the services rendered the defendant by the plaintiff were reasonably worth the sum of fifteen hundred dollars; (4) that payment has been demanded and refused."

265 The plaintiff makes clear his meaning by his evidence, in which he said: "I was to do everything I could, through my paper and by personal service, in the interest of the railroad. I published editorials, etc., in the paper for two years. I don't know that I published articles favoring the railroad in every issue. They were to pay me for editorials." He further testified that he had a great many conversations with the president and general manager of the defendant railroad company, "in all of which he agreed to pay for my services. I ran a paper—that was my regular work. Another service I rendered was in arranging for and helping to carry the elections for issuing bonds for the railroad in 1903. Contract was, 'if it won, would issue fifteen thousand dollar bonds and take second mortgage,' etc. I was largely instrumental in getting citizens interested and in

calling elections and in getting people to register and vote and in carrying the elections. Don't know that others got anything for services. Munford (an advertiser) has paid me as much as four hundred dollars. I gave him more space than I did the railroad, but if I had advocated his business like I did for the railroad it would have been worth several thousand to his business. I never published notices for railroad. County and town paid me for election notices. I wrote the editorials published in my paper myself and would copy extracts from other papers." On redirect examination he admitted that "There is a difference in advertising a thing and advocating a measure." The court concurs in this last proposition.

When an advertisement is inserted the public knows that it is paid for, that it speaks for the advertiser and that the representations are made by him and not by the editor. But an editorial is understood to express the true and unbought views of the editor. It is because of that fact that they carry any weight with the public. It was precisely because of such weight that the defendant thought it worth money to buy the use of plaintiff's editorial columns. Had the plaintiff informed [206] the public that he had sold his editorial columns to the railroad company, his editorials would have had no weight whatever in inducing the citizens to vote a bond issue on themselves in favor of the railroad. Both parties knew this. Both are at fault. Public policy will not permit the courts to enforce a contract based upon an immoral consideration, but will leave the parties to their own devices: Basket v. Moss, 115 N. C. 448, 44 Am. St. Rep. 463, 20 S. E. 733, 48 L. R. A. 842; Burbage v. Windly, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409, and many other cases cited, 135 N. C. at pp. 733, 734. Neither the sale of editorial columns nor services for carrying an election are recognizable in a court of justice as ground of action for a recovery of compensation.

Contracts, for money or personal profit, to use efforts and influence to "carry an election," especially an election of this character, are contra bonos mores: 9 Cyc. 500; Wilson v. Puryear, 12 Ky. 556; 15 Am. & Eng. Ency. of Law, 984; Dean v. Clark, 80 Hun, 80, 30 N. Y. Supp. 45.

In Trist v. Child, 88 U. S. 441, 22 L. ed. 623, there is citation of numerous authorities which have refused to uphold contracts alleged in the complaint because they are held to

be against the policy of the law and the theory upon which the government of this republic is founded.

The plaintiff in this case was the editor of a paper, and is seeking to recover for sale of his editorial influence and for other alleged services in carrying an election to issue bonds. Certainly this was as much against public policy as an agreement for a consideration not to bid on articles to be sold by the government, or an agreement to pay for a contract to carry the mail, or an agreement to pay for procuring signatures to a pardon to be presented to the governor, or an agreement not to bid at a sale made under the judicial order, or an agreement to pay for promoting a marriage; because, in each of the several instances mentioned, which have all been held to be invalid by reason of public policy, the interests affected are private [207] and largely bear upon individuals rather than upon a community, while in this case the interests affected are public, and bear, if the burden should be placed, upon the whole community.

There are other services mentioned in the complaint, but they are all stated in the same cause of action and so mixed up with it as to poison the whole: Trist v. Child, 88 U. S. 441, 22 L. ed. 623. It is probable that the whole employment was based upon the influence of the newspaper and its editorials. Certainly the defendant's demurrer ore tenus to the action should have been sustained below, and it must be sustained here.

Action dismissed.

Contracts for the Purpose of Influencing Elections are unenforceable, because opposed to public policy: Liness v. Hesing, 44 Ill. 113, 92 Am. Dec. 153; Swayze v. Hull, 3 Halst. 54, 14 Am. Dec. 399. And a public office cannot be the subject of a contract: Water Commissioners v. Cramer, 61 N. J. L. 270, 68 Am. St. Rep. 705; White v. Cook, 51 W. Va. 201, 90 Am. St. Rep. 775; Edwards v. Randle, 63 Ark. 318, 58 Am. St. Rep. 108. Agreements for compensation to procure appointment to a public office, or to resign such office in another's favor for a consideration, are void, because against public policy: Basket v. Moss, 115 N. C. 448, 44 Am. St. Rep. 463.

ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY v. ATLANTIC AND NORTH CAROLINA COMPANY.

[147 N. C. 368, 61 S. E. 185.]

CONTRACTS.—Executory Contracts are Assignable Except Such as call for the performance of personal services or involve personal credit or trust; and this exception may be waived by the party for whose benefit it exists, and it does not apply when the contract is entirely objective in its nature and gives clear indication that the personality of the other party was in no way considered. (p. 556.)

CONTRACTS—Assignment of Contract to Furnish Wood.—A contract to furnish wood to a railway company for use in its engines is assignable by that company to its lessee; and if the lessee, after using wood furnished under the assigned contract, refuses to receive the remainder, it is liable to the lessor in damages which have been recovered against it by the contractor for breach of the contract. (p. 558.)

CONTRACTS—Rules of Interpretation.—The Object of All Rules of interpretation is to arrive at the intention of the parties as it is expressed in the contract; in arriving at this intent the contract must be considered as a whole, and the words are prima facie to be given their ordinary meaning. (p. 560.)

CONTRACTS—Interpretation in Light of Circumstances.—In the interpretation of a contract the facts and attendant circumstances established by parol testimony may be considered. (p. 561.)

CONTRACTS—Damages for Breach by Assignee.—Where a judgment is recovered against the assignor of a contract for the purchase of cord-wood on account of the assignee's breach thereof, the assignor may recover from the assignee the amount of the judgment, together with his costs and attorney fees incurred in resisting the original suit. (p. 562.)

LESSEE RAILWAY—Liability on Lessor's Contract.—Where a railway company leases its property, including "all lands and interest in lands, timber rights and contracts now owned by the lessor," the lease transfers to the lessee executory contracts then existing between the lessor and third persons to furnish wood for its locomotives, and the lessee being entitled to the benefits of the contract, must assume its burdens; the primary liability on the contract, as between the lessor and lessee, is with the latter. (pp. 564, 565.)

ATTORNEY AND CLIENT—Privileged Communications.—The testimony of one who has been counsel for one of the parties to a lease cannot be objected to as a confidential communication when it was in regard to a fact necessarily known to both parties, brought out during their negotiations concerning the lease. (p. 565.)

George Rountree and P. M. Pearsall, for the plaintiff.

Aycock & Daniels, Simmons, Ward & Allen and Moore & Dunn, for the defendant.

370 HOKE, J. A jury trial having been formally waived by the parties, the court heard the testimony and found the facts as follows:

1. The plaintiff is a corporation duly organized and existing under the laws of North Carolina.

2. The defendant is a corporation duly organized and existing under the laws of North Carolina.

3. On September 1, A. D. 1904, the plaintiff made, duly executed and delivered a lease to the Howland Improvement Company. A copy of said lease is hereto annexed and made a part of these findings of fact.

4. The defendant succeeded to the rights and liabilities of the said Howland Improvement Company under said lease.

5. Previous to the execution of said lease the plaintiff used in its locomotives for the transportation of freight and passengers over its railroad wood as fuel, and for the purpose of supplying itself with a sufficient quantity of wood the plaintiff had purchased timber lands and standing timber and had entered into contracts with several persons for cutting timber, among others one B. W. Ives, for the cutting and delivery to plaintiff of fifteen thousand cords of wood; and in pursuance of said contract the said Ives, prior to the date of said lease, had cut and delivered large quantities of said wood to plaintiff, and at the time of the execution of said lease the contract between plaintiff and Ives was in regular course of performance by both parties thereto.

6. When the defendant took over the property of the plaintiff under the said lease all of the locomotives which it received [371] were what are known as "wood burners," and it was necessary to have an adequate supply of wood as fuel for said locomotives, and the defendant used in its railroad operations only those locomotives for several months, and used up large quantities of wood as fuel, including a portion of the wood cut and delivered to plaintiff by said Ives under said contract.

7. Some months after defendant had been in the operation of said railroad under the said lease it changed the locomotives from "wood burners" to "coal burners."

8. After the lease the defendant refused to carry out the wood contract with Ives or to take any wood from him under and in pursuance of said contract between the plaintiff and said Ives; thereupon the said Ives demanded of the plaintiff that it carry out said contract, and upon the failure of the plaintiff to perform said contract the said Ives, on December 28, 1904, brought suit against the plaintiff for the breach of said contract.

9. Upon the institution of said suit the plaintiff notified the defendant to come in and defend the same, which the defendant declined to do, and the plaintiff undertook the defense of said suit, and did defend it to the best of its ability, and at considerable expense and cost, but judgment was finally awarded, both in the superior and supreme courts, against the plaintiff and in favor of said Ives for the sum of $8,106.90, with interest and costs. In addition to said amount the plaintiff was forced to pay the following amounts: Interest on said amount, $216.16; cost superior court, $104.60; cost supreme court, $23.55; attorney's fee, $700; amounting in all at the time of said payment to the sum of $9,147.21.

10. The defendant knew of the existence of said contract at the time of the said lease, as shown by the paper-writing itself and the testimony of Howland, Davidson and Bryan.

11. Said contract was assignable, and was duly assigned by the plaintiff to the defendant and was broken by the defendant.

372 12. Said contract between the plaintiff and B. W. Ives was not in writing, nor was there any writing concerning same at the time of the making of the lease to the defendant.

13. The referee held that the defendant is liable to the plaintiff for the amount set out in paragraph 9 above, and that judgment be entered in favor of the plaintiff and against the defendant accordingly.

The portions of the lease referred to in the third finding of fact, pertinent to this inquiry, are as follows:

"Now, therefore, for and in consideration of the several sums of money, rents, covenants, agreements and stipulations hereinafter specified and agreed to be paid, kept and performed by the Howland Improvement Company, the said lessor, namely, the Atlantic and North Carolina Railroad Company, has demised, let, hired, farmed out and delivered, and by these presents doth demise, let, hire, farm out and deliver to the said lessee, namely, the Howland Improvement Company, the entire railroad of the lessor, with all its franchises, privileges, rights of transportation, works and property, including among other things its superstructure, roadbed and rights of way incident thereto, situated in the state of North Carolina and extending from Morehead City, in the county of Carteret, to the city of Goldsboro, in the county of Wayne, in the said State; and also all depots, houses, shops, piers, wharves, waterfronts, water privileges, buildings, fixtures, engines, cars and railroad equipment, and all franchises,

rights and privileges and other things, if any, of whatsoever kind and nature, to the said lessor belonging and necessary, incident and appurtenant to the free, easy and convenient operation of the said railroad leased hereby and now or heretofore used in that behalf; and also including the property situated in the said Morehead City known as the Atlantic Hotel, with all its rights, privileges, hereditaments and appurtenances, and the furniture, fixtures, equipments and appliances now therein or used therewith, and also all lands and [373] interests in lands, timber, timber rights and contracts now owned by the lessor, for the full term of ninety-one (91) years and four (4) months from and after the first day of September, 1904, and to be fully ended, commencing the first day of September, 1904."

And, further, a covenant of indemnity as follows:

"And the lessee further covenants to and with the lessor, its successors and assigns, to indemnify and save harmless the said lessor against and from any and all damages which may be recovered from or against it, according to law, by reason of any failure of the said lessee, its agents, employés, successors or assigns to perform in all things, or its or their violation of their duties and obligations, whereby the lessor may become liable to any party injured or sustaining injury in his or her person, reputation or property; and the lessor on its part covenants to and with the lessee that whenever any suit or action shall be instituted against it, the said lessor, for any causes of action for which the lessee would be liable to the lessor under the terms of this lease, the lessor will immediately give due notice and tender defense of such suit or action to the lessee, such notice to be given to the resident agent of the lessee at either of the following named places, to wit: Morehead City, New Bern, Kinston or Goldsboro, all in the state of North Carolina."

And further: "It is further agreed between the parties that all cash on hand and all bills and accounts receivable, due and payable to the lessor at the date this lease goes into effect shall not pass by this conveyance, nor shall the lessee be liable for any debts of the said lessor at said date."

On the findings of fact and conclusions of law there was judgment for plaintiff, and defendant excepted and appealed.

[374] The contract by reason of which this recovery was had and its effect and binding force as between the original parties were construed and determined in Ives v. Atlantic & N. C. R. R., 142 N. C. 131, 115 Am. St. Rep. 732, 55 S. E. 74,

and it was there held that the contract was for the cutting and delivery to the present plaintiff on its right of way a specified amount of cordwood, and was not, therefore, within the statute of frauds requiring that contracts concerning land should be in writing. The judgment obtained by Ives in that case having been paid off and discharged, the plaintiff instituted this action to recover of the present defendant the amount of that judgment and the cost and reasonable expense incurred in defending the suit.

Such recovery is resisted on the grounds chiefly (1) that the contract in question was not assignable; (2) that, as a matter of fact, it was not assigned. But we are of opinion that neither position can be sustained.

While at common law the rights and benefits of a contract, except in the case of the law merchant and in cases where the crown had an interest, could not be transferred by assignment, a doctrine which Lord Coke attributes to the "wisdom and policy of the founders of our law in discouraging maintenance and litigation, but which Sir Frederick Pollock tells us is better explained as a logical consequence of the archaic view of a contract as creating a strictly personal obligation between the debtor and creditor," the rule in its strictness was soon modified in practical application by the common-law courts themselves and more extensively by the decisions of the courts of equity; and the principles established by these cases have been sanctioned and extended by legislation until now it may be stated as a general rule that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that actions for breach of same can be maintained by the assignee in his own name.

[375] The general doctrine as to the assignability of rights is very well stated in Pomeroy's Equity Jurisprudence (volume 3), section 1275, as follows:

"*What Things in Action are or are not Assignable.*—It becomes important, then, in fixing the scope of the equity jurisdiction, to determine what things in action may thus be legally assigned. The following criterion is universally adopted: All things in action which survive and pass to the personal representatives of a decedent creditor as assets, or continue as liabilities against the representatives of a decedent debtor, are in general thus assignable; all which do not thus survive, but which die with the person of the creditor or of the debtor, are not assignable. The first of these classes, according to

the doctrine prevailing throughout the United States, includes all claims arising from contract, express or implied, with certain well-defined exceptions; and those arising from torts to real or personal property and from frauds, deceits and other wrongs whereby an estate, real or personal, is injured, diminished or damaged. The second class embraces all torts to the person or character, where the injury and damage are confined to the body and the feelings; and also those contracts, often implied, the breach of which produces only direct injury and damage, bodily or mental, to the person, such as promises to marry, injuries done by the want of skill of a medical practitioner contrary to his implied undertaking, and the like; and also those contracts, so long as they are executory, which stipulate solely for the special personal services, skill or knowledge of a contracting party."

And an interesting and well-considered article by Professor Frederick C. Woodward on the assignability of contracts will be found in 18 Harvard (Law Review, vol. 18, No. 1, p. 23). There is an exception, as indicated in the last part of this citation from Pomeroy, to the effect that executory contracts for personal services involving a personal relation or confidence between the parties cannot be assigned: Lawson on Contracts, sec. 355. And another, equally well established [876] and well-nigh as broad as the rule itself, is that executory contracts imposing liabilities or duties which in express terms or by fair intendment from the nature of the liabilities themselves import reliance on the character, skill, business standing or capacity of the parties cannot be assigned by one without the assent of the other. This last exception and the reason upon which it rests are stated by Justice Gray, delivering the opinion in Delaware Co. Commrs. v. Diebold S. & L. Co., 133 U. S. 473, 10 Sup. Ct. Rep. 399, 33 L. ed. 674, as follows: "A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his right and his obligations, cannot be assigned without the consent of the other party to the original contract"; citing the case of Arkansas Val. S. Co. v. Belden Min. Co., 127 U. S. 379, 8 Sup. Ct. Rep.

1308, 32 L. ed. 246. And the same principle is stated in Clark on Contracts, 364: "It may be said generally that anything which involves a right of property is assignable, with the exception that rights, when coupled with liabilities under an executory contract for personal service or under contracts otherwise involving personal credit, trust or confidence, cannot be assigned."

It is contended that, by reason of those exceptions stated in the authorities referred to, the contract before us was not assignable so as to impose liability of performance on defendant lessee, but we think the position is not well taken. In the first place, the exception noted arises for the protection of the other party, and if such party assents, as he did in this instance, the restriction no longer exists. But, apart from this, it will be noted that the exception referred to does not arise or apply when the contract is entirely objective in its [377] nature, and gives clear indication that the personality of the other contracting party was in no way considered: Anson on Contracts, p. 288; Clark on Contracts, p. 360. And this limitation imposed on the exception itself is applied and extended in numerous and well-considered decisions of courts of the highest authority: Horner v. Wood, 23 N. Y. 350; Devlin v. City of New York, 63 N. Y. 8; New York v. Twenty-third St. Ry. Co., 113 N. Y. 311, 21 N. E. 60; Rochester Lantern Co. v. Stiles & Parker P. Co., 135 N. Y. 209, 31 N. E. 1018; City of St. Louis v. Clemans, 42 Mo. 69; Galey v. Mellon, 172 Pa. 443, 33 Atl. 560; Tolhurst v. Cement Co., [1893] H. L. App. Cas. 414; British Wagon Co. v. Lea & Co., [1879-80] L. R. 5 Q. B. 149.

In Devlin v. City of New York, 63 N. Y. 8, the general principle we are discussing is stated and applied as follows: "1. Where an executory contract is not necessarily personal in its character, and can, consistent with the rights and interests of the adverse party, be fairly and sufficiently executed as well by an assignee as by the original contractor, and where the latter has not disqualified himself from a performance of the contract, it is assignable. 2. The assignment by the contractor with a municipal corporation for work is not against public policy so long as the corporation retains the personal obligation of the original contractor and his sureties; and in the absence of anything in the statute which authorized the work prohibiting it, such an assignment is valid. It does not terminate the contract or authorize the corporation to repudiate it. 3. Accordingly held that an assignee of a contract for

street cleaning, made between the corporation of the city of New York and another under authority of the act entitled 'An act to enable the supervisors of the county of New York to raise money by tax for city purposes and to regulate the expenditure thereof,' etc. (Laws of 1860, chapter 509), could maintain an action against the city for moneys due thereon and for damages resulting from a repudiation of the contract [378] and an interference on the part of the city authorities, preventing a further performance."

And in British Wagon Co. v. Lea & Co., [1879-80] L. R. 5 Q. B. 149, Chief Justice Cockburn, delivering the opinion, discusses the principle as follows: "We entirely concur in the principle on which the decision in Robson v. Drummond, 2 Barn. & Adol 303, rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is, in such a case, of the essence of the contract, which consequently cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these wagons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company or by anyone with whom the company might enter into a subsidiary contract to do the work. All that the hirers—the defendants —cared for in this stipulation was that the wagons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus, if without going into liquidation or assigning these contracts the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the wagons in repair. While fully acquiescing in the general [379] principle just referred to, we must take care not to push

it beyond reasonable limits. And we cannot but think that in applying the principle the court of queen's bench, in Robson v. Drummond, 2 Barn. & Adol. 303, went to the utmost length to which it can be carried, as it is difficult to see how, in repairing a carriage when necessary or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done whether it is done by the immediate party to the contract or by some one on his behalf. In all these cases the maxim, 'Qui facit per alium facit per se,' applies."

It will be noted here that, while the case of Robson v. Drummond, 2 Barn. & Adol. 303, frequently cited in support of the position that contracts imposing liabilities cannot be assigned, is not overruled, there is decided intimation that it has gone too far in the application of this principle, and there is doubt if the case of Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9, is not subject to the same criticism. Certainly neither one of these cases can, it seems to us, be supported, except on the theory that there were terms in the contract importing reliance on the personal skill, business standing or methods of the other contracting party. A correct application of the principle established by these cases leads to the conclusion that the contract in question was assignable. It was an ordinary business contract for the delivery of so much cordwood on the lessee's right of way, not requiring or importing any special reliance on Ives' skill or business qualifications. It could be performed as well by one man as another. As a matter of fact, there is testimony to the effect that it was to be done in this instance by convicts, and that quarters had already been constructed for their protection and accommodation while doing the work. As said by Justice Walker, in the opinion of Ives v. Atlantic & N. C. R. R., 142 N. C. 131, 115 Am. St. Rep. 732, 55 S. E. 74. "It was a contract of employment in the sense that it was to 380 be performed by means of personal labor, but not in the sense that it was expected or intended that it should be performed by Ives." Nor did the credit or business responsibility of the original parties affect the matter one way or the other; not that of Ives, for the wood was not to be paid for till it was delivered, and so the defendant assignee was fully protected; nor that of the assignor, for unless Ives had agreed to accept the defendant's responsibility in stead and place of

the assignor, making it a new contract by way of novation, the assignor would, notwithstanding the assignment, still remain liable: Crane v. Kildorf, 91 Ill. 567; Martin v. Orndoff, 22 Iowa, 504. And see the article of Professor Woodard, supra, wherein it is shown that the assent of the other party to an assignment does not always necessarily import that the assignor is relieved of liability.

This, ordinarily, is all the books mean when they state the proposition in general terms that a contract imposing liability cannot be assigned; that the assignment of such a contract does not, as a rule, relieve the assignor from responsibility. It may be well to note that we are speaking of the assignment of the contract and not of the transfer of the property about which parties may have contracted. In the last case it is a generally accepted doctrine that, in the absence of an agreement, express or implied, a party who buys property from a vendee, to whom the owner has contracted to sell it, does not, as a rule, come under personal obligation to the owner to pay the purchase price: Adams v. Wadhams, 40 Barb. 225; Comstock v. Hitt, 37 Ill. 542. We have so held in effect at the present term in Briggers v. Matthews, 147 N. C. 299, 61 S. E. 55.

The contract in question here, being for the delivery of so much cordwood on defendant's right of way, may be classed with a contract of sale of a given quantity of staple goods having a known market value, and, under the principle established by the authorities referred to, we hold that it was [381] assignable, so as to impose on defendant the obligation to pay for the wood when delivered according to its terms.

And we are also of the opinion that by the terms of the lease the contract was, and was intended to be, assigned. The operative words of the lease are that the parties of the "first part do demise, let, hire, farm out and deliver to the said lessee, etc., the franchise, property, etc., of the lessor for the full term of ninety-one years and four months from and after the first day of September, 1904." And the descriptive words as to the property passed included the franchise, works, property, right of way, etc., appertaining to the railroad; also the Atlantic Hotel property, with all its rights, privileges, hereditaments and appurtenances, and the furniture, etc., used therewith; and, in reference to the matter now before us, "also all lands and interests in lands, timber, timber rights and contracts now owned by the lessor," etc. There was testimony to the effect, and it was found as a fact by the trial judge:

"5. That previous to the execution of said lease the plaintiff used in its locomotives for the transportation of freight and passengers over its railroad, wood as fuel, and for the purpose of supplying itself with a sufficient quantity of wood the plaintiff had purchased timber lands and standing timber, and had entered into contracts with several persons for cutting timber, and among others one B. W. Ives, for the cutting and delivery to plaintiff of fifteen thousand cords of wood; and in pursuance of said contract the said Ives, prior to the date of said lease, had cut and delivered large quantities of said wood to plaintiff, and at the time of the execution of said lease the contract between plaintiff and Ives was in regular course of performance by both parties thereto. 6. That when the defendant took over the property of the plaintiff under the said lease all of the locomotives which it received were what are known as 'wood burners,' and it was necessary to have an adequate supply of wood as fuel for said locomotives; and that the defendant used in its railroad operations only those locomotives for several [382] months and used large quantities of wood as fuel, including a portion of the wood cut and delivered to plaintiff by said Ives under said contract. 7. That some months after defendant had been in the operation of said railroad under the said lease it changed the locomotives from 'wood burners' to 'coal burners.'"

It is well recognized that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract, and that in written contracts which permit of construction this intent is to be gathered from a perusal of the entire instrument. In Paige on Contracts, section 1112, we find it stated: "Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole." And while in arriving at this intent words are prima facie to be given their ordinary meaning, this rule does not obtain when the "context or admissible evidence shows that another meaning was intended": Paige on Contracts, sec. 1105. And, further, in section 1106 it is said that the context and subject matter may affect the meaning of the words of a contract, especially if, in connection with the subject matter, the ordinary meaning of the term would give an absurd result. Again, as said by Woods, J., in Merriam v. United States, 107 U. S. 437, 27 L. ed. 531, "In such contracts

it is a fundamental rule of construction that the courts may look to not only the language employed, but to the subject matter and surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." And in Beach on Modern Law Contracts, section 702, the author says: "To ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects they had in view. The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have." Applying these [383] accepted rules of construction, and considering the facts and attendant circumstances established by the parol testimony, which was properly received for the purpose indicated (Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613; Ward v. Gay, 137 N. C. 397, 49 S. E. 884), we are of the opinion that the contract with Ives for the cutting and delivery of cordwood came within the descriptive terms of the lease and was assigned to the lessee as stated. It is true that the terms "demise" and "let" are usually applied to leases and conveyances of real estate, but they both contain the idea of a grant; and when, as in this instance, the parties have used them as the operative words applied to a transfer of timber rights and contracts, passing such interest for ninety-one years and more, by fair interpretation and considering the nature of the interests, the parties could only have intended an assignment. And the term "contracts" in the descriptive words must have included this contract with Ives to cut cordwood. Referring to the parol testimony competent for the purpose stated, this and another contract with Overman of like nature were all the contracts of this kind they had. The terms "land," "timber" and "timber rights" included all the standing timber, and these two contracts to cut cordwood were the only interests on which the words could operate. The evidence, too, further shows that these two contracts were brought to the attention of the lessee before the contract was entered into; that the one here in question was being carried out by Ives at the time of the lease, and its benefits were for a short while accepted by the lessee. We do not attach any importance to the words "now owned by the vendors" at the conclusion of the descriptive words. The rights and benefits of a contract like this are considered as property, and the term "owned by them" is not inapt as a part of the description: Thurber v. LaRoque, 105 N. C. 301, 11 S. E. 460.

And so, as to the word "timber," ordinarily this term applies to timber fitted for structural purposes, but it would be entirely improper to give it that significance when the testimony [384] shows that the entire purpose of these holdings and contracts concerning them was to supply cordwood for the operating purposes of the railroad. And we think it a fair surmise, permissible in view of the facts and attendant circumstances, that if the lessee had not decided to change its engines from wood to coal burners, this litigation would never have arisen.

If we are correct in our position that the contract was assignable, and that, as a matter of fact, it was assigned, then we are of opinion that plaintiff has the undoubted right to recover of the defendant the amount of the judgment, together with the cost and reasonable attorney's fees incurred in resisting the suit instituted by Ives. Though the lessee may have repudiated any and all obligations to Ives by reason of this contract, the lessor was not thereby relieved of the obligation to do what was reasonably required to resist recovery: Tillinghast-Styles Co. v. Providence Cotton Mills, 143 N. C. 268, 55 S. E. 620; Bowen v. King, 146 N. C. 385, 59 S. E. 1044. And defendant's obligation, we think, arises by the express covenant of the lease, in which it is evidently contemplated that resistance to such suits should be made whenever the facts and conditions offered reasonable grounds of defense. One of the stipulations of the lease (page 47, record) provides as follows: "And the lessee further covenants to and with the lessor, its successors and assigns, to indemnify and save harmless the said lessor against and from any and all damages which may be recovered from or against it, according to law, by reason of any failure of the said lessee, its agents, employés, successors or assigns to perform in all things or its or their violation of their duties and obligations whereby the lessor may become liable to any party injured or sustaining injury in his or her person, reputation or property; and the lessor on its part covenants to and with the lessee that whenever any suit or action shall be instituted against it, the said lessor, for any causes of action for which the lessee would be liable to the lessor under the terms of this [385] lease, the lessor will immediately give due notice and tender defense of such suit or action to the lessee; such notice to be given to the resident agent of the lessee at either of the following named places, to wit: Morehead City, New Bern, Kinston or Goldsboro, all in the state of North Carolina."

When the defendant bought and took an assignment of this contract for the delivery of so much cordwood on its right of way, and thus acquired the right to enforce performance by Ives or recover damages for its breach, it assumed the liability to pay for it when delivered. It could not take over the benefits of the contract without bearing its burdens. Defendant took the contract cum onere (Union Pacific Ry. Co. v. Douglas Co. Bank, 42 Neb. 469, 60 N. W. 886; Smith v. Rogers, 14 Ind. 224); and having in the stipulations quoted agreed to "save lessor harmless from any and all recovery that may be had against the lessor by reason of the failure of the lessee and its assigns to perform in all things their duties and obligations," the liability to repay the amount comes within the express terms of the covenant of indemnity; and, having duly notified the lessee of the institution of the Ives suit and "tendered the defense" the reasonable expenses of such defense may also be recovered. The words of this stipulation, "to indemnify against any and all damages which may be recovered against it, according to law, by reason of its failure to perform in all things the duties and obligations, whereby the lessor may become liable," etc., are broad enough to include this obligation to Ives. And if it were otherwise—if, as defendant contends, the covenant was only intended to apply to the charter obligations of these companies—the result would be the same, for while, as heretofore stated, the lessor company was not relieved of the obligations under this contract unless Ives had agreed to accept the lessee in discharge of the former as between these parties, the lessor and lessee, the force and effect of the assignment were to establish in any event a primary liability in the lessee; and under the general equitable principles of indebitatus assumpsit, the 386 lessor, having been forced to pay, can recover of the lessee the amount of this enforced recovery: Keener on Law Quasi Contracts, p. 396; 15 Am. & Eng. Ency. of Law, 1108.

In the citation from Keener, supra, it is said: "It may be stated as a general proposition that a plaintiff can recover against a defendant as for money paid to his use to the extent that the claim paid by the plaintiff should have been paid by the defendant." This primary liability of the assignee is well brought out in the case of Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 21 Am. St. Rep. 63, 25 Pac. 52, 10 L. R. A. 369. In that case, speaking of the obligation of parties to an imperfect assignment as between themselves, Works, J., for the court, said: "We therefore think it plain

that, as the plaintiff, as assignee, was still bound to Blackwood to pay the price stipulated in the contract, notwithstanding the assignment, and as the defendant, as assignee, assumed such obligations, the plaintiff, as between it and defendant, stood in the nature of a surety for the latter for the performance of the obligation. If this be correct, it then follows that from the assignment an implied contract arose between the plaintiff and defendant whereby the latter became bound to the former to receive and pay for the apricots according to the terms of the original contract." While this ruling was made to depend to some extent on a section of the California code, the statute itself is only an embodiment of the generally accepted doctrine applicable to the facts indicated.

The assignment of the Ives contract having established as between the parties a primary liability on the part of the defendant lessee, the obligations of that contract would not by any fair or correct interpretation be included under the later stipulation of the lease, "that defendant shall not be liable for any debt of the lessor at that date." This obligation, by the force and effect of the lease and assignment, had become the debt primarily of the lessee. And for the same reason the doctrine stated in general terms by Mr. Elliott in his valuable [887] work on railroads (section 462), to which we were referred by counsel, "that a lessee, under an authorized lease, is not liable on the contracts of the lessor in the absence of a stipulation to that effect," does not apply here. This is true when the lessee takes over the franchise and ordinary property of the lessor, without more; but in the case before us the lessee has taken the contract, thereby imposing on itself the obligation as a primary liability. And this distinguishes the present case from that of Pennsylvania Co. v. Erie & P. Ry., 108 Pa. 621. In that decision it was held that an oral agreement by the lessee company to give an annual passing consideration of a release of a right of way through an owner's land was not binding on the lessee. The decision was put on the ground that, while the right of way which had been obtained by the lessor company passed under the lease, there was no connection between the two so as to make them concurrent and dependent stipulations, and therefore in taking over the road, including the right of way, there was not any implied agreement to make good the oral promise to give a pass. The opinion (on page 629) proceeds as follows: "But the parol agreement to provide a pass was no part of the release; the latter was an executed contract, absolute and unconditional in

its terms, and the transfer of it, in the absence of an express provision to the contrary, carried with it to the transferee no legal responsibility to the former. Each, it is true, was the consideration of the other, but they were distinct and independent; one secured a right, whilst the other evidenced a debt of the company." This decision will certainly not extend or apply to the facts presented here where, as stated, a primary liability of the lessee company was assumed and established by taking over a contract having mutual and dependent stipulations.

The objection to the testimony of one who had been of counsel for Howland, the original lessee, as to the fact that the Ives contract was mentioned and referred to at the time of 888 taking the lease, is without merit. This was a fact necessarily known to both parties, brought out during their negotiation concerning the lease, and could in no sense be considered a confidential communication: Weeks on Attorneys, 289; Wigmore on Evidence, 2311; 2312; 23 Am. & Eng. Ency. of Law, p. 67; Elliott v. Elliott, 3 Neb. (Unof.) 832, 92 N. W. 1008, citing with approval Hills v. State, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155.

After giving the case most careful consideration, we find no error in the record, and the judgment below must be affirmed.

Executory Contracts are now generally regarded as assignable: La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179; Up River Ice Co. v. Denler, 114 Mich. 296, 68 Am. St. Rep. 480; Anchor Investment Co. v. Kirkpatrick, 59 Minn. 378, 50 Am. St. Rep. 417; unless the agreement is one which calls for the performance of personal services of a peculiar character: La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179; or unless the parties stipulate that the agreement shall not be assigned: Mueller v. Northwestern University, 195 Ill. 236, 88 Am. St. Rep. 194.

CHERRY v. WILLIAMS.

[147 N. C. 452, 61 S. E. 267.]

NUISANCE—Injunction in Advance of Injury.—When the owner of property is about to engage in an enterprise which may or may not become a nuisance, according to the manner in which it may be conducted, courts usually will not interfere in advance to restrain the undertaking, especially when the apprehended injury is doubtful or contingent or eventual; but this rule is relaxed in cases where the threatened injury is to health rather than to comfort and convenience. (p. 568.)

NUISANCE—Restraining Erection of Tuberculosis Hospital.—The erection of a hospital for the purpose of treating patients afflicted with tuberculosis and other contagious diseases in a residence portion of a city, so as to menace the health of people living in that vicinity, may be enjoined at their suit. (pp. 572, 573.)

G. S. Bradshaw, King & Kimball and Douglas & Douglas, for the plaintiffs.

Stedman & Cooke, for the defendant.

453 HOKE, J. The complaint alleged and there was evidence tending to show:

1. That the plaintiffs are residents and citizens of the county and state aforesaid, and reside on Chestnut street, in the city of Greensboro.

2. That the defendant, Dr. John Roy Williams, is a practicing physician, residing in said city, on said street, and is the owner of a lot fronting fifty feet in width on said Chestnut street and running back a distance of something over two hundred feet in depth from said street.

3. That the defendant, John Roy Williams, is now erecting on the said lot owned by him a building to be used as a sanatorium for the treatment of tuberculosis and other infectious and contagious diseases, and has also, as these plaintiffs are advised and believe, entered into a contract for the erection of a number of small cabins or pesthouses for the treatment of tuberculosis and other diseases, and he is now engaged in the construction and erection of said buildings on said lot for the treatment of tuberculosis and other diseases aforesaid for his individual gain.

4. That the plaintiff Luther H. Cherry is the owner of a lot adjoining the said lot of the said Williams, of the same size, between which there is no obstruction or protection, and that the said Cherry, who has a wife and children, lives within one hundred feet of the said lot on which are being erected the buildings aforesaid; that the plaintiffs N. J. Bakke, J. W.

Case, G. A. Hood, J. T. Wade, W. B. Young and others are also owners of lots on the same street, located within a few feet of the said lot on which the said Williams is erecting the buildings aforesaid.

5. That the said lot of the said Williams is located in a thickly populated section of the city and on the said street where not only plaintiffs, but a large number of other people, [454] reside, and that the erection and use of said buildings for the purposes aforesaid are in violation of the rights of the plaintiffs, and if permitted to be erected and completed and used for the purposes aforesaid will work irreparable and permanent injury and loss to the plaintiffs.

6. That the plaintiffs are advised and believe that the disease or diseases for the treatment of which said buildings are being erected are infectious and contagious and a menace to the public health, and if defendant is permitted to use said buildings for the treatment of said disease or diseases the health of the plaintiffs and the public will be endangered thereby, and that consequent loss of health and life will follow the construction and use of said buildings for the treatment of such disease or diseases as the defendant has determined to treat in said buildings.

7. That the plaintiffs are suffering or about to suffer not only irreparable injury in the matter aforesaid, but they are also forced to sustain irreparable and permanent loss by the depreciation of their property located in close proximity to the said lot by reason of the location of said buildings on the said lot of defendant for said purposes, and by reason of the further fact that the defendant is, as plaintiffs are advised and believe, insolvent and utterly unable to respond in damages for the injury and loss which they have already sustained and will continue to sustain.

8. That if the defendant is permitted to complete said buildings and to use them for the purpose of treating tuberculosis and other diseases, the plaintiffs and their neighbors who reside on the same street will be made to suffer loss and permanent injury, unless the court intervenes for their protection and restrains the defendant from the continuance of his work in the erection of said buildings, and that the private injury resulting therefrom is greatly in excess of any benefit to be derived therefrom.

Defendant, admitting his purpose to construct and use [455] buildings for the treatment of consumptives, and at the place indicated, offered a large amount of evidence, including

affidavits of specialists eminent in their profession and in the treatment of tuberculosis in hospitals and otherwise, to the effect that "a sanatorium for the treatment of consumptive patients located in the city of Greensboro, properly maintained and conducted, would not be a menace to the health of the community in which it is situated nor to the public health; that such sanatoriums are conducted in large and populous cities all over the country where the climate is suitable for the patients, and that experience has shown that such sanatoriums are not a menace to the public health, but rather a benefit"; that the proposed locality is not thickly populated, and consumption is not a contagious or an infectious disease, and that defendant is qualified to conduct the proposed sanatorium properly and intelligently.

On considering the evidence offered by plaintiffs and defendant, the restraining order was continued to the hearing, in terms as follows: "This cause coming on to be heard, and being heard upon the complaint and affidavits herein filed, and it appearing to the court from the complaint and affidavits of the plaintiffs in this cause that the defendant is now erecting on the lot described in the complaint buildings to be used for the treatment of tuberculosis and other infectious and contagious diseases, and that said buildings are a menace to the public health and threaten to cause irreparable and permanent injury and loss to the plaintiffs; and, further, that the plaintiffs are entitled to have the defendant, John Roy Williams, temporarily restrained from the continuance of his work in the erection of said buildings." It was ordered that the restraining order heretofore issued be continued to the hearing. Defendant excepted and appealed.

456 The authorities in this state will uphold the position that, when there are facts in evidence which give good reason to believe that the owner of property in the residential portion of a thickly settled vicinity is about to devote it permanently to a use which imports serious menace to the health of the owners and occupants of adjacent property, such user should be restrained until the facts on which the rights of the parties depend can be properly determined at the final hearing. The conditions suggested, if established, come well within the definition of an actionable nuisance, and if there is a well-grounded apprehension that neighbors will be unreasonably exposed to serious danger from a disease of the nature of consumption, the injunction should be continued

to the hearing. The injury threatened in such case would be irreparable.

As said by Justice Walker, in Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453 7 L. R. A., N. S., 321: "When injunction is sought to restrain that which it is apprehended will create a nuisance, the proof must show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate."

Courts are properly very reluctant to interfere with the enjoyment of property by the owner, and there is a line of cases in this state, and they are in accord with established doctrine, to the effect that when the owner of the property is about to engage in an enterprise which may or may not become a nuisance, according to the manner in which it may be conducted, courts will not usually interfere in advance to restrain such an undertaking, and especially when the apprehended injury is "doubtful or contingent or eventual"; but these decisions will very generally be found to obtain in causes where the apprehended injury was threatened by reason of some industrial enterprise which gave promise of benefit to the community, affecting rather the comfort and convenience than the health of adjoining proprietors, and giving indication [457] that adequate redress might in most instances be afforded by an award of damages, as in Simpson v. Justice, 43 N. C. 115; Hyatt v. Myers, 71 N. C. 271; Hickory v. Southern R. R. Co., 143 N. C. 451, 55 S. E. 840, to which we were referred by counsel for defendant. But, so far as we have examined, whenever this principle has been apparently applied with us to cases which threatened serious injury to health, and injunctive relief was denied complainant, it will be found either that there was some defect in the proof offered by plaintiff, or such proof was successfully controverted by defendant, or there were other conditions present which required the application of some other principle than that which defendant here invokes for his protection. Thus, in Ellison v. Commissioners of Washington, 58 N. C. 57, 75 Am. Dec. 430, bill in equity to restrain the placing of a cemetery so as to threaten the healthfulness of plaintiff's dwelling, injunction was refused on the ground that the evideuce did not tend necessarily to establish that the proposed cemetery would bring about the apprehended result, and further, on the ground that "plaintiff had voluntarily put himself by the site of the ground

selected for this establishment." And accordingly, in the very next volume of the reports (Clark v. Lawrence, 59 N. C. 83, 78 Am. Dec. 241) it was said that, where it was made to appear that a proposed cemetery would endanger the life and health of an adjoining owner, an injunction should be granted, and Judge Battle, delivering the opinion of the court and referring to Ellison v. Commissioners of Washington, 58 N. C. 57, 75 Am. Dec. 430, said: "The same principle which would excite into activity the restraining power of the court, where the health of the community or of an individual member of it is in danger of being destroyed or impaired by a mill pond, will be equally ready to interpose its protection when a similar danger is threatened from the establishment of a cemetery in a city or town or very near the dwelling-house of a private person. This, we think, was recognized in the case of Ellison v. Commissioners of Washington, 58 N. C. 57, 75 Am. Dec. 430, though the decision in [458] that case, on account of its peculiar circumstances, was adverse to the application for the injunction." And in Vickers v. Durham, 132 N. C. 880, 44 S. E. 685, being a case for injunction against discharging sewage of the city of Durham on property so as to threaten the health of complainant's family, relief was denied in part on the ground that the testimony of the complainant failed to controvert that of defendant as to the efficiency of the disinfecting plant of the city. And the fact that the present right to dump the sewage was of great public importance was also allowed weight in the conclusion arrived at. Thus Montgomery, J., for the court, said: "So it appears from everything in the case that the complaint of the plaintiff is based solely upon an apprehension of injury. None of the witnesses of the plaintiff professed to know anything concerning the plant for disinfection or the methods of purification. The plaintiff is simply afraid that he may be injured by something of which he has no theoretical knowledge and with which he has no practical experience. On the other hand, the affidavits filed by the defendant are made by prominent and experienced scientists, and one of them has in several instances seen the practical results of the plan proposed by the city of Durham to dispose of its sewage. In Dorsey v. Allen, 85 N. C. 358, 39 Am. Rep. 704, this court said: 'When the anticipated injury is contingent and possible only, or the public benefit preponderates over the private inconvenience, the court will refrain from interfering.' We think

that still the correct rule, though there may be and are some expressions to the contrary in Marshal v. Commissioners, 89 N. C. 103. In addition to what we have said above, the great importance to the city of Durham of the public work which it is trying to carry out would make us hesitate before we would interfere by injunction." And in Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L. R. A., N. S., 321, Walker, J., refers to the failure on the part of the complainant to offer available evidence which would have gone far toward establishing the injury complained of if it had been in his favor.

459 But where the special conditions referred to, and to some extent relied upon in these cases, do not exist, and there are facts in evidence which tend to establish with reasonable certainty that there is a well-grounded apprehension of irreparable injury to complainant's health by reason of the threatened and unwarranted use of adjacent property, the decisions in this state are to the effect that such user should be restrained till the hearing. Thus, as far back as 4 Hawks, in the case of Attorney General v. Blount, 11 N. C. 384, 15 Am. Dec. 526, this being a bill to prevent the erection of a mill dam, on the ground that there was reasonable certainty that such a structure threatened the health of citizens living near, the court held "that, while the object of a bill is to prevent the erection of that which will be productive of injury serious and irreparable if erected, this court will pass upon the question and interpose its authority to prevent the threatened injury." And in Attorney General v. Hunter, 16 N. C. 12, this being a bill to enjoin the maintenance of a mill dam, on the ground that it injuriously affected the health of the inhabitants of the town, it was held that the suit was well brought, and Henderson, J., delivering the opinion of the court, said: "Where the right infringed is of a doubtful character, as the right of view over another's ground, there a court of equity will order the right to be established at law before it will grant an injunction, in the meantime staying the owner of the land from closing up the view; but here the rights infringed upon are of a character not in the least doubtful—the health and comfort of the relators and others for whom they act."

In Eason v. Perkins, 17 N. C. 38, the principle of these last two cases was affirmed, and that case was distinguished on the ground that it appeared that the mill in question was a great public benefit, and as the injury was only threatened

to one family, the private right under the special circumstances there prevailing should yield to the public good. And a similar decision was made for like reason in Daughtry v. [460] Warren, 85 N. C. 136. Again, in Clark v. Lawrence, 59 N. C. 83, 78 Am. Dec. 241, it was held that when it was made to appear with reasonable certainty that the health of adjacent residents would be affected by the erection of a cemetery, equity would interfere, though in that case a preliminary restraining order was refused on the ground that the evidence did not come up to the requirements so as to bring the case within the principle.

The doctrine announced in these cases in our own court is supported by well-considered decisions in other jurisdictions: Gilford v. Babies' Hospital, 1 N. Y. Supp. 448; Baltimore v. Fairfield Imp. Co., 87 Md. 352, 67 Am. St. Rep. 344, 39 Atl. 1081, 40 L. R. A. 494; Coker v. Birge, 9 Ga. 425, 54 Am. Dec. 347; Goldsmith v. Tunbridge Wells Imp. Co., L. R. 1 Eq. Cas. 161. These and other authorities, too, indicate that it is not practicable to lay down a general rule so clearly defined that its proper application can always be readily made, and each case to some extent must be made to depend upon its own special facts and circumstances. Thus, in Gilford v. Babies' Hospital, 1 N. Y. Supp. 448, it is said: "The learned counsel have cited many adjudications, and the subject is thoroughly treated in Wood's Law of Nuisance. It seems unnecessary to specify cases, because each one differs from most others in facts. In Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654, the court states a correct conclusion: 'In fact, no precise definition can be given. Each case must be judged of by itself.' In Wood's text-book it is well said, in section 9: 'The locality, the condition of property and the habits and tastes of those residing there, devested of any fanciful notions or such as are dictated by "dainty modes and habits of living," is the test to apply in a given case. In the very nature of things there can be no definite or fixed standard to control every case in any locality. The question is one of reasonableness or unreasonableness in the use of property, and this is largely dependent upon the locality and its surroundings.' To my mind, the hospital is not a reasonable use of property, considering the locality and surroundings."

[461] In the case at bar there is evidence on the part of plaintiff, direct, positive and specific, that the erection and use of a hospital in that particular locality, in the manner and for the purpose proposed, will be a source of real dan-

ger to the lives and health of numbers of people living in that vicinity; and, while the affidavit of defendant himself makes specific response, a large portion of the supporting evidence offered by defendant is very general in its terms, and made without reference either to the special locality or to the special manner in which the particular hospital is to be constructed and carried on.

If defendant desires to proceed with the construction of his buildings and risk the results of the trial, the restraining order may be modified to that extent, but any and all use of the buildings for the purposes indicated should be restrained to the hearing, and the judgment of the court below in that respect is affirmed.

Modified and affirmed.

Courts of Equity will not Grant an Injunction to Allay Mere Apprehensions of injury, but only when the injury is imminent and irreparable: Schubach v. McDonald, 179 Mo. 163, 101 Am. St. Rep. 452; Boyd v. Board of Council of Frankfort, 117 Ky. 199, 111 Am. St. Rep. 240.

The Right of a City to Locate a Pesthouse or Smallpox Hospital in a residence portion of a city is discussed in City of Paducah v. Allen, 111 Ky. 361, 98 Am. St. Rep. 422; Frazer v. Chicago, 186 Ill. 480, 78 Am. St. Rep. 296.

The Liability of Persons Communicating Contagious Diseases to Others is the subject of a note to Missouri etc. Ry. Co. v. Wood, 93 Am. St. Rep. 840.

CASES

IN THE

SUPREME COURT

OF

NORTH DAKOTA.

BLAKEMORE v. COOPER.

[15 N. D. 5, 106 N. W. 566.]

TAX DEEDS.—Executors are the "Assigns" of Their Testator within the meaning of a statute authorizing the issuance of a tax deed "to the purchaser, his heirs or assigns." (p. 576.)

TAX TITLE—Burden to Prove Compliance with Law.—In the absence of an enabling statute, it is incumbent upon one who claims title to land derived from a sale thereof for taxes to prove affirmatively that every mandatory provision of the law under which the sale was affected was strictly complied with. (p. 577.)

CONSTITUTIONAL LAW—Impairment of Obligation.—All legislative acts which work an impairment of the obligation of a contract, whether by directly changing its terms or indirectly by rendering it ineffective and of less value through a change of remedies, are forbidden by the constitution. (p. 578.)

TAX TITLE—Impairment by Subsequent Legislation.—A statute making tax deeds prima facie evidence of title enters into the contract of purchase, and thereafter the legislature cannot impair the evidentiary character of the deeds, for to do so would impair the obligation of the contract. (p. 581.)

TAX SALES.—The Right to Redeem from a Contract of Sale, under North Dakota laws of 1890, was a "right accrued" within the meaning of section 2686 of the Revised Code, which preserves actions and proceedings which had been commenced and rights which had accrued. (p. 584.)

TAXATION—Repeal of Revenue Laws.—The repeal or revision of revenue laws has a prospective operation only, unless the intention of the legislature to the contrary clearly appears. (p. 585.)

TAXATION—Retroactive Operation of Redemption Statute.—Statutory provisions relating to redemption from tax sales are prospective, and do not apply to certificates issued under former statutes. (p. 585.)

TAXATION—Notice Terminating Right of Redemption.—If statutes in force when a tax sale was made require service of notice of the expiration of the right of redemption as a condition to obtaining a deed, deeds issued without such notices are invalid. (p. 585.)

TAX SALE.—A Notice of Tax Sale Published in a Newspaper is not invalidated through the failure of the owner or manager to file with the county auditor an affidavit setting forth the paper's qualifications as required by statute. (p. 586.)

J. E. Robinson, for the appellant.

Newman, Holt & Frame, for the respondent.

[8] YOUNG, J. The plaintiff brought this action under chapter 5, page 9, Laws of 1901, to determine adverse claims to the north fifty feet of lot 6 in block 37, Keeney & Devitt's second addition to the city of Fargo. The plaintiff's interest therein was acquired through purchase at three separate tax sales to wit, the sales for the 1890, 1892 and 1893 taxes, and upon which tax deeds were issued in 1902. The sales were made to Louis A. Kedney, and tax sale certificates issued to him. The deeds were issued to "Robert B. Blakemore, executor, and Laura B. Kedney, executrix." The complaint alleges that Louis A. Kedney died in 1898; that in his [9] last will and testament he named Robert B. Blakemore as executor and his widow, Laura B. Kedney, executrix; that the persons so named duly qualified and have not been discharged; that the said Louis A. Kedney devised his entire estate, real, personal and mixed, to Robert B. Blakemore and William C. Macfadden in trust for the use and benefit of his wife, Laura B. Kedney, during her widowhood, the remainder to his children per stirpes when they shall have attained the age of twenty-two years; that Laura B. Kedney was duly appointed guardian of the persons and of the estate of the three children, who are all minors. All of the persons above named are joined as plaintiffs, and allege that they have "an estate and interest in and encumbrance upon" the property above described, and that the defendant claim "certain interests in or estates in or liens or encumbrances upon said premises adverse to these plaintiffs." The prayer is in the statutory form, except that neither possession nor compensation for the use are asked for. The defendants, John Cooper and George McCauley, answered jointly, and expressly deny that the plaintiffs have any right, title or interest in or lien upon the land in question, and allege that in May, 1903, McCauley was the owner in fee of said land and under a patent from the United States government, that he conveyed the same to his codefendant Cooper, and that the latter is now owner in fee simple and in possession. When the case was called for trial counsel for defendants demanded a trial by jury, stating that the action is in effect an action in ejectment. The request was denied and the case was tried under section 5630, Revised Codes of 1899. The findings of the trial judge were in all respects favorable to the plaintiff and judgment was entered thereon quieting

and confirming plaintiff's title and adjudging that the adverse claims of the defendants are null and void, and enjoining them from further asserting them, and for costs. Defendants have appealed from the judgment, and demand a review of the entire case in this court under the above section.

The preliminary question urged by counsel for defendants in his brief, that the defendants were entitled to a trial by jury, does not merit or require discussion. This contention is inconsistent with their attitude upon the record which they have prepared and presented to this court. They have demanded a trial anew under section 5630, Revised Codes of 1899. This section does not authorize retrials in jury cases. In demanding a retrial they necessarily assume [10] that the action is not properly triable to a jury. It is entirely clear, however, that the relief sought in this case is purely equitable, and that the case was properly tried under section 5630, supra. The plaintiffs rested their case upon the tax sale certificates and tax deeds. It is urged by counsel for the defendants that the deeds are void because they are issued to "Robert B. Blakemore, executor, and Laura B. Kedney, executrix," instead of Blakemore and Macfadden, who are named in the will as devisees in trust for the benefit of the widow and children. This contention cannot be sustained. Section 110, Laws of 1890, as amended by chapter 100, page 266, Laws of 1891, in addition to providing a form of deed, authorized the issuance of the same to "the purchaser, his heirs or assigns." We are of the opinion that the executor and executrix are the assigns of the testator within the meaning of the above section. An assign or assignee is "one to whom an assignment has been made. Assignees are either assignees in fact or assignees in law. An assignee in fact is one on whom an assignment has been made in fact by the party having the right. An assignee in law is one in whom the law vests the right, as an executor or administrator": Bouvier's Law Dictionary, "Assignee." "An executor may be deemed an assignee, in law, of the testator: Dyer, 5. That is, he takes without any appointment of the person, but by operation of law. The testator names the individual as executor, but it is the law makes him the assignee of the property": Hight v. Sackett, 34 N. Y. 447. The word "assignee" is applied most frequently to assignees in fact, but it is also applied to assignees in law, and we are of opinion that it must be considered as used in its most comprehensive sense in the above statute, including, as applied to this case, the executor and executrix: Blakemore v. Roberts, 12 N. D.

394, 96 N. W. 1029; Douglas v. Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583; Brown v. Crookston Agl. Co., 34 Minn. 545, 26 N. W. 907.

It is also contended that the introduction of the certificates and deeds did not make out a prima facie case. This contention is likewise untenable. It is true that "in the absence of an enabling statute, it is incumbent upon any person who claims title to land derived from a sale thereof for taxes to prove affirmatively and by proper evidence that every mandatory provision of the law under which the sale was effected was strictly complied with; that each step in the proceedings from the assessment of the taxes to the execution of the deed was formally and regularly taken by [11] the officers or persons thereto legally authorized and that he or his grantor was the purchaser at the sale. And this obligation is not met, in the absence of an enabling statute, by the mere production of the tax deed. The deed of conveyance would not stand for this evidence. It would prove its own execution, nothing more": Black on Tax Titles, secs. 443, 444; 2 Cooley on Taxation, 3d ed., 1004. The common-law rule of proof was abrogated by the statute under which the sales in question were made. The several sales were made in 1891, 1893 and 1894, under chapter 132, page 376, Laws of 1890 as amended by chapter 100, page 266, Laws of 1891. Section 71 of the 1890 act prescribed a form of certificate to be delivered to the purchaser and section 72 of that act provided that "such certificate shall in all cases be prima facie evidence that all the requirements of the law in respect to the sale have been duly complied with, and that the grantee named therein is entitled to a deed therefor after the time for redemption has expired." The 1890 revenue law made no provision for the issuance of a tax deed. The amendatory act (chapter 100, page 266, Laws of 1891) cured this defect, and, among other things, provided for the issuance of deeds, "which shall vest in the grantee an absolute estate in fee simple which shall be conclusive evidence of the truth of all the facts therein recited, and prima facie evidence of the regularity of the proceedings from the valuation of the land by the assessor up to the execution of the deed." All of the sales were made under the statute as amended.

The deeds, however, were not issued until 1902. The revenue law under which the sales were made was expressly repealed in 1895, and it is contended that the assurances made

to purchasers by the former statute as to the evidential force of certificates and deeds, is, therefore, not available. This contention was urged in Fisher v. Betts, 12 N. D. 197, 96 N. W. 132, and was overruled. It was contended in that case that because of the repeal of the revenue laws of 1890 and 1891 in 1895, a tax deed issued thereafter had no force as evidence that the tax proceedings were regular, and that the regularity of all acts of all of the taxing officers must be affirmatively established. It was claimed that the repeal in this respect related solely to the remedy, and that the legislature has a right to change existing remedies. We denied that the repeal had the effect contended for, in the following language: "The contention would not be disputed if the change referred to [12] the remedy only, but if the change of remedy or change in the rules of evidence goes further in its results, and affects contract rights, such changes are inhibited. The legislature will not be permitted, under the guise of changing a remedy or a rule of evidence, to impair a vested right under an existing contract; and the presumption that all requirements of law with respect to the sale have been complied with, raised by the delivery of the tax certificate, was raised in favor of the tax purchaser by the law in force at the time of his purchase. This presumption was perpetuated by the deed, was a vested matter of right, and could not be taken away by a repeal of these laws: Cooley's Constitutional Limitations, 347. Speaking of section 1639 of the Compiled Laws of 1887, which was practically the same as the section under consideration, this court said, in Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049: 'This statute entered into the contract of purchase, and became a part thereof.' "

Counsel for defendants vigorously challenges the soundness of the above decision, contending that the statute stated a mere rule of evidence, relating to the remedy, and that remedies are always under legislative control. It has been held in a number of cases that "rules of evidence are at all times subject to modification and control by the legislature, and changes thus made may be made applicable to existing causes of action," and that the repeal of a statute under which purchasers at tax sales have been made effectually deprives the purchaser of the assurances contained in it as to the evidential effect of the deed. The following cases so hold: Hickox v. Tallman, 38 Barb. 608; Howard v. Moot, 64 N. Y. 262; Roby v. City of Chicago, 64 Ill. 447; Gage v. Caraher, 125 Ill. 447, 17 N. E. 777; Gibbs v. Gale, 7 Md. 76; Strode

v. Washer, 17 Or. 50, 16 Pac. 926; Marx v. Hanthorn (C. C.), 30 Fed. 579. We have no quarrel with the rule, and it is a general rule that the legislature may control remedies, but the rule is subject to the exception, which is as firmly fixed as the rule itself, that the legislature cannot, by a repeal or change of remedies, impair the obligation of a contract. The protection against the impairment of the obligation is absolute, and all legislative acts which work that result, whether by directly changing its terms or indirectly by rendering it ineffective, and of less value through a change of remedies, are prohibited. This is well stated in 2 Story on the Constitution, fifth edition, section 1385: "It is perfectly clear that any law which enlarges, abridges or in any manner changes the intention of the [13] parties, resulting from the stipulations in the contract, necessarily impair it. The manner or degree in which this change is effected can in no respect influence the conclusion, for whether the law affect the validity, the construction, the duration, the discharge or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all supposed cases."

The views of the supreme court of the United States upon this question are clearly set forth in the language of Mr. Justice Swayne, in Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793: "The constitution of the United States declares that 'No state shall pass any law impairing the obligation of contracts.' A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done. The lexical definition of 'impair' is 'to make worse; to diminish in quantity, value, excellence or strength; to lessen in power; to weaken; to enfeeble; to deteriorate': Webster's Dictionary. 'Obligation' is defined to be 'the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath, or contract,' etc.: Webster's Dictionary. The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' It is also the settled doctrine of this court that the

laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement: Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397. In Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547, this court said, touching the point under consideration: 'It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights [14] and interests.' 'One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree, or manner or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force': Planters' Bank of Mississippi v. Sharp, 6 How. 301, 12 L. ed. 447. It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account. These rules are axioms in the jurisprudence of this court. We think they rest upon a solid foundation. The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is, therefore, void."

Again, in United States v. Quincy, 71 U. S. 535, 18 L. ed. 403, Mr. Justice Swayne, speaking for the court, said: "It is also settled that the laws which subsist at the time and place of the making of a contract, ... enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. It is competent for the states to change the form of remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. When-

ever the result mentioned is produced, the act is within the prohibition of the constitution, and to that extent void."

The question, then, is, not whether the repeal related to the remedy, but whether it impaired the obligation of the purchaser's contract with the state, by making it less effective and less valuable. In Fisher v. Betts, 12 N. D. 197, 96 N. W. 132 we hold that it did, and we are still of the same opinion. The state was one of the contracting parties. It promised to those who would purchase the lands of tax debtors at its sales that it would give to them deeds which would be prima facie evidence of their title. Under this assurance the purchasers parted with their money. If the proceedings were in [15] fact regular, the prima facie effect of the deed was an unassailable assurance of title in the grantee and his successors forever. But if the purchaser be deprived of this assurance, the deed evidences nothing. Neither he nor his successors are in that event protected by the fact that the proceedings were regular. They must be prepared to furnish (sometimes an impossible thing) the actual evidence of regularity whenever their title is challenged. That this change goes to the very life and value of the contract is, we think, apparent; and we cannot believe either that the legislature intended that its promises should be meaningless, or that purchasers did not in fact rely upon it as a strong, if not controlling, inducement to part with their money.

The necessity which gave rise to statutes like this is well stated in Black on Tax Titles at section 448, in the following language: "The application of the common-law rule, casting the burden of proving every step upon the claimant under a tax title, was found to operate very much to the disadvantage of purchasers at tax sales. Aside from the difficulty of the undertaking—to prove every item in a long and technical course of proceedings—it was an arduous task to collect and preserve all the necessary fragments of evidence. Many of these were of a perishable nature, subsisting only in the files of newspapers, or fugitive documents; and the lapse of a considerable number of years, from the time of the first assessment, frequently put it beyond the power of the purchaser to fortify his claim with the evidence that was required of him. This fact, taken in conjunction with the strict and minute compliance with the statutory directions that was demanded of all the officers concerned, and with the extreme probability that some flaw, some slight omission or irregularity, could be detected in the proceedings, tended to make tax sales entirely nugatory. It became pro-

verbial that a tax title was no title at all. And, indeed, transactions of this character came as near being an outright mockery as was possible for anything having the sanction of the law."

In our opinion the statute in question entered into, and was a substantial part of, contracts of purchase. It was framed to be relied upon by purchasers. To permit the state to repeal it would be to impair its obligation to the purchaser. This it cannot do. In our opinion it is within the mischief which the constitution was intended to prohibit. We must decline, therefore, to follow those courts which have sustained such repeals upon the ground [16] that the change effected was merely a rule of evidence. It follows from what has been said that the burden was upon the defendants to overcome the prima facie case made by the introduction of the tax sale certificates and tax deeds. Have they sustained that burden? We are of opinion that they have as to the tax deeds but not as to the tax certificates.

The invalidity of the deeds is established by proof that no sufficient notice of the expiration of the redemption period was given. The property in question is the "north 50 feet of Lot 6 in Block 37, in Keeney & Devitt's Second Addition to Fargo." One of the notices described it as "Lot 6, Block 37, Keeney & Devitt's Second Addition to Fargo" (failing to describe the part of the lot). Another described it as the "north 50 feet of Lot 6, Block 37, Keeney & Devitt's Addition to Fargo" (instead of "Second Addition to Fargo"). The third notice did not describe the part of the lot or correctly describe the addition in which the property is situated. The notices were clearly insufficient because of their failure to correctly describe the property. The three notices referred to are set out in full in the abstract which is presented as a basis for our decision. True, they are notices which were personally served upon the defendant. They are, however, notices prepared under the hand and seal of the county auditor, and we cannot disregard them and assume, for the purpose of sustaining the tax deeds, that the county auditor prepared and served, either personally or by publication, other notices which were sufficient.

Counsel for plaintiff contend finally that no notice was necessary, and that the validity of the deeds is therefore not affected by the insufficiency of the notices. This presents a question of some difficulty. The sales were made under chapter 132, page 376, Laws of 1890. All sales under that act were subject to redemption. The purchaser's lien could

ripen into title only after service of notice of the expiration of the redemption period, and the owner's title could not be devested or his right of redemption terminated until the statutory notice was given. The purchaser could, by a timely service of the notice, limit the right of redemption to three years. By failing to serve it the period was extended and the right preserved until sixty days after such notice was given. Chapter 132, page 376, Laws of 1890, was expressly repealed by section 12 of repeals Revised Codes of 1895, which took effect on January 1, 1896. Section 1264 of the revenue laws contained in the Revised Codes [17] of 1895 fixed the redemption period at two years from the date of sale, and did not require notice of expiration. Two of the sales in question were made more than two years before the 1895 code took effect. If the repeal was effective in terminating the purchaser's obligation to give notice, and the land owner's right to notice under the 1890 law and the provisions of the Revised Codes fixing the redemption period at two years are applicable to these certificates, it is clear that the purchaser became entitled to a deed upon two of the certificates upon demand and without redemption notice when the Revised Codes took effect, for in each case more than two years had elapsed since the date of sale; and as to the third certificate, the right of redemption expired on December 4, 1896, and without notice. Plaintiff's counsel contend that the repeal had this effect. We are unable to agree with this contention. It is true, chapter, 132, page 376, Laws of 1890, was expressly repealed. But it does not follow that all of the provisions of the repealed act were abrogated as to rights which had accrued under them. As to a purchaser at a tax sale, it is well settled that the statute in force at the time of the sale becomes a part of his contract, and it is beyond the power of the legislature to sweep it away to his disadvantage by subsequent legislation: Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132. In Minnesota it has been held, and apparently for the same reason, that the redemptioner's rights are also governed by the statute under which the sale was made. In Merrill v. Dearing, 32 Minn. 479, 21 N. W. 721, that court said: "The right of property acquired by the purchaser at this sale, and the right of redemption remaining to the owner must both be governed by the law in force at the time of sale. Neither, in our judgment, could be abridged or enlarged by subsequent legislation. This is unquestionably so as to the rights of the purchaser. The

same rule ought to apply in favor of the owner as against any statute shortening the time to redeem, and it is equally unjust to legislate against the owner of the land as in his favor: State v. McDonald, 26 Minn. 145, 1 N. W. 832; Hillebert v. Porter, 28 Minn. 496, 11 N. W. 84; Fleming v. Roverud, 30 Minn. 273, 15 N. W. 119; State v. Foley, 30 Minn. 350, 15 N. W. 375; Cooley on Taxation, 350." See, also, Gaston v. Merriam, 33 Minn. 271, 22 N. W. 614; Kipp v. Johnson, 73 Minn. 34, 75 N. W. 736.

[18] Other courts point out that the tax debtor has no contract with the state for any definite period in which to redeem; that the state has the power to sell his land without any right of redemption, and that the right to redeem and the time for exercising it are accorded as a matter of grace and not of right, and conclude, for these reasons, that the legislature has the power to reduce the redemption period and to otherwise modify the right in substantial particulars by subsequent legislation: Negus v. Yancey, 22 Iowa, 57; Muirhead v. Sands, 111 Mich. 487, 69 N. W. 826; Baldwin v. Ely, 66 Wis. 171, 28 N. W. 392; Black on Tax Titles, sec. 353; 25 Am. & Eng. Ency. of Law, 410; Robinson v. Home, 13 Wis. 341.

We do not find it necessary to express an opinion upon these conflicting views at this time, for we are of opinion that the legislature, in enacting the Revised Codes of 1895, saved the right of redemption as it existed under chapter 132, page 376, Laws of 1890. The effect of the repeal by the code of 1895 must be considered in connection with the general saving provisions contained in section 2686 of that code which read as follows: "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this code so far as they are applicable." This section preserves "actions" which had been commenced; "proceedings" which had been commenced; and "rights" which had accrued when the Revised Codes of 1895 took effect. The proceedings were thereafter required to conform to the provisions of the 1895 code "so far as its provisions are applicable." We are agreed that the right of redemption, as it existed under chapter 132, page 376, Laws of 1890, was a "right accrued," and was preserved by the above section. The saving provisions contained in this section, while general in terms, are such as usually accompany a revision of revenue laws: 1 Cooley on Taxation, 3d ed., 499-501, and cases cited. And they are

generally held to perpetuate pre-existing laws so far as they are necessary to protect and enforce the right of the tax debtor as well as the purchaser. For cases in point, see Fletcher v. Post, 104 Mich. 424, 62 N. W. 574; Matter of Munn, 165 N. Y. 149, 59 N. E. 881; also, Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178; Wilmington v. Cronly, 122 N. C. 388, 30 S. E. 9; Puget Sound Nat. Bank v. King County (C. C.), 62 Fed. 546; Indianapolis v. Morris, 25 Ind. App. 409, 58 N. E. 510.

In the recent case of Hagler v. Kelly, 14 N. D. 218, 103 N. W. 629, my associates were of opinion that the lien of a tax judgment [19] in favor of the state was a "right accrued," and was preserved by the above section, notwithstanding the repeal of the statute which created it. I expressed no opinion upon the point. My doubt rested upon the belief that the lien was a remedy, and not a right. As to the present case there can be no doubt, and I fully agree with my associates that the right of redemption as it existed under chapter 132, page 376, Laws of 1890, was a "right accrued," and was perpetuated through the saving clause, notwithstanding the repeal. It is equally clear that the provisions of the 1890 law, regulating the termination of the right of redemption by the purchaser—i. e., by notice of expiration, and the manner of effecting redemption by the tax debtor—were also continued in force, and govern in this action, unless they have been superseded by other subsequent provisions which are applicable. This is true under the language of the saving clause, and also under the general rule of construction applicable to a revision or repeal of revenue laws, which is that the repeal or revision is to have a prospective operation only unless the intent of the legislature to the contrary clearly appears: Smith v. Humphrey, 20 Mich. 398; Clark v. Hall, 19 Mich. 356; Auditor General v. Supervisors, 36 Mich. 70; Thomas v. Collins, 58 Mich. 62, 24 N. W. 553; Hall v. Perry, 72 Mich. 202, 40 N. W. 324; City of Oakland v. Whipple, 44 Cal. 303; Smith . Kelly, 24 Or. 464, 33 Pac. 642; 1 Cooley on Taxation, 3d ed., 681, and cases cited.

This rule of construction is expressly made applicable to the Revised Codes of 1895. Section 2681 of that code reads as follows: "No part of this code is retroactive unless expressly so declared." There is nothing in section 1264 of that 1895 code which will authorize us to hold that it relates to redemptions under former sales. It clearly relates to redemptions from sales made under the 1895 revenue law, of which it is a part. The same rule of construction also re-

quires us to hold that section 106, chapter 126, page 295, Laws of 1897 (section 1289, Revised Codes of 1890) and chapter 166, page 221, Laws of 1901, are prospective, and do not apply to certificates issued under previous statutes. The statutes in force when the sales here in question were made, relating to redemption, required notice of expiration as a condition to obtaining a deed. No such notice has been given. The deeds are therefore invalid.

The defendants also attack the validity of the tax sales: First, upon the ground that the owner or manager of the newspaper in which the notices were published failed to file the affidavit with [20] the county auditor, required by chapter 120, page 346, Laws of 1890; second, because of the alleged insufficiency of the notices published. Neither of these contentions can be sustained. Chapter 120, page 346, Laws of 1890, consists of three sections. The first prescribes the qualifications of a newspaper which may do public printing and publish legal notices. Section 2 makes it the duty of the "owner or manager" of a newspaper, before it can be awarded a contract, to file with the county auditor a statement setting forth its qualifications. Section 3 subjects the person or corporation publishing notices or doing printing without filing such statement to a fine of not less than twenty-five nor more than one hundred dollars and also a "forfeiture of all pay for any such printing." It is not claimed that the newspaper was not in all respects qualified under section 1 of this act. The only objection is that the owner did not make a sufficient affidavit. It is apparent that this failure did not invalidate the publication. Section 3 designates the consequences for such failure, namely, a fine and forfeiture visited upon the person or corporation owning the newspaper which is at fault, and names no other consequences. We find no warrant for holding that the legislature intended to declare notices void which are published in a newspaper which is qualified in fact, because the owner or manager fails to file the affidavit. On the contrary we think the effect of such failure is that prescribed by section 3, to wit, liability to fine and forfeiture, and nothing more.

It is also claimed that the notices of sale did not contain a sufficient description of the property, and were therefore void. No proof of any kind was offered as to the notice of sale for 1894, and as to the other years the evidence does not show that the notices were insufficient. The notices of sale for the years 1891 and 1892 were published in the "Fargo Republican." Defendants' counsel took the stand in their

behalf and offered in evidence, over objection, two printed slips of paper, which he testified were cut from newspapers in his possession purporting to have been published on November 1, 1891, and November 1, 1893, respectively. These clippings contain only a small part of the tax sale notices. The descriptions are not as intelligible as they would be if the entire notice had been offered in evidence, and it is very doubtful whether a sufficient foundation was laid for the introduction of the evidence; a question we need not decide for we are agreed that the description contained in each of the papers offered is sufficient. In each, [21] underneath the headlines, "Name, description, lot, block," the following appears: "G. W. McCauley, N. 50 ft. 6—37," and on each the foregoing description follows the general heading, printed in large letters: "Keeney & Devitt's Second Addition to Fargo." The objection is based upon the fact that between the general heading and the rest of the description of the property in question, i. e., the name, lot and block, certain other headings appear—on one: "Magill's Subdivision of Lot 1 and 2, Block 33"; on the other; "Bond's Subdivision of lots 6 and 7, Block 30." A casual inspection shows that these notices do not contain a misdescription or a misleading description. The headings just described do not include "Block 7 of Keeney & Devitt's Second Addition to the City of Fargo," in which the lot in question is situated. On the contrary, they cover the other blocks in this addition, which are designated by numbers, expressly excluding block 37. Apparently some of the blocks in this addition have been subdivided and appropriate subheads were inserted designating those which were subdivided. Upon their face, the subheads do not apply to the property in question, the description of which, concededly otherwise sufficient, appears under the heading, "Keeney & Devitt's Second Addition to Fargo."

It follows that the attack upon the sales must fail, and the certificates must be held valid. The district court is directed to modify its judgment to correspond with the conclusions herein set out. Appellants will recover their costs on this appeal.

All concur.

The Remedy is Included Within the Term "Obligation of Contracts," where it affects substantial rights, and cannot be altered so as materially to impair that obligation:-Welch v. Cross, 146 Cal. 621, 106 Am. St. Rep. 63; Miners' & Merchants' Bank v. Snyder, 100 Md. 57, 108 Am. St. Rep. 390.

If the Statute Existing When a Tax Sale is Made Gives the Property owner the right to redeem until the notice therein prescribed of the expiration of the time for redemption is given, a subsequent statute attempting to dispense with such notice is unconstitutional: Johnson v. Taylor, 150 Cal. 201, 119 Am. St. Rep. 181, and see the cases cited in the cross-reference note thereto.

The Legislature may Make Tax Deeds Prima Facie Evidence that Every Requirement of the law essential to their validity has been complied with, but it cannot make them conclusive evidence thereof: Larson v. Dickey, 39 Neb. 463, 42 Am. St. Rep. 595; Maguiar v. Henry, 84 Ky. 1, 4 Am. St. Rep. 182. See, also, Lynde v. Lynde, 162 N. Y. 405, 76 Am. St. Rep. 332. It is said that a tax deed creates no presumption that the facts upon which it is based, or which are recited therein, had any existence, in the absence of a statute providing the effect which shall be given it in evidence: Miller v. Miller, 96 Cal. 376, 31 Am. St. Rep. 229. See, also, Hurd v. Brisner, 3 Wash. 1, 28 Am. St. Rep. 17; Washington v. Hosp, 43 Kan. 324, 19 Am. St. Rep. 141.

BANK OF LISBON v. BANK OF WYNDMERE.

[15 N. D. 299, 108 N. W. 546.]

FORGED CHECK—Recovery of Money Paid.—The drawees who have by mistake paid a forged check may recover the money paid unless the person receiving it has been misled to his prejudice by the failure of the drawees to detect the forgery; and the burden of showing that he has been so misled or prejudiced rests on him. (p. 594.)

Rourke, Kvello & Adams, for the appellant.

Purcell & Divett, for the respondent.

301 ENGERUD, J. This is an appeal from an order sustaining a demurrer to the complaint on the ground that it does not state a cause of action. The complaint states the following facts: The plaintiff and defendant are banking corporations, located, respectively, at Lisbon and Wyndmere, in this state. On July 1, 1905, the defendant caused to be presented to plaintiff for payment a forged check purporting to have been drawn by Bixby & Marsh upon the plaintiff bank in favor of Theodore Larson for sixty dollars and twenty-five cents, dated June 27, 1905, and indorsed in blank by the payee. It also bore the indorsement of the defendant, and each of the several banks through whose hands it had passed in the usual course of transmission from defendant to plaintiff. Each indorsing bank had expressly guaranteed the genuineness of previous indorsements. Bixby & Marsh were depositors in plaintiff bank, and had to the credit subject to check a sufficient amount to pay the check in question. The

plaintiff bank, believing the check genuine, paid it and charged it to the account of Bixby & Marsh. The name of this firm had been forged, but this fact was not discovered until July 20th when Bixby & Marsh, who were ranchmen living more than twenty miles from Lisbon, called at the bank and examined the canceled vouchers. Bixby and Marsh declined to allow credit to plaintiff for the spurious voucher. Immediately on that day, the plaintiff notified the defendant bank of the forgery, and demanded repayment; at the same time returning the forged check to defendant. The defendant refused to refund. Judgment is demanded for the amount of the check and interest.

The question presented by this case is one that has never heretofore come before this court. It will be noticed that the complaint does not charge the defendant with any bad faith or neglect of duty in indorsing and putting in circulation the forged check, and we must therefore assume that the defendant indorsed, and caused the check to be presented for payment in good faith in the mistaken belief that it was genuine. The plaintiff upon whom the check was drawn, accepted and paid the check under the same mistaken belief that the drawer's signature was genuine. If we had not read the numerous cases which have been cited dealing with this question, we would have thought the proposition was a very plain one, readily solved by the application of fundamental principles [302] of law and common sense. The plaintiffs had received from the defendant without consideration a sum of money which it was not rightfully entitled to, and the sole moving cause which induced the exchange of money for the spurious check was the mental mistake of the parties to the transaction with respect to the genuineness of the writing. In the absence of any showing that the defendant had been misled or prejudiced by the plaintiff's mistake so as to render it inequitable to compel repayment, the defendant ought to refund the money had and received. Unfortunately, however, this just and simple solution of what seems to us a plain proposition has not generally prevailed. A number of courts have laid down the unqualified rule that where the drawee of a check to which the name of the drawer has been forged, pays it to a bona fide holder, he is bound by the act, and cannot recover the payment: National Park Bank v. Ninth National Bank, 46 N. Y. 77, 7 Am. Rep. 310. The reason generally assigned to justify the adoption of this rule is stated in Germania Bank v. Boutell, 60 Minn. 189, 51 Am. St. Rep. 519, 62 N. W. 327, 27 L. R. A. 635, as follows: "The

money of the commercial world is no longer coin. The exchanges of commerce are now made almost entirely by means of drafts and checks. It was largely in deference to this fact that the recovery of money paid on paper of this kind to which the drawer's signature was forged, was made an exception to the general rule as to the recovery of money paid under a mistake of fact. In view of the use of this class of paper as money, it was considered that public policy required that as between the drawee and good faith holders, the drawee bank should be deemed the place of final settlement, where all prior mistakes and forgeries should be corrected and settled once for all, and if not then corrected, payment should be treated as final; that there must be a fixed and definite time and place to adjust and end these things as to innocent holders; and that time and place should be the paying bank and the date of payment, and that if not done then, the failure to do so must be deemed the constructive fault of the payee bank, which must take the consequences." According to this line of cases the whole duty and risk of determining the genuineness of a draft or check rests upon the drawee, and as Lord Mansfield is reported to have said in Price v. Neal, 3 Burr. 1354, the holder "need not inquire into it," provided he acquired the paper for value in good faith: Bank of St. Albans v. Farmers' & Mechanics' [303] Bank, 10 Vt. 141, 33 Am. Dec. 188; Neal v. Coburn, 92 Me. 139, 69 Am. St. Rep. 495, 42 Atl. 348; Deposit Bank v. Fayette National Bank, 90 Ky. 10, 13 S. W. 339, 7 L. R. A. 849; Bernheimer v. Marshall, 2 Minn. (Gil. 61) 78, 72 Am. Dec. 89. Of this extreme view it is well said in 2 Morse on Banking, fourth edition, section 464: "This doctrine is fast fading into the misty past, where it belongs. It is almost dead, the funeral notices are ready, and no tears will be shed, for it is founded in misconception of the fundamental principles of law and common sense."

Most of the courts now agree that one who purchases a check or draft is bound to satisfy himself that the paper is genuine; and that by indorsing it or presenting it for payment or putting it into circulation before presentation he impliedly asserts that he has performed this duty. Consequently, it is held that if it appears that he has neglected this duty, the drawee, who has, without actual negligence on his part, paid the forged demand, may recover the money paid from such negligent purchaser. The recovery is permitted in such case, because, although the drawee was constructively negligent in failing to detect the forgery, yet if

the purchaser had performed his duty, the forgery would, in all probability have been detected and the fraud defeated: Gloucester Bank v. Salem Bank, 17 Mass. 33; Bank of United States v. Bank of Georgia, 10 Wheat. 333, 6 L. ed. 334; National Bank of America v. Bangs, 106 Mass. 441, 8 Am. Rep. 349; First National Bank of Danvers v. First National Bank of Salem, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44; First National Bank v. Ricker, 71 Ill. 439, 22 Am. Rep. 104; Rouvant v. San Antonia Nat. Bank, 63 Tex. 610; Commercial etc. Bank v. First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554; People's Bank v. Franklin Bank, 88 Tenn. 299, 17 Am. St. Rep. 884, 12 S. W. 716, 6 L. R. A. 724; Ellis v. Ohio etc. Trust Co., 4 Ohio St. 628, 64 Am. Dec. 610; Commercial etc. Bank v. First Nat. Bank, 58 Ohio St. 207, 50 N. E. 723; First Nat. Bank v. State Bank, 22 Neb. 769, 3 Am. St. Rep. 294, 36 N. W. 289; Canadian Bank v. Bingham, 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955. While all these authorities agree that negligence on the part of the purchaser in taking a forged check subjects him to liability for the loss, they are not in accord as to what constitutes such negligence. These authorities, it seems to us, have had the effect of substituting uncertainty and confusion for a rule which, although manifestly arbitrary and unjust, had at least the merit of simplicity and clearness. It must be conceded that the majority of the [304] courts that have passed on the question are committed to the doctrine that the drawee who has paid a spurious check can recover the payment from a good faith holder only when the latter had been negligent. If the law of this state is to be determined by the mere weight of authority alone, as evidenced by the decisions in other states, then we should be constrained to hold that this complaint shows no liability on defendant's part, because it does not show that the defendant has been in any degree negligent.

However valuable the decisions of courts in other jurisdictions may be as guides to aid us in coming to a correct decision, it cannot be admitted that such decisions, however numerous and uniform, conclusively establish the law in this jurisdiction. They are, after all, only arguments in support of the views entertained by the judges who uttered them. Unless the doctrines advocated by them have become part of the law of this state by the adoption of them by positive law or general usage and opinion, they must be received and considered by us merely as arguments to be weighed, and adopted or ejected according as we deem them sound or unsound. If, in our opinion, a doctrine advocated by the courts

of other states is an unwarranted departure from the fundamental principles of law, it is our duty to reject it, unless the rule so advocated, even though fundamentally erroneous, has become part of our common law by general usage and custom; or has been expressly or impliedly made part of our law by statute. There has been no statutory adoption of such a rule, and we have no hesitation in saying that there is no general usage or custom prevailing in this state that the checks and drafts of individuals shall circulate, and be treated and dealt with as bank or government currency. Yet, as indicated by the language quoted from the Minnesota decision (Germania Bank v. Boutell, 60 Minn. 189, 51 Am. St. Rep. 519, 62 N. W. 327, 27 L. R. A. 635), the rule that the drawee must save in exceptional cases, bear the consequences of his mistake in honoring a spurious check, was adopted in deference to such a supposed usage. The fact that the cases advocating this doctrine all cite as authority Bank of United States v. Bank of Georgia, 10 Wheat. 333, 6 L. ed. 334, and Gloucester Bank v. Salem Bank, 17 Mass. 33, which involve forged bank notes, shows that the rule rests on the assumption that the checks and drafts of individuals are to be placed in the same class with bank bills which are issued and intended to circulate as money. There is no statute or business usage in this state to warrant that assumption. The decisions which advocate [305] the rule that a drawee may recover in case of negligence on the part of the holder who presents and receives payment of a spurious check, all recognize the fallacy of those decisions which apply the same rule to checks and drafts as is applicable to bank notes which circulate as money. Yet, strange to say, nearly all of them expressly or impliedly accept as true the proposition that a drawee of a check or draft should be excepted from the operation of that fundamental rule which permits one who parts with money by mistake to recover it from one who in equity and good conscience ought not to retain it. They simply hold that this exception should not apply in cases where the purchaser or indorsee was negligent in not taking proper precautions to guard against forgery. It is evident at a glance that this proposition, which these cases thus accept as proper, has no other foundation than the same premise which they very properly hold to be fallacious—namely, that checks and drafts on banks or individuals should be governed by the same rules as apply to bank notes which circulate as money. If it is conducive to the best interests of the business world to put checks and drafts on the same footing as bank currency, and

if it would tend to make checks and drafts a more safe and convenient circulating medium of exchange, to shift the whole risk of loss by forgery upon the drawee instead of letting it rest upon those who are credulous enough to assume the risk of parting with value for such paper, the legislative branch of the government can be trusted to establish that rule, if such a radical departure from fundamental principles of law is deemed wise. The court has no power to do so.

Being convinced, as we are, that this doctrine advocated by the great majority of the cases which have come to our attention, to the effect that a drawee of a check should be excepted from the ordinary rules relating to the right to recover money paid by mistake, is unsound, and has never been adopted in this state by usage or statute, it would be nothing less than usurpation of legislative power by this court to declare that rule to be the law of this state because courts in other states have so held. That the rule in question is unsound in principle and unjust, is almost universally admitted, and the courts are showing an increasing tendency to discard it. We think, therefore, that we are showing no disrespect to precedent in taking the stand toward which the modern decisions are unmistakably tending, and from which it is generally [306] conceded there should have never been any departure. We, therefore, reject as unsound the doctrine that a drawee of a check should be excepted from the general rule in relation to the recovery of money paid by mistake. The drawee is presumed to know the signature of the drawer of the check or draft; and the holder of such check or draft who has acquired it in good faith has the right to act in reliance on that presumption, provided he himself has omitted no duty, the performance of which would have prevented the success of the fraud. Consequently, if the drawee pronounces the check genuine by paying it or otherwise honoring it, the holder who has acted in good faith and without negligence may safely rely upon the judgment of the drawee, and act accordingly. The drawee cannot, under such circumstances, recall his acceptance or payment to the detriment of the party who has rightfully relied upon his decision. In such a case the party who received the money has the superior equity, and he may justly retain the money, although he was not originally entitled to receive it.

But, as is usually the case, when the party who has collected the check had previously cashed it or taken it in ex-

change for commodities, there is no reason why he should not refund. Everyone with even the least experience in business knows that no business man would accept a check in exchange for money or goods unless he is satisfied that the check is genuine. He accepts it only because he has proof that it is genuine, or because he has sufficient confidence in the honesty and financial responsibility of the person who vouches for it. If he is deceived, he has suffered a loss of his cash or goods through his own mistake. His own credulity or recklessness, or misplaced confidence, was the sole cause of the loss. Why should he be permitted to shift the loss due to his own fault in assuming the risk upon the drawee, simply because of the accidental circumstance that the drawee afterward failed to detect the forgery when the check was presented? Our views find much support in many of the cases which still cling more or less tenaciously to the negligence rule, notably the following: First Nat. Bank of Davers v. First Nat. Bank of Salem, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44; Ellis v. Ohio etc. Trust Co., 4 Ohio St. 628, 64 Am. Dec. 610; People's Bank v. Franklin Bank, 88 Tenn. 299, 17 Am. St. Rep. 884, 12 S. W. 716, 6 L. R. A. 724; Canadian Bank v. Bingham, 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955; First Nat. Bank v. State Bank, 22 Neb. 769, 3 Am. St. Rep. 294, 36 N. W. 289; First Nat. Bank v. First Nat. Bank, 4 Ind. App. 355, 51 Am. St. Rep. 221, 30 N. E. 808. The case of [307] McKleroy v. Southern Bank, 14 La. Ann. 458, 74 Am. Dec. 438, directly supports our views, and we are gratified to note that our views are in accord with those generally advocated by the text-writers. We, therefore, hold that drawees of checks and drafts are not to be excepted from the general rule which permits the recovery of money paid by mistake. We hold that a drawee who has by mistake paid a spurious check or draft may recover the money paid unless the party receiving the money has been misled to his prejudice by the drawee's mistake. If any such facts exist, they are best known to the defendant, and it is his duty to prove them. The complaint discloses prima facie cause of action by alleging the payment by mistake.

The order appealed from must be reversed, and the demurrer overruled.

All concur.

The Rights and Remedies of the Several Parties when a forged check has been paid are discussed in the note to People's Bank v. Franklin Bank, 17 Am. St. Rep. 889; and the liability of one receiving pay-

ment of a check on a forged indorsement is discussed in the note to First Nat. Bank v. City Nat. Bank, 94 Am. St. Rep. 641. For other recent authorities on the questions, consult Cunningham v. First Nat. Bank, 219 Pa. 310, 123 Am. St. Rep. 657; Wellington Nat. Bank v. Robbins, 71 Kan. 748, 114 Am. St. Rep. 523.

BRYNJOLFSON v. DAGNER.

[15 N. D. 332, 109 N. W. 320.]

ADVERSE POSSESSION—A Mortgagee in Possession.—The fact that the grantee of the purchaser at an invalid foreclosure sale may in equity be deemed a mortgagee in possession does not make him such in fact so that his possession is not adverse to the mortgagor. (p. 597.)

EVIDENCE—Best and Secondary.—Parol Evidence that a Given Note was secured by a mortgage on real estate is inadmissible where no reason is advanced for not producing the instrument or an authenticated copy of it. (p. 598.)

ESTOPPEL BY DEED.—The Grantor in a Warranty Deed who holds a prior mortgage on the premises can assert no rights as mortgagee against his grantors; and one thereafter acquiring the mortgage from him is in no better position unless he can show himself entitled to the protection due innocent purchasers. (p. 598.)

CHAMPERTY AND MAINTENANCE.—A Deed is Void when made in violation of the statute denouncing the sale or purchase of pretended titles. (p. 599.)

A. Besancon and Newman, Holt & Frame, for the appellants.

Tracy R. Bangs and Chas. M. Cooley, for the respondents.

335 ENGERUD, J. This is an appeal from a final judgment in plaintiff's favor, and is before us for review on all the issues, under section 5630, Revised Codes of 1899.

The plaintiff alleges that he is the owner in fee of the quarter section of land in question, and the action was brought for the threefold purpose of quieting his title, recovering possession and redeeming the land from a mortgage. The defendants, who have appealed, are the heirs at law and the administrators of the estate of one Gottlieb Dagner, deceased, who, in his lifetime, was in the exclusive possession of the land, claiming title thereto under a warranty deed from the Mortgage Bank and Investment Company, executed and delivered to him in January, 1893. Gottlieb Dagner died in February, 1896, intestate, and his heirs or the administrator of his estate, who is also an heir, have remained in possession of the premises since that time, claiming title under 336 the deed aforesaid. Among other defenses pleaded, these de-

fendants deny the plaintiff's alleged title on the ground that the deed under which he claims is void because executed and accepted in violation of section 7002, Revised Codes of 1899. We think this defense must be sustained, and it is therefore unnecessary to discuss the other questions in the case.

The common source of title is one Hans K. Libak, who, it is conceded, still owns the land, unless his title has been acquired by one or the other of the contestants in this litigation. In 1889 Libak mortgaged the land to the Mortgage Bank and Investment Company to secure a debt of five hundred and fifty dollars. This mortgage and debt was assigned by the mortgagee to Asa W. Kennedy, and the assignment was recorded, as also was the mortgage. In 1891 the original mortgagee notwithstanding the assignment, undertook to foreclose the mortgage by advertisement, and at the pretended sale bid in the land, and subsequently in October, 1892, received a deed purporting to convey to it the land in question pursuant to the foreclosure sale after the time for redemption had expired. The Mortgage Bank and Investment Company, claiming title under this pretended foreclosure, sold and conveyed the land by warranty deed with full covenants to said Gottlieb Dagner, since deceased. The deed was delivered in January, 1893. Dagner bought in good faith, believing the title good, and paid full value. It is, of course, conceded that Dagner's grantor had no title to convey, but the appellants claim that by reason of certain alleged written statements made by Libak the latter is estopped to question Dagner's title. Libak, apparently intending to abandon the land to his creditors, left the land in 1890 or 1891, and went to Oregon, where he has since resided. The respondent subsequently discovered the defect in Dagner's title, and in 1899 induced Libak to execute and deliver the deed of the land under which he now claims title, and the right to the relief sought in this action, which was not commenced until 1903. The consideration for the deed in question was thirty-five dollars in cash and the surrender of certain notes, which will be referred to later. It is conceded that Libak had not asserted any right to the land since he abandoned it until he gave the deed in question, and the proof is conclusive that he never intended to assert any right to the land until he was solicited to execute that instrument. The plaintiff had not only constructive but actual notice of Dagner's adverse claim before he [837] took the Libak deed. That the transaction by which the deed was obtained, and which ultimately gave birth to this lawsuit, was necessarily

productive of the very evil which the rule of law embodied in section 7002 was designed to prevent, is too plain for question: Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Schneller v. Plankinton, 12 N. D. 561, 98 N. W. 77.

Respondent, however, contends that he is not within the law against maintenance for two reasons: First, because Dakner in his lifetime, and after his death the present appellants, were merely mortgagees in possession, and hence could not claim adversely to Libak; and, second, because the respondent was the owner of certain notes secured by mortgage of the land, and could lawfully extinguish the owners' right of redemption by surrendering his lien in exchange for an estate in fee simple.

The proposition that Dagner and his heirs held as mortgagees in possession is based on the fact that after Dagner had accepted the deed from the Mortgage Bank and Investment Company the latter purchased and procured a reassignment to itself of the mortgage previously assigned to Kennedy. This mortgage, which was the same one which the investment company had pretended to foreclose, contained a clause authorizing the mortgagee or its assigns to take possession of the premises in case of default. It appears that the investment company took the reassignment on the theory that such reassignment would cure the foreclosure and validate the title of the company's grantee. It may be true that Dagner was in a position to claim the rights of a mortgagee in possession by reason of the facts just mentioned and that a court of equity would, if the circumstances required it, sustain that claim, in order to protect and adjust the rights of the parties with respect to the land. Counsel, however, falls into the error of assuming that Dagner was in fact a mortgagee in possession because a court of equity might treat him as such under certain circumstances. There is a wide distinction between an actual mortgagee in possession and one who in equity may be dealt with as such in order to afford equitable relief. The fiction by which an adverse claimant is deemed a mortgagee in possession is resorted to and applied after the adverse claim is found to be invalid, but the defeated claimant is nevertheless entitled to equitable relief. In short, in order to place appellants in the position of mortgagees in possession, we must first decide that their adverse [338] claim is invalid. It will be seen, then, that respondent's argument is utterly illogical. It not only virtually admits the adverse possession, which is the very fact which it seeks to disprove, but also assumes that plaintiff can

question the validity of the adverse claim, which is the very thing which section 7002 forbids one in his position to do.

We think the second proposition is equally untenable. It appears that the respondent had obtained possession of two notes executed by Libak. When he got them and how much he paid for them was not disclosed by the evidence. One of these notes was for two hundred dollars, due in 1890, and made payable to the order of Libak, the maker. There had been paid on this note in 1890 one hundred and eighty-six dollars and seventy-five cents. The other note was for one hundred and forty dollars, signed by Libak, and payable to the Mortgage Bank and Investment Company, and was due in 1890. The one hundred and forty dollar note was secured by a mortgage of the land in question. Respondent testified that the two hundred dollar note was secured in like manner, but Libak testified to the contrary. Respondent did not produce the alleged mortgage or a record copy of it, or account for its nonproduction. His testimony that the note was secured by mortgage of the land in question was duly objected to as incompetent, and must be disregarded for that reason. In addition to these notes, the respondent also had several of the coupon notes representing the interest on the five hundred and fifty dollars mortgage debt hereinbefore mentioned. All these notes were surrendered to Libak in part consideration for the deed. Respondent contends that by virtue of his ownership of these notes he was the owner of the mortgage securing them, and that section 7002 does not apply to a mortgagee who takes a deed from the mortgagor in satisfaction of the debt. Whether this is true or not we need not decide, because, as we view the facts, the respondent is not in a position to avail himself of that rule, even if it were good law. The only notes proven to be secured by mortgage on the land were the one hundred and forty dollar note and the coupons. All these notes so secured were payable to the Mortgage Bank and Investment Company, who executed and delivered to Dagner the warranty deed for the land upon which it held these mortgages. It is obvious that the warranty deed estopped this company to make any claim under these mortgages as against its grantee or his representatives, and it is also equally clear that its assignee is in no better position, unless he is a bona fide purchaser for value without actual or constructive notice of the [339] equities existing in Dagner's favor. There is no evidence whatsoever to show that the respondent is in that position. We hold, therefore, that the respondent is within both the spirit and let-

ter of the statute against maintenance, and acquired no title by the deed, and cannot maintain this action.

The judgment is reversed, and the cause will be remanded, with directions to render judgment dismissing the action, with costs of both courts.

All concur.

To Constitute "Mortgagee in Possession," he must be in possession by reason of the agreement or assent of the mortgagor or owner of the fee that he have the possession under and because of the mortgage. The assent need not necessarily be express, but may be implied from circumstances: Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613. A mortgagee who enters into possession under a void foreclosure, the mortgagee acquiescing therein, is a mortgagee in possession: Kelso v. Norton, 65 Kan. 778, 93 Am. St. Rep. 308. If a foreclosure and sale thereunder are void because the grantee of the mortgagor was not a party thereto, but the purchaser enters into possession peaceably, though without the consent of the mortgagor, and claiming title under the sale, such purchaser has such right to retain possession that he cannot be disturbed therein at the suit of the mortgagor or of his successor in title, without first paying, or offering to pay, the mortgage debt, though it is barred by the statute of limitations: Burns v. Hiatt, 149 Cal. 617, 117 Am. St. Rep. 157.

FENTON v. MINNESOTA TITLE INSURANCE AND TRUST COMPANY.

[15 N. D. 365, 109 N. W. 363.]

SUMMONS—Publication Against Unknown Owners.—A published summons in a suit to quiet title which neither describes the land in controversy nor names the adverse claimants does not constitute due process against them; and a judgment taken against them is void, and subject to collateral attack. (p. 605.)

TAXES—Payment as a Condition to Quiet Title.—The plaintiff in a suit to remove a cloud on his title caused by a void tax sale may be required to pay the amount justly due for the taxes included in such sale. (p. 606.)

J. E. Robinson, for the appellants.

Pierce & Tenneson, for the respondent.

366 ENGERUD, J. On February 3, 1902, the respondent, Minnesota Title Insurance and Trust Company, as trustee for Fidelity Investment Company, procured the entry by the district court of Ransom 367 county of a judgment purporting to quiet its alleged title to the quarter section of land now in controversy. The action in which that judgment was entered was one to determine adverse claims under section 5904 et seq., Revised Codes of 1899, as amended by chapter

5, page 9, Laws of 1901, commenced by said respondent against ninety-two known defendants and "all other persons unknown, claiming any estate or interest in, or lien or encumbrance upon the property described in the complaint, and their unknown heirs." The plaintiff in that action claimed to have acquired title to the land in controversy by virtue of two tax deeds executed and delivered to it by the county auditor of Ransom county on April 12, 1901. The respondents Northern Trust Company, Douglas A. Fiske and Emma C. Simmons now claim to have an indefeasible title to said land as tenants in common by virtue of conveyances from said Minnesota Title Insurance and Trust Company, as trustee aforesaid, executed after the entry of said judgment. They assert that the judgment above mentioned is a conclusive adjudication against all the world that the tax deeds to their grantor were valid, and that the judgment bars the assertion of any right of redemption even on the part of the appellant David Allen Murray, who is an infant. The appellants Lizzie Fenton and David Allen Murray are, respectively, the widow and only son of Warham N. Murray, deceased, who died long before the commencement of the former action, and they are the owners of the land unless their rights are barred by the judgment above mentioned. David Allen Murray was at the time of the commencement of this action about seventeen years of age, and appears by guardian. He and his mother have never been residents of this state, but reside in New Hampshire, of which state Warham N. Murray, deceased, was also a resident during his lifetime. The appellant Henry O. Wheeler has no estate or interest in the property, and was improperly joined as plaintiff. The action should be dismissed as to him.

This action was commenced in November, 1903. The issues are presented by the allegations composing what the pleader styles the "second cause of action" in the complaint, as amended, and the pleading interposed by the Northern Trust Company, Douglas A. Fiske and Emma C. Simmons, who were joined as additional defendants after the action had been commenced against the first-named defendant. The complaint alleges plaintiffs' ownership [368] of the premises, and alleges that the Minnesota Title Insurance and Trust Company, as trustee aforesaid, claimed to have acquired title thereto by virtue of two pretended tax deeds; that said company had procured the rendition and entry of the judgment above mentioned, and by reason thereof denied plaintiffs' title. The complaint alleges in detail facts showing that the tax

deeds, as well as the taxes upon which they were based, were invalid, and also avers that the judgment purporting to quiet title was void, because, among other reasons, the proceedings culminating in the judgment in that action did not constitute "due process of law," and hence the court was without jurisdiction to render the decree complained of. The facts upon which the plaintiffs relied to sustain their attack upon the judgment were specifically alleged. They will appear in the course of this opinion.

The prayer for judgment is: "First, that the said tax deeds and the judgment purporting to confirm the same, and all taxes charged against said land for the years 1895 and 1899, inclusive, be canceled, annulled and declared and adjudged to be void, and that the defendant corporation, and all persons claiming under it, may be forever barred and precluded from any title or interest in or to said land. Second, that in case it appears that any of said taxes are valid, then that the court ascertain and determine the amount of the same, and the amount which the plaintiffs should pay to redeem said land from such taxes and tax sales, and that they be permitted to redeem from the same, and that they have such other and further relief as may be just, together with the costs and disbursements of this suit." The answer of the impleaded defendants set forth that their grantor, the Minnesota Title Insurance and Trust Company, acquired title by virtue of the tax deeds referred to in the complaint, which deeds, it is averred, were valid conveyances, and they plead the judgment above mentioned, obtained by their grantor, as a bar to the assertion of any claim by plaintiffs. The trial court sustained the defendants' plea of res adjudicata. The plaintiffs thereupon appealed from the judgment and demanded a trial de novo, under section 5630, Revised Codes of 1899.

The first question for determination is as to the validity of the prior judgment. If the judgment is valid, it precludes all further inquiry. The entire judgment-roll in that former action was introduced in evidence. The facts disclosed by that record are as [369] follows: On September 3, 1901, a verified complaint, in the form prescribed by section 5907, Revised Codes of 1899, as amended by chapter 5, page 9, Laws of 1901, was filed in the office of the clerk of the district court of Ransom county, and a summons issued to the sheriff of that county. Said summons and complaint named the Minnesota Title Insurance and Trust Company, trustee for the Fidelity Investment Company, as plaintiff, and named as de-

fendants ninety-two different persons or corporations "and all other persons unknown, claiming any estate in, or lien or encumbrance upon, the property described in the complaint, and their unknown heirs." Neither Mrs. Fenton nor David Allen Murray were named as defendants, but the name of Warham N. Murray appeared among the ninety-two defendants named. The complaint alleged that the plaintiff was the owner in fee simple of the property therein described. The lands described in the complaint consisted of fifteen distinct tracts of land, situated in various parts of Ransom county. On September 12, 1901, the sheriff's return on the summons was filed, showing that after diligent search and inquiry he was unable to make service upon about seventy of the defendants named. On the same day an affidavit for publication of the summons was filed, which we shall assume was in proper form. It shows that the places of residence of about sixty of the nonresident defendants named were unknown, and sets forth the addresses of the remaining nonresident defendants. The summons was thereupon published, in accordance with the provisions of section 5224, Revised Codes of 1899. On January 18, 1902, after the time for answering had expired, an affidavit in the usual form was filed, showing that most of the defendants had made default. On January 25, 1902, the court heard and granted the plaintiffs' applications for judgment by default against the defendants who had not appeared, and made and filed formal findings of fact, conclusions of law, and an order for judgment. On February 3, 1902, judgment was entered in accordance with the court's order, and is to the effect that the plaintiff therein is the owner in fee of each of the fifteen tracts of land described, which included the quarter section involved in the present action; and further decrees that the claims or pretended claims of all of the defaulted defendants are null and void and without right, and that said defendants, and each of them, and all persons claiming under them or either of them, be forever barred from asserting any claim thereto. Subsequently two other judgments were entered in the same action, disposing of [370] the rights of those defendants who had appeared and answered. It appears from the findings and judgments in the former action, as well as from the other evidence offered in the present suit, that neither Lizzie Fenton, David Allen Murray, nor Warham N. Murray ever had or claimed to have any interest in the fourteen other tracts involved in the action to quiet title. The same is true with respect to the adverse

claims against each of the other tracts. The adverse claims against each tract were wholly distinct and independent from the claims against every other tract. Neither did the plaintiff in that action acquire its alleged title by a single instrument or transaction, but it based its claim upon separate tax sales and tax deeds, one or more for each tract; in other words, although the complaint on its face purported to set forth a single cause of action, the proceeding was in fact a combination of fifteen wholly distinct causes of action, having no connection, the one with the other. It is argued by respondent that this omnibus or "log-rolling" proceeding is warranted by the statute (chapter 5, page 9, Laws of 1901) relating to actions to quiet title, and constitutes "due process of law." This act of 1901 is a remarkable piece of legislation in form, phraseology and substance. It purports to amend sections 5904-5913, Revised Codes of 1899, but comparison of the act with the sections of the Revised Codes which purports to amend will disclose that it is a misnomer to term the act an amendatory one. It is virtually a total repeal of the former provisions, and the substitution of wholly different ones. Its evident purpose was to do away with all of the most important safeguards which the act of 1899 (chapter 157, page 228, Laws of 1899) had provided in order to minimize the likelihood of obtaining judgment in such an action without adequate notice to adverse claimants, whether known or unknown. The act of 1899, which was incorporated in the Revision of 1899 as sections 5907 and 5907a, provided a procedure whereby all unknown adverse claimants could be cited to appear by publication of the summons, and make known their claims, to the end that the nature and validity thereof might be determined. That act provided for the filing of a notice of lis pendens in the office of the register of deeds, and the publication of that notice with the summons: Rev. Codes 1899, sec. 5907. In this way notice was published to the world, disclosing the nature of the action and the property affected. The plaintiff was required to specify by name all known adverse claimants, whether their claims appeared of record or not.

371 There were also other safeguards for the protection of the rights of unknown claimants. Section 5907, Revised Codes of 1899, is substantially, and to a great extent, a literal copy of section 5818, General Statutes of Minnesota of 1894. The constitutionality of the Minnesota statute was sustained in Shepherd v. Ware, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773. The act of 1901 (chapter 5, page 9, Laws of

1901) declares that it shall be sufficient to specifically name as parties defendant those who are in possession, or whose adverse claims appear of record. All other adverse claimants, resident or nonresident, however well known they may be to the plaintiff, may be proceeded against as "unknown" without specifically naming them. In the recent case of Gilbreath v. Teufel, 15 N. D. 152, 107 N. W. 49, we held that it was a gross abuse of judicial process to designate as "unknown" certain adverse claimants whose names and whereabouts were known or ought to have been known to the plaintiff, and we held that a judgment so obtained ought to be vacated, although there had been a literal compliance with the language of the statute. In that case the adverse claimants voluntarily appeared in the action after judgment, and asked leave to defend. We did not therefore express any opinion as to the constitutionality of the law. In this case it is a disputed question as to whether the plaintiff was chargeable with knowledge of the claims of Warham N. Murray's heirs, and it may be conceded, arguendo, that these heirs were in fact and law unknown adverse claimants. In this case, as in Gilbreath v. Teufel, 15 N. D. 152, 107 N. W. 49, the proceedings are in a strict accord with the letter of the law. The two cases well illustrate the gross abuse of process which the act has undertaken to devise as a substitute for "due process." It will be readily seen that, if such a proceeding could be sustained as "due process," it would easily be possible for one having a pretended claim to land to obtain a judgment by default, barring the true owner without his knowledge, even though the latter were the plaintiff's next door neighbor, and the plaintiff knew that his neighbor was the owner of the land in fee simple under an unrecorded deed; and this could be done without violating a single provision of the statute. As if to still further reduce the chances that the summons would convey any notice to adverse claimants, this act repealed the provision of the former act requiring a notice of lis pendens to be recorded in the registry of deeds, and a copy thereof to be published with the summons. The result was that the plaintiff was required to name [372] in the summons only such adverse claimants as were in possession, or whose adverse claim appeared of record. All others, although actually known to the plaintiff, could be described as unknown claimants to the land involved, and this without describing the land in the summons. No service of summons upon such claimants was required, ex-

cept by publication, and the publication disclosed neither the names of the claimants nor the land affected.

In a case of this kind there is no actual seizure of the property of which the adverse claimants may be deemed to have any sort of constructive notice. It is manifest therefore, that the jurisdiction of the court to determine the rights of claimants to the property must be acquired by the service upon the adverse claimants of an appropriate notice. The form of the notice and the mode of service to be required are matters resting in the legislative discretion. This legislative discretion is not, however, unlimited, but is controlled and restricted by that provision of the fourteenth amendment of the federal constitution, which declares that no state shall deprive any person of life, liberty or property without due process of law. The state constitution contains the same prohibition: Const., art. 1, sec. 13. The fact, therefore, that the notice by which the court's jurisdiction to hear and determine must be acquired is in the form and has been served as prescribed by the statute is not a conclusive test of its sufficiency: Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. Rep. 410, 44 L. ed. 520; Bardwell v. Collins, 44 Minn. 97, 20 Am. St. Rep. 547, 46 N. W. 315, 9 L. R. A. 152.

There can be no doubt as to the right of the legislature to provide for some other method of giving notice to interested parties of the pendency of an action than by personal service of the summons where the action involves property within the territorial jurisdiction of the court, and where personal service of the summons is for any reason impracticable. Notice by publication in such cases has always been held sufficient. There must, however, be notice of some kind, and it must be a notice of such a character that it will have a tendency, in a reasonable degree, to convey information to interested parties that the action affects their rights. A notice such as the published summons in this case, which neither names the adverse claimants to the land in controversy nor describes the land itself, is clearly neither appropriate nor reasonable. It conveys no information whatsoever that the action involved [373] the title to the land of these appellants, or that these appellants were in any way interested in the action. The publication of such a summons, containing no description of the property or persons affected, is, so far as the adverse claimants not named are concerned, no notice at all. As to such persons it possesses none of the essential attributes of a notice such as is required by "due process."

The legislature of 1905 has recognized the inadequacy of the proceedings prescribed by the act of 1901 to acquire jurisdiction in this form of action by an amendatory act, which restores substantially the proceedings required by the act of 1899: See Laws 1905, c. 4, p. 8. We hold, therefore, that the judgment in the former action does not conclude these appellants, because the proceedings, although in statutory form, did not constitute "due process of law" against adverse claimants who were not named and who did not appear. As to such persons the judgment was wholly void, whether directly or collaterally attacked. Its invalidity affirmatively appears on the face of the judgment-roll. Under such circumstances, the former recitals in the findings and judgment, to the effect that process had been duly served and jurisdiction duly obtained, are obviously of no avail: Adams v. Cowles, 95 Mo. 501, 6 Am. St. Rep. 74, 8 S. W. 711.

The evidence shows that the tax sales upon which the tax deeds were issued were void. The respondents virtually concede this by their silence on this point. Appellants, however, contend that all the taxes for which these void tax sales were made are wholly void, and should be canceled. This contention is not sustained by the evidence. The defects relied upon, even if the competency of the evidence to prove them were conceded, are mere irregularities of a trifling nature, which do not afford any ground for equitable relief from the tax. If any of the taxes were excessive (and the proof on that point is not clear), the excess is so slight that it is not worth mentioning in the computation of the amount required to redeem in equity. We think the case is one where the maxim "de minimis non curat lex" may be justly applied. This is not a case where the validity of the title depends upon the correctness of the amount charged.

Following the case of State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 375, and Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 361, recently decided, but not as yet reported, we hold that the plaintiffs, as a condition precedent [374] to equitable relief, should be required to pay to defendants, or into court for them, the total amount of taxes paid by the purchaser of the tax title, being the taxes for the years 1895, 1896, 1897 and 1898, all of which were paid by the Minnesota Title Insurance and Trust Company when the rights of the county were assigned to it on July 7, 1899. The amount so paid was seventy-six dollars and sixty-three cents, to which should be added the sum of fif-

teen dollars and twenty-six cents, paid by said assignee on February 1, 1900, for the taxes of 1899. The defendants are entitled to interest on these sums from the respective dates of payment at the rate of seven per centum per annum. A provisional decree or order may be entered, requiring such payment within thirty days after notice of the entry thereof, and upon compliance with its conditions a final judgment may be entered for the relief prayed for in the complaint, including taxable costs. If the plaintiffs fail to comply with the conditions imposed, judgment should be entered to the effect that the plaintiffs are entitled to no equitable relief, and that defendants recover the taxable costs and disbursements.

This case is distinguishable from Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 361, where we ordered a dismissal of the action, in this: That the complaint shows on its face and the evidence discloses that the plaintiffs were ready and willing and offered to redeem by paying what was justly due, but the defendants declined the offer, and their answer shows that a formal tender would have been unavailing.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion. The appellants will recover the taxable costs and disbursements of this appeal.

All concur.

Proceedings Against Unknown Owners for the Purpose of Quieting Title are discussed in the note to McClymond v. Noble, 87 Am. St. Rep. 858. That statutes authorizing such proceedings are constitutional, see Title etc. Restoration Co. v. Kerrigan, 150 Cal. 289, 119 Am. St. Rep. 199; but that such statutes must be strictly complied with in order to confer jurisdiction, see Thomas v. Thomas, 96 Me. 223, 90 Am. St. Rep. 342; Gilmore v. Lampman, 86 Minn. 493, 91 Am. St. Rep. 376.

DEDRICK v. CHARRIER.

[15 N. D. 515, 108 N. W. 38.]

PARTIES—Discretion in Bringing in Additional.—Courts have a discretion to allow additional parties to be brought in, and this discretion will not be disturbed on appeal unless it has been clearly abused. (p. 609.)

PARTIES—Bringing in After Judgment.—Additional parties may be brought in in a proper case even after the rendition of judgment. (p. 609.)

JUDGMENT—Relief After Term Time.—The right to apply for the amendment or opening of a judgment exists after term time in North Dakota; there are no terms of court in that state in the common-law sense. (p. 609.)

JUDGMENT—Relief from by Successful Party.—The right to have a judgment set aside on the ground of mistake is not confined to the unsuccessful party; excusable mistakes may be remedied on behalf of successful litigants. (p. 609.)

Cleary & McLean, for the appellants.

Gordon & Wheeler, for the respondent.

[516] MORGAN, C. J. On December 14, 1903, a judgment of foreclosure of a mechanic's lien was rendered in favor of the plaintiff and against the defendants. The plaintiff furnished the materials and labor for the erection of a hotel building for two of said defendants upon their lots in the village of Langdon. This judgment was rendered on the default of said defendants. The premises described in the judgment were regularly sold under execution to the plaintiff for the full amount of the judgment and costs, and the execution returned with the sheriff's indorsements thereon showing these facts. On June 25, 1904, the plaintiff, on notice duly served on the [517] defendants, moved to set aside the judgment of December 14, 1903, and the subsequent sale based thereon, on the ground that the judgment was entered through plaintiff's mistake and excusable neglect. The motion was based upon affidavits setting forth the facts concerning the entry of the judgment and the failure to ascertain the facts concerning the rights of certain mortgagees to the premises in suit, as against plaintiff's lien. The relief asked is that these mortgagees be brought in as parties defendant. The affidavits show that the plaintiff was mistaken as to the relative rights of these mortgagees to his mechanic's lien, and that he was unable, after due diligence, to ascertain the exact date when the work on the building on which lien was secured was commenced; that in consequence thereof he com-

menced the action to foreclose on the theory that such mortgages were prior encumbrances to his lien and that the mortgagees were not necessary parties to a full determination of his rights; that after the sale under the foreclosure judgment, he discovered that such mortgages are inferior liens to his mechanic's lien. The district court entered an order setting aside the judgment and the sale, and granted the plaintiff leave to make these mortgagees defendants, and provided that they should be brought in by service of summons on them, and permitted the summons and complaint to be amended by inserting their names as defendants, and the complaint to contain proper allegations as to their claims. The original defendants appeal from this order.

We think that the action of the district court was proper. The showing made on the hearing of the motion was sufficient to warrant the action taken and was in furtherance of justice. Plaintiff's showing as to the effort made to ascertain just when the work on the building was commenced was uncontradicted, and we cannot say, as a matter of law, that it was not excusable neglect in not ascertaining that the mortgages were subsequent to his lien as he now claims them to be, before the action was commenced. Courts are vested with discretion on such applications, and this discretion will not be disturbed except in clear cases of the abuse thereof. Several objections are interposed by the defendants to the action of the court in permitting additional defendants to be brought in and the pleadings to be amended accordingly.

It is first contended that the court had no power to set aside the judgment after the term at which it was rendered had passed. The common-law practice that judgments could not generally be set [518] aside or amended after the term at which rendered is not in vogue in this state. The right to apply for the amendment or opening up of a judgment exists after term time in this state, subject to limitation as to time on some applications, the same as it existed at common law during the term. This court has recently held that there are no terms of court in this state in the common-law sense: Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937.

It is also claimed by the appellants that a party in whose favor a judgment is entered has no right to apply to have it set aside or modified. No reason is apparent why excusable mistakes should not be remedied on behalf of successful litigants as in case of those not successful. The object to be attained is to do complete justice to all the parties. The right

to remedy mistakes is an inherent power with courts, and this power extends to all parties to actions: Black on Judgments, sec. 314, and cases cited; 15 Ency. of Pl. & Pr. 252, and cases cited. This power to amend process and to bring in additional parties in proper case also exists under the statute. The statute permits such procedure even after judgment: Rev. Codes 1899, sec. 5297. Under the statute the power is to be exercised only in furtherance of justice, and is therefore discretionary. In this case there was no abuse of discretion. The action of the court in no way prejudices defendants' rights.

The order is affirmed.

All concur.

A Court may Direct, at Any Time, before or after judgment, that other persons be made parties, to the end that substantial justice be done: Walker v. Miller, 139 N. C. 448, 111 Am. St. Rep. 805; Camp Phosphate Co. v. Anderson, 48 Fla. 226, 111 Am. St. Rep. 77. See, also, the note to White v. Johnson, 50 Am. St. Rep. 737.

A Judgment Free from Jurisdictional Defects cannot be relieved against, except by independent statute in equity, after the term in which it was rendered, or after the time limited by statute: Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 74 Am. St. Rep. 845; Alabama etc. Ry. Co. v. Bolding, 69 Miss. 255, 30 Am. St. Rep. 541. But if a judgment is void by reason of an entire lack of jurisdiction of the party, it is a nullity, and the party affected is entitled to have it set aside whenever such fact is made to appear, and without proof or suggestion of merits: Flowers v. King, 145 N. C. 234, 122 Am. St. Rep. 444. And a judgment, not final in its effect, may be amended after the expiration of the term at which it was rendered: Venner v. Denver Union Water Co., 40 Colo. 212, 122 Am. St. Rep. 1036.

DEAN & CO. v. COLLINS & MAHOOD.

[15 N. D. 535, 108 N. W. 242.]

PARTNERSHIP—Assumption of Debts by Retiring Partner.—Where a retiring partner transfers his interest to the remaining partner, and the latter agrees to pay the partnership debts, as between themselves the partner assuming the debts becomes the principal and the retiring partner the surety. (p. 611.)

PARTNERSHIP—Assumption of Debts by Remaining Partner. Where one partner transfers his interest in the firm property to the other, and the latter agrees to pay the firm debts, their obligation as joint debtors to a creditor who has not assented to the transaction continues although the creditor has notice. (p. 613.)

Brooks & Kehoe and Burke & Middaugh, for the appellant.

Davis & Sennet, F. N. Hedrix and L. J. Van Fossen, for the respondent.

[536] YOUNG, J. This action was brought to recover a balance of nineteen hundred and fourteen dollars and seventy-two cents upon two promissory notes, executed by the defendants in 1901 and due, respectively, on November 1st and November 15th of that year. When the notes were given, and for two years prior thereto, the defendant, D. B. Collins, and J. A. Mahood, were engaged in the farm machinery business as a copartnership under the firm name of Collins & Mahood. The notes were given by the copartnership for goods purchased from the plaintiff. Mahood did not answer. Collins attempted to avoid personal liability by alleging and offering to prove certain facts which his counsel contend show that Mahood is the principal debtor, and that he (Collins) is a mere surety, and that he has been discharged from liability by reason of the plaintiff's failure to sue Mahood. The existence of the copartnership is admitted, and also the execution of the notes. He alleges that in December, 1901, the partnership was dissolved; that all of its property was transferred to Mahood; that as a part of the agreement for dissolution Mahood agreed to pay the firm debts including the notes in suit; that all firm creditors, including the plaintiff, were duly notified of the dissolution and [537] the terms upon which it was made; that on several occasions this defendant notified the plaintiff to proceed against Mahood; that Mahood was solvent when the partnership was dissolved, but has since become insolvent. The trial court rejected the testimony offered to sustain the above defense and directed a verdict for the amount due upon the notes. Defendant has appealed from the judgment entered upon the verdict.

The first question raised by the assignments of error (and it is the only one we need consider) is whether the allegations of the answer and the offers of proof constitute a defense. Counsel for defendant contend that they do. They contend that "where a partnership is dissolved, and one partner purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, he becomes in equity the principal debtor as to such debts, and the other his surety, and a creditor having notice of such agreement is bound by such relationship; and (2) that where a creditor with such notice is requested by the surety to collect his claim from the partner who has assumed the debts, and he neglects or refuses to do so, the surety is discharged, provided the principal was at the time solvent." We shall have occasion to refer only to the first of the above propo-

sitions. That the relation of principal and surety is created as between the remaining and the retiring partner upon the facts stated is well settled. As between themselves, the partner assuming the debts becomes the principal, and the retiring partner the surety: Pingrey on Suretyship and Guaranty, sec. 20; Moore v. Topliff, 107 Ill. 241; Wendlant v. Sohre, 37 Minn. 162, 33 N. W. 700. As to this there is no dispute. The question in controversy (and upon this there is a conflict of judicial opinion) is whether a creditor who is not a party to the agreement between the partners creating this new relation between them, and does not assent to it, but merely has notice of it, is bound by it, and must after such notice treat the retiring partner, not as a joint debtor, but as a surety. We have no hesitation in holding that, under such circumstances, the partners continue to be bound as joint debtors to the creditor, pursuant to their original obligation. In our view there is no reasonable ground for a difference of opinion upon this. The obligation of the partners to their creditor was created by contract. They were joint obligors. By the contract they subjected themselves to all of the obligations of that relation, and conferred upon their [538] creditor all of the benefits arising from it. To sustain the doctrine that the partners can by their own act change the character of their obligation to their creditor, and without this assent, express or implied, violates the fundamental principles of the law of contract. It abrogates an express contract without the consent of the party beneficially interested, and forces upon him a new contract to which he has not given his assent. In Pingrey on Suretyship and Guaranty, section 21, it is said that "the great weight of authority is that two or more principal debtors cannot by agreement among themselves, without consent of the creditor, so change the character of the liability of one of them to such creditor from principal to surety, as to enable him to demand from the creditor the treatment of a surety for the debt; that is, a retiring partner or other principal debtor cannot become a surety as to the creditor by simply informing him that his codebtors have agreed that he shall be held only as a surety."

The question has been carefully considered in a large number of cases, and the rule announced is in harmony with the foregoing text. From these we cite: Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464; Shapleigh Hdw. Co. v. Wells, 90 Tex. 110, 59 Am. St. Rep. 783, 37 S. W. 411; White v. Boone, 71 Tex. 712, 12 S. W. 51; Hall v. Jones, 56 Ala. 493;

Barnes v. Boyers, 34 W. Va. 303, 12 S. E. 708; Whittier v. Gould, 8 Watts (Pa.), 485; McAreavy v. Magirl, 123 Iowa, 605, 99 N. W. 193; Shepherd v. May, 115 U. S. 505, 6 Sup. Ct. Rep. 119, 29 L. ed. 456; Conwell v. McGowan, 81 Ill. 285; First Nat. Bank v. Finck, 100 Wis. 446, 76 N. W. 608; Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. Rep. 494, 33 L. ed. 667; Story on Partnership, sec. 158; Parsons on Partnership, 4th ed., secs. 296-324; Bates on Partnership, secs. 533, 534. The leading cases upholding the doctrine that a creditor with notice of the agreement between the partners is bound by it are Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90, and Smith v. Sheldon, 35 Mich. 42, 24 Am. Rep. 529. Both cases rest upon what was supposed to be the rule of the English courts, laid down in Oakley v. Pasheller, 4 Clark & F. 207. It will appear from an examination of Shapleigh Hdw. Co. v. Wells, 90 Tex. 110, 59 Am. St. Rep. 783, 37 S. W. 411, and other cases above cited, that the court's opinion in that case was misunderstood, and that the creditor assented to the arrangement between the partners. The doctrine stated in the New York and Michigan cases does not represent the English rule; for in Swire v. Redmon, L. R. 1 Q. B. D. 536, the chief justice said: "There is no [539] English case which holds the doctrine that is contended for by those who claim that the agreement between the partners themselves, without the consent of the creditor, could change their relation to the latter; and we have found no decision in the American courts which directly holds to that theory, except those we have herein cited, all of which rest upon the misinterpretation of Oakley v. Pasheller, 4 Clark & F. 207."

In our opinion, the rule announced in Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90, is unsound in principle and is against the decided weight of authority. We conclude, therefore, that where the creditor has in no way assented to the new relation created by the parties, as between themselves, he is not bound by it, and as to him they continue as joint debtors. The trial court did not err in so holding.

Judgment affirmed.

All concur.

An Agreement Between Partners that one of them shall retire from the firm, and that those remaining will assume and discharge the firm liabilities, unless consented to by its creditors, does not release the retiring partner from liability, nor change his liability into that of a surety: Shapleigh Hardware Co. v. Wells, 90 Tex. 110, 59 Am. St. Rep. 783; National Cash Register Co. v. Brown, 19 Mont. 200, 61 Am. St. Rep. 498. It has been held, however, that mere notice to a creditor of the retirement of one partner, and of an agreement by

the continuing partner to assume the firm debts, requires him to treat the retiring partner as a surety for the continuing partner; and if he extends the time of payment of his debt without the retiring partner's knowledge, the latter is released; but the notice must be actual: Preston v. Garrard, 120 Ga. 689, 102 Am. St. Rep. 124.

SKJELBRED v. SHAFER.

[15 N. D. 539, 108 N. W. 487.]

PROCESS—Publication of Summons Against Unknown Owners. A judgment in an action to quiet title based on a published summons which does not describe the land in controversy is void as against adverse claimants not specifically named in the summons. (p. 615.)

JUDGMENT—Time for Seeking Relief from Void Decree.—Relief from a judgment void for want of service may be had on motion after the expiration of the statutory limitation of one year without the showing of merits and excuse required where jurisdiction has attached. (p. 615.)

Christianson & Weber, for the appellant.

Le Suer & Bradford, for the respondent.

[540] YOUNG, J. The plaintiff has appealed from an order vacating a judgment in an action to quiet title and permitting one Ethel May Southard to appear and defend. The action was brought under chapter 5, page 9, Laws of 1901. The summons was served by publication and named as defendants, "Usher D. Shafer, Sylvester [541] Conkling, Mary E. Conkling, Mortgage Bank and Investment Company, a corporation, A. B. Guptill, as receiver of the Mortgage Bank and Investment Company, a corporation, Mary F. Howard, and all other persons unknown, claiming any estate in or lien or encumbrance upon the property described in the complaint, and their unknown heirs." The moving papers show that the above-named Mary F. Howard died in Parksville, Missouri, on April 20, 1890, and that the respondent, Ethel May Southard, is her sole heir. The action was commenced on February 28, 1903. Judgment was entered on September 29, 1903, quieting title in the plaintiff against all adverse claims of the defendants and all persons claiming through or under them. The respondent was not named in the summons and was not served, unless the description "unknown heirs" in the published summons was sufficient to give jurisdiction. On September 29, 1904, which was just one year from the date of entry of judgment, she procured an order to show cause why the judgment should not be set aside as to her and

she be permitted to defend. The order was returnable on October 8, 1903. Her moving affidavit and proposed answer show that Mary F. Howard, who is named in the summons as one of the defendants, was the owner of the land in question at the time of her death; that the applicant is her sole heir, and is now the owner of the fee, and has a good defense to the action. On the return day, to wit, October 8, 1904, and more than one year after the entry of the judgment, of the trial court after considering the affidavits submitted in support of and in opposition to the motion, made the order from which this appeal was taken.

The plaintiff urged (1) that the court had no power to open the judgment after one year; (2) that the applicant had not sufficiently excused her default; and (3) that her affidavit of merits was not sufficient. The same objections are urged in this court as grounds for reversal. None of these several questions need be considered. They are all based upon the assumption that chapter 5, page 9, Laws of 1901, to the extent that it attempts to confer jurisdiction over "unknown heirs" by thus designating them in the published summons, is valid. Since this case was submitted the validity of that portion of the act was before us in Fenton v. Minnesota T. & F. Co., 15 N. D. 365, ante, p. 599, 109 N. W. 363, and we held that as to persons not named in a summons published under the authority of that act the proceedings did not constitute "due process of law," and that a judgment so [542] rendered is void as to those who are not named or personally served and do not appear. The decision in that case is controlling. As to the applicant in this case, the judgment was void. Judgment having been entered without jurisdiction, the statutory limitation of one year for applying for relief has no application. She was in no respect in default, and was not subject to the statutes and rules which apply in such cases: Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342; Magin v. Lamb, 43 Minn. 80, 19 Am. St. Rep. 216, 44 N. W. 675; Coughran v. Markley, 15 S. D. 37, 87 N. W. 2; Aetna Life Ins. Co. v. McCormick, 20 Wis. 265; Weatherbee v. Weatherbee, 20 Wis. 499. See, also, Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095, and Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292.

The record in this case shows that as to the applicant for relief the judgment was void. The order vacating was therefore properly made and must be sustained. Such will be our order.

All concur.

Relief from a Judgment void for lack of jurisdiction in the court which rendered it may be set aside at any time when such fact is made to appear, and without proof or suggestion of merits: Flowers v. King, 145 N. C. 234, 122 Am. St. Rep. 444, and see cases cited in the cross-reference note thereto.

A Published Summons in a suit to quiet title which neither describes the land in controversy nor names the adverse claimants does not constitute due process against them, and a judgment taken against them is void, and subject to collateral attack: Fenton v. Minnesota Title etc. Co., 15 N. D. 365, ante, p. 599.

SILANDER v. GRONNA.

[15 N. D. 552, 108 N. W. 544.]

CONTRACTS—Compromise as a Consideration.—A compromise cannot be a sufficient consideration for a promise where there has been no dispute between the parties. (p. 617.)

COMPROMISE—Necessity of Dispute.—A compromise can be made, as a matter of law, only when the parties disagree among themselves as to their respective rights. (p. 618.)

COMPROMISE.—A Promise to Pay a Sum as a Release of a contract is not necessarily a compromise of a disputed right or question. (p. 618.)

COMPROMISE.—To Compromise a Dispute is to Adjust It by mutual concessions; each party must yield something. (p. 618.)

HOMESTEAD—Conveyance by Husband Alone.—A contract to convey a homestead made by the husband alone is without validity, and damages cannot be recovered against him for its breach. (p. 618.)

CONTRACTS—Absence of Consideration.—A promise to pay money to release a void contract is without consideration. (p. 619.)

CONTRACTS—Mutual Mistake of Law.—A contract entered into by the parties under a mutual mistake of law is not enforceable. (p. 619.)

Fred A. Kelley and Scott Rex, for the appellant.

Frich & Kelley and Tracy R. Bangs, for the respondent.

553 MORGAN, C. J. Plaintiff brought this action for an accounting and for the release and cancellation of certain mortgages and liens held by the defendant upon his real estate. The defendant answered and set forth all his mortgages, liens, claims and promissory notes against the plaintiff. After a trial the district court made findings of fact and conclusions of law in defendant's favor. The plaintiff did not perfect an appeal from such judgment. The trial court disallowed a certain claim of seventy-five dollars, which the defendant contended should have been allowed as a valid claim in his favor, and against the plaintiff. The facts in regard to that item are set forth in the following findings

of fact made by the trial court on its own motion: "That there was included in the note last aforesaid the sum of seventy-five dollars, which sum plaintiff agreed to pay defendant Gronna in consideration of his releasing him from all liability under and the cancellation of a certain written contract, theretofore and in December, 1902, entered into between plaintiff and said defendant, whereby plaintiff had agreed to sell and convey to said defendant the real property described in finding 3, and which sum was accepted by the said defendant in full cancellation of said contract, and in full release of plaintiff from all liability thereunder; that at the time said contract was entered into plaintiff was a married man and the head of a family, which fact was not known to said defendant, and that at said time said real property was the homestead of plaintiff; that the parties, at the time it was agreed between them that plaintiff should be released from all liability under said contract and the said contract canceled in consideration of said seventy-five dollars so to be paid and included in said note, did know that, as matter of law, said contract was void; that both parties acted in said matter in good faith. Save only as hereinbefore found, the said note was given for a full and adequate valuable consideration."

554 The defendant appealed from the judgment and asks to have the judgment modified to the extent only of allowing that item in his favor. No statement of the case was settled. The facts stated in the finding must therefore be taken and proven. There is no dispute as to the facts, but it is defendant's contention that the conclusion of law that defendant is not entitled to have the item of seventy-five dollars allowed in his favor is not sustained by the facts found. The pivotal question to be considered is whether there was a valid consideration between the parties for plaintiff's promise that he would pay defendant seventy-five dollars for a release of the contract for the conveyance of plaintiff's land to the defendant. Plaintiff contends that the contract was void and made under a mutual mistake of law. Defendant contends that the promise was based on a valid consideration arising out of the compromise of a disputed question between the parties. It is conceded that if the finding shows a compromise of a disputed question, which arose in good faith between the parties, there was a valid consideration. Does the finding show that there was a compromise of a disputed question actually and in good faith existing between the parties? The language of the finding will not warrant any such

conclusion. There is nothing in the finding from which a conclusion that there was a dispute between the parties can be drawn. That there must be a bona fide dispute as to some question before the principles of law pertaining to compromises become applicable is well settled: McGlynn v. Scott, 4 N. D. 18, 58 N. W. 460; Fryer v. Cetnor, 6 N. D. 518, 72 N. W. 909; Greenlee v. Mosnat, 116 Iowa, 535, 90 N. W. 338; Hansen v. Gaar Scott Co., 63 Minn. 94, 65 N. W. 254; Dolcher v. Frey, 37 Barb. 152; Moon v. Martin, 122 Ind. 211, 23 N. E. 669; Gray v. United States Savings & Loan Co., 116 Ky. 967, 77 S. W. 200. A compromise can be made as a matter of law only when the parties disagree among themselves as to their respective rights. A promise to pay a certain sum as a release of a contract is not necessarily a compromise of a disputed right or question. It does not signify that the promise was made after the parties had yielded a part of their claims and mutually agreed that payment of that sum was agreed upon as a settlement of the dispute. There is nothing in the language of the finding that is inconsistent with the fact that each one of the parties agreed that seventy-five dollars actually represented defendant's damage in surrendering the contract, and plaintiff's benefit from such surrender. The finding does not show that the parties [555] considered that there was any dispute or doubt as to their respective rights under the contract. It shows a promise to pay seventy-five dollars in consideration of a release of a contract, and shows nothing more as to the reasons existing for these promises. To compromise a dispute is to adjust it by mutual concessions. Each party to the dispute must yield something: 2 Words and Phrases, p. 1374, and cases cited. The seventy-five dollar item which was included in the note was not based upon any consideration, upon the theory that there was a compromise of a disputed claim so far as the finding shows. The plaintiff agreed to sell the homestead of himself and wife. The wife did not join in the written contract for sale. The fact that she did not execute the contract rendered the contract of no validity so far as a conveyance of the homestead is concerned: Rev. Codes 1899, sec. 3608; Rev. Codes 1905, sec. 5052; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245.

It is conceded by counsel for both parties that such a contract is not valid for any purpose, and will not sustain an action against the husband for damages for its breach. It was a void contract, and imposed no legal obligations upon the husband. Counsel for appellant does not claim that the

contract had any validity for any purpose except as a basis for a binding compromise. The authorities sustain the contention that damages cannot be recovered against the husband upon his contract to convey the homestead of himself and wife. The reason is that the contract is void, and if damages were recoverable upon such a contract it would indirectly tend to defeat the object of the statute requiring the signature of the wife before the homestead can be conveyed or encumbered: Waples on Homestead and Exemptions, p. 384; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817; Hodges v. Farnham, 49 Kan. 777, 31 Pac. 606; Cowgell v. Warrington, 66 Iowa, 666, 24 N. W. 266; Donner v. Redenbaugh, 61 Iowa, 269, 16 N. W. 127. A promise to pay money to release such a contract is without any consideration whatever. The trial court also found that both parties were mistaken as to the legal effect of the contract, and did not know that the contract was void. Section 3843, Revised Codes of 1899 (section 5288, Revised Codes of 1905), provides that an apparent consent is not real or free when obtained through mistake. Section 3854 (section 5299, Revised Codes of 1905) provides that a mistake of law is a "misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially [556] the same mistake as to the law." The parties did not consent to the contract of release, and neither is bound by it as a matter of law: Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037; 2 Pomeroy's Equity Jurisprudence, sec. 846; Rued v. Cooper, 119 Cal. 463, 51 Pac. 704. The trial court did not err in refusing to find that the seventy-five dollar item was due from the plaintiff under the contract.

The judgment is affirmed.

All concur.

The Compromise of a Disputed Claim or the settlement of an action usually constitutes a sufficient consideration for a contract: Bolln v. Metcalf, 6 Wyo. 1, 71 Am. St. Rep. 898; Everts v. District Township of Rose Grove, 77 Iowa, 37, 14 Am. St. Rep. 264; East Line etc. Co. v. Scott, 72 Tex. 70, 13 Am. St. Rep. 758.

The Effect of a Conveyance of the Homestead by one of the spouses only is the subject of a note to Jerdee v. Furbush, 95 Am. St. Rep. 909. The general rule is that a conveyance of a homestead by the husband without his wife joining in the deed is a nullity: Bolen v. Lilly, 85 Miss. 344, 107 Am. St. Rep. 291; McDonald v. Sanford, 88 Miss. 633, 117 Am. St. Rep. 758; Lininger v. Helpenstell, 229 Ill. 369, 120 Am. St. Rep. 264.

BAIRD BROS. v. CHAMBERS.

[15 N. D. 618, 109 N. W. 61.]

NEGLIGENCE—Duty to Prevent Spreading of Fire.—After discovering a fire on his premises, for which he is not responsible, the owner is not bound to use the highest degree of care, but only ordinary diligence, to prevent it from spreading to his neighbor's property. (p. 621.)

J. W. Walker and S. E. Ellsworth, for the appellant.

T. R. Mockler and Maddux & Rinker, for the respondent.

619 ENGERUD, J. This is an action to recover compensation for the destruction of plaintiff's property by a prairie fire. It is alleged that the defendant negligently kindled the fire on his premises, and negligently permitted it to spread so as to cause the damage complained of. It is undisputed that the fire in question was started on defendant's premises and spread from there to plaintiff's ranch, about seven or eight miles distant, and destroyed plaintiff's property. The defendant, however, did not kindle the fire, and was in no manner responsible for the kindling thereof. He discovered the fire, however, a few minutes after it started. It is conceded that the defendant is not liable for the damages caused by the fire unless his failure to extinguish it after discovering it was due to some omission of duty on his part. The charge to the jury on this question was as follows: "In determining the question of negligence, if you find from the evidence that 620 at the time the defendant discovered the fire in question it would have been possible for him to prevent the spread of the same with the help and means within his reasonable reach, then under the law he would be held responsible for negligently or carelessly allowing the fire to spread." There was much else said on the same subject, but it was merely a repetition of the same idea in different language. The instructions on this point were duly excepted to, and form the basis for the main assignment of error. It was not claimed that the defendant failed to make use of the means available to him for extinguishing the fire, but plaintiff contended that defendant had not used those means with proper promptness and diligence. What degree of promptness and diligence was the defendant under obligations to exert? As will be seen from the instruction above quoted, the jury were told in effect that defendant was liable if the fire could possibly have been extinguished

by him. The jury were left to infer that if, by the utmost promptness and extremest diligence of effort on defendant's part the fire might have been extinguished, then the defendant was liable. That is clearly not the law. Even if the defendant had himself set the fire, he was bound to exercise only ordinary care and diligence to prevent it from spreading: 1 Thompson's Commentaries on Law of Negligence, sec. 729. Surely, no greater degree of care is required of one who is not responsible for starting the fire. After he discovered the fire on his premises he was bound to exercise reasonable care and diligence to prevent it from spreading so as to endanger his neighbor's property. His duty in this respect after discovering the fire would be the same as that resting upon a person who, without negligence, starts a fire on his own premises. He was bound to put forth such reasonable effort to prevent the fire endangering his neighbors as a man of ordinary prudence would put forth, who was actuated by a proper regard for his neighbors' rights and safety: McCully v. Clarke, 40 Pa. 399, 80 Am. Dec. 584.

This error in the instructions requires a reversal and a new trial.

All concur.

The Principal Case is cited in the recent note to Weitzmann v. Barber Asphalt Co., 123 Am. St. Rep. 577, on the duty and liability of land owners to adjoining proprietors.

GRAND FORKS COUNTY v. FREDERICK.

[16 N. D. 118, 112 N. W. 839.]

APPEAL.—Where the District Court Certifies a Question to the Supreme Court for review, under the North Dakota statute, it should make a brief statement of the facts established, but should not return the evidence; no questions of fact are reviewable by the supreme court under such proceedings, but only questions of law. (p. 625.)

TAXATION—Insufficient Description of Land.—A description of land in an assessment-roll must be sufficiently accurate and definite to enable the owner to identify the property therefrom as his; otherwise the assessment is void. A sufficient description is necessary, not only for his benefit, but as a basis for future titles. (p. 625.)

TAXATION—Insufficient Description of Land.—The fact that the name of the owner of land is correctly given in the assessment-roll, and that he is not misled by an insufficient description and knows that his land was intended to be assessed, does not relieve the authorities from the necessity of proceeding regularly in assessment matters and sufficiently describing the property. (p. 626.)

TAXATION.—A Curative Statute Which Legalizes only irregularities in the assessment of taxes has no application to assessments void because of an indefinite description of the land. (p. 626.)

TAXATION.—Absence of a Verification to an Assessment-roll is fatal to the tax in a law action, but not in equitable actions. (p. 627.)

J. B. Wineman, state's attorney, and B. G. Skulason, for the appellant.

W. J. Mayer, for the respondent.

[120] MORGAN, C. J. This action is brought by the county of Grand Forks against the defendant, under the provisions of chapter 161, page 213, of the Laws of 1903, an act entitled as follows: "An act to enable boards of county commissioners to institute proceedings to enforce payment of taxes on real property sold to the state or county for taxes and remaining unredeemed for more than three years." The county claims that the defendant has not paid any taxes on the land described in the tax proceedings during the years 1890 to 1903, inclusive, excepting in the year 1892. The defendant answered and alleged several grounds upon which she claimed that she was not liable for the payment of the taxes upon such land. Among the defenses so alleged is one that the land or lot described was never assessed, for the reason that it was not described in the assessment-roll. The trial court made findings of fact and conclusions [121] of law, sustaining the defendant's contentions, and dismissed the proceedings against the county of Grand Forks. After the rendition of judgment, the trial court certified certain questions for a decision by this court, under the provisions of section 10 of said act, which reads as follows, so far as it bears on the question of making a certificate by the trial court: "The judgment which the court shall render shall be final, except that upon application of the county, or other party against whom the court shall have decided the point raised by any defense or objection, the court may, if in its opinion the point is of great public importance, or likely to arise frequently, make brief statement of the facts established, bearing on the point, and of its decision and forthwith transmit the same to the clerk of the supreme court, who shall enter the same as a cause pending in such court, and place the same on the term calendar of such court for the term then in session, or for the first term thereafter."

The respondent makes a motion in this court to strike out the evidence and certain other parts of the record, as not properly in the record under proceedings for a review by

this court of the decision of the trial court in such cases. In this case, all the evidence taken upon the trial has been returned to this court, together with the findings of fact and conclusions of law of the trial court. Under the section just quoted, it is not proper practice to certify the evidence on which the decision of the trial court was based to this court. The trial court makes "a brief statement of facts established and its decision." From this reading, it is clear that the evidence has no place in the record to be transmitted from the trial court. This court is to reach its conclusions upon the facts established as certified to this court. In other words, no questions of fact are reviewable by this court under proceedings based on this section. This court passes only upon questions of law. In this case, however, the trial court certified its findings of fact and conclusions of law, and these may be taken as statements of facts established by the trial court. However, proper practice would require that the trial court make a statement of the facts established in connection with the questions certified, and it is unnecessary, or would be unnecessary in many cases, to return all of the findings of fact. This section contemplates a summary proceeding in the supreme court to determine the questions certified, and does not contemplate a return to this court of all the evidence or all the proceedings. The motion will therefore be granted to strike from the record the evidence [123] certified to this court; but the case will be reviewed on the findings of fact, which we will consider in this case as equivalent to the making of a brief statement of the facts established in the court below.

The law is similar to section 1589, Revised Statutes of Minnesota of 1894, now repealed. The construction given by the supreme court of that state to that act is that ultimate facts and the court's conclusions only are properly certified to the supreme court under that act: In re Cloquet Lumber Co., 61 Minn. 233, 63 N. W. 628; Morrison County v. St. Paul etc. Ry. Co., 42 Minn. 451, 55 N. W. 982; County of Ramsey v. Chicago etc. Ry. Co., 33 Minn. 537, 24 N. W. 313. A statute similar to this was before this court in Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241, and in Emmons County v. Bennett, 9 N. D. 131, 81 N. W. 22; but no question of practice was therein involved. It is claimed that this case is not such a case as is contemplated to be reviewed by this court under said section. That section specifies that the questions may be certified, "if, in the opinion of the trial court, the point is of great public im-

portance or likely to arise frequently." As this point was not raised or argued, we shall not determine the question suggested. It is clear, however, that this section is not meant to give the right of review upon a certificate of all questions that relate only to the determination of private rights. It may be that the certificate of the judge that the question is deemed of great public importance, and that it is likely to arise frequently, would be considered as a final determination of the importance of the question. Whether such certificate would be binding upon this court in all cases we do not determine. However, it is clearly the intent of the law that, in certifying cases to this court, the trial court should act with judicial discretion, and only certify such questions as are deemed of great public importance or are likely to arise frequently.

The principal question involved in the merits is as to whether the tract land involved in the taxation proceedings was properly described in the assessment-roll. The tract attempted to be assessed was composed of a part of three lots in block 25, original townsite of the city of Grand Forks. Practically the same point is raised against the validity of the assessment as to the description of the three lots. The part of lot 2 which was attempted to be assessed is accurately described as follows: "Part of lot 2, beginning at a point in block 25, original townsite of Grand Forks, N. D., and on the line of Third street, distant 73 feet from the intersection of the ^{123} southerly line of De Mers avenue and the easterly line of Third street; thence northeasterly toward the Red River of the North on a line parallel with De Mers avenue 200 feet; thence northwesterly and along line common to lots 1 and 2, 200 feet, to the line of Third street; thence southeasterly and on the line of Third street, 23 feet, to the place of beginning—being a strip of land 23 feet wide and 200 feet in depth of lot 2, block 25, original townsite of Grand Forks, fronting on Third street." This lot was described in the assessment-roll for the year 1890 as follows:

Owner	Description	Lot	Block
E. B. Frederick.....	Town N. 23x200 ft. deep.	2	

The number of the block in this description was not given, in the description immediately above this one, the number "25" was given as the number of the block. There were

no ditto marks given in this description to indicate that block 25 was intended to be described. The effect of the omission of the number of the block need not be determined.

Whether this is such a description as will sustain an assessment is the paramount question certified to this court by the district court. The question certified is as follows: "(1) Sufficiency of the descriptions: Are the descriptions, or any of them, of the lands sought to be charged with the above taxes, sufficient to sustain these proceedings?" If the description is sustained as sufficient, other questions that have been certified will require an answer. It is established by decisions of this court, almost from its organization, that, before there can be a valid tax, there must be a description sufficiently accurate and definite to enable the owner to identify it therefrom as his property. The description as given in the assessment-roll is to be used in all the subsequent tax proceedings. There is no provision for changing the description thereafter in order to correct it or make it more certain, and extrinsic evidence is not admissible to show what is meant to be described or what the words or figures used mean. A sufficient description is necessary, not alone for the benefit of the owner. The land assessed, if thereafter sold, is transferred to a purchaser. The necessity of a sufficient description is further emphasized by this fact. The description [124] becomes the basis of future titles. This description is not definite. It is impossible to tell from it what north part of lot 2 of block 25 it describes. Lot 2 is about five hundred and seventy feet in depth. The north twenty-three feet by two hundred feet does not locate any particular part of lot 2. The same descriptions would be quite as applicable to other parts of the north side of lot 2. The tract owned by the defendant was an oblong tract in the northwest corner of that lot. From this description a surveyor could not locate the tract. No point is given as the starting point for the dimensions twenty-three by two hundred feet. The act under which these proceedings were brought provides that no taxes shall be declared invalid unless it shall be made to appear, among other things, that the description or valuation of the property cannot be definitely ascertained from the assessment-roll. The description was clearly so indefinite that we have no hesitation in declaring the assessment void. The following decisions of our own court amply sustain our conclusion: Power v. Larrabee, 2 N. D. 141, 49 N. W. 724; Power v. Bowdle, 3 N. D. 107, 44 Am. St. Rep. 511, 54 N. W.

404, 21 L. R. A. 328; Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350; Sheets v. Paine, 10 N. D. 103, 86 N. W. 117; Nind v. Myers, 15 N. D. 400, 109 N. W. 335, 8 L. R. A., N. S., 157; Wells Co. v. McHenry, 7 N. D. 246, 74 N. W. 241. Question No. 1 in the certificate is therefore answered in the negative.

The fact that the owner's name was correctly given, and that he was not misled by the description, and knew that his land was intended to be assessed, is not material, and does not relieve the authorities from proceeding regularly in assessment matters: Sheets v. Paine, 10 N. D. 103, 86 N. W. 117; Power v. Bowdle, 3 N. D. 107, 44 Am. St. Rep. 511, 54 N. W. 404, 21 L. R. A. 328.

The effect of the curative provisions of chapter 166, page 232, Laws of 1903, upon the tax in question, is also certified for a decision. The language of that act in that regard is as follows: "No tax shall be set aside for any defect or irregularity in form or illegality in assessing, laying or levying such tax, if the person against whom, or the property upon which such tax is levied, assessed or laid, is in fact liable to taxation unless it be made to appear to the court that such irregularity resulted to the prejudice of the party objecting." The reasonable construction of that act is that irregularities only are cured and rendered immaterial. Omissions going to the groundwork of the tax such as an assessment are not included within the provisions of the act. Without this essential there is no tax. The want [125] of a sufficient description was not rendered immaterial or cured by the terms of that act. This defect is not a mere irregularity, but goes to the groundwork of the tax. The land is not assessed unless described with sufficient accuracy for identification: Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241; Nind v. Myers, 15 N. D. 400, 109 N. W. 355, 8 L. R. A., N. S., 157; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350; State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76; Lee v. Crawford, 10 N. D. 482, 88 N. W. 97. The answer to this question will be that the act of 1903 does not cure void assessments, but that it refers only to irregularities, and not to matters of jurisdiction to the tax.

Another question that is certified is as to the effect of a failure to verify the assessment-roll, when such failure is urged as a defense to the collection of the tax under said act of 1903. Legal defenses are permitted to be pleaded to the tax under that act. The language as to what defenses may be interposed in the answer is as follows: "Setting forth the

defense or objections to the tax or penalty which need not be in any particular form, but shall clearly refer to the piece or parcel of land intended, and shall clearly set forth in ordinary and concise language the facts constituting the defense or objections to such taxes or defenses." The effect of the absence of a verification of the assessment-roll is well established by decisions of this court. The rule established is that the absence of a verification is fatal to the tax in a law action, and not fatal in equitable actions: Farrington v. New England Inv. Co., 1 N. D. 102, 45 N. W. 191; Douglas v. City of Fargo, 13 N. D. 467, 101 N. W. 919; Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188; Lee v. Crawford, 10 N. D. 482, 88 N. W. 97. The answer to this question is that the absence of a verification to an assessment-roll is fatal to the tax in proceedings brought under the act in question, which permits defenses legal in their character to taxes attempted to be collected.

Other questions are certified bearing upon the judgment to be entered and what penalties and interest should be charged, and the effect of a prior adjudication against the validity of some of these same taxes. The questions answered are decisive of the case and of the judgment to be entered. The appellant does not claim that these other questions become material, unless a reversal is to be ordered. The other questions are of no general importance. Hence an answer to them is unnecessary.

Judgment affirmed.

All concur.

Fisk, J., disqualified.

Burke, judge of fifth district, sitting by request.

A Description of Land Assessed is essential to a valid tax; an uncertain and indefinite description vitiates the assessment and all subsequent proceedings: State Finance Co. v. Mulberger, 16 N. D. 214, post, p. 650; Power v. Bowdle, 3 N. D. 107, 44 Am. St. Rep. 511; Lessee of Massie's Heirs v. Long, 2 Ohio, 287, 15 Am. Dec. 547; State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76; State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984.

STATE v. NOHLE.

[16 N. D. 168, 112 N. W. 141.]

QUO WARRANTO—Relation of Private Person.—Quo warranto is strictly a prerogative writ, and will issue by the supreme court on the relation of a private person only in exceptionable cases. (p. 629.)

LACHES.—In Applying the Doctrine of Laches, or the rule of estoppel by acquiescence, no fixed time will be taken as controlling, but the facts in each particular case must govern the court's decision. (p. 630.)

QUO WARRANTO—Relation of Private Person.—The issuance of a writ of quo warranto by the supreme court is discretionary, and an application on the relation of a private person for a writ directing county officials to desist from exercising their authority, on the ground that the county has no legal existence because organized under an unconstitutional statute, will be denied when to grant it would open up strife and confusion without any corresponding benefit to the relator or other persons. (p. 632.)

Crawford & Burnett and Ball, Watson & Young, for the relator.

T. F. McCue, attorney general, Robert Norheim, T. S. Becker and Geo. A. Bangs, for the respondents.

[169] FISK, J. This is an application for the issuance by the court of an original writ in the nature of quo warranto.

The application is made in the name of the state by one John Frish, a private person, as relator, and the object sought by such writ is to compel the defendants, who are acting as certain county officers of what is known as McKenzie county, to desist from exercising jurisdiction and authority as such county officials over the territory embraced within the limits of such county; relator's contention being that no such county legally exists, for the reason that the law under which the same was attempted to be organized, being chapter 73, page 155, of the Laws of 1905, is unconstitutional and void, as being in violation of section 167 of the constitution, which, it is claimed, prohibits special legislation upon the subject of the organization of counties. Upon the presentation and filing of the application, an order was made and served upon defendants requiring them to show cause before this court why such writ should not be issued as prayed for. Pursuant to such order to show cause, the defendants, through their counsel, have appeared and resist the issuance of such writ, both upon the ground that the relator has no right to institute the proceedings and also upon the merits. The facts as stipulated are briefly as follows: The defendants Nohle, Bangs and Shaw were, in the month of April, 1906, appointed county

commissioners in and for McKenzie county, by the governor, and the defendants Dimmick and Millhouse were at said time appointed by the governor to the offices of treasurer and auditor, respectively, and that all such persons thereupon assumed the duties of their respective offices and acted as such officers until January 7, 1907; that all of said officers except the defendant Shaw, who was succeeded by one R. B. Gore, were, at the general election held in November, 1906, in said county, elected to the respective offices to which they had been theretofore appointed, and they each duly qualified and entered upon the discharge of their duties on January 7, 1907, since which time they have been the qualified and acting officers aforesaid. Said officers have performed all the duties usually performed by such county officers, and that during the year 1906 taxes were assessed, levied and collected in said county and the portion thereof belonging to the [170] state has been turned over by the treasurer of said county to the state in the same manner as taxes are collected and turned over by regularly organized counties; that since the organization of such county roads have been established, indebtedness created and county warrants issued; that there is now outstanding approximately five thousand dollars of such warrants, which are held by divers persons who have taken them in the ordinary course of business; that upon the passage and approval of chapter 73, page 155, of the Laws of 1905, the governor established a temporary county seat for said county at Alexander, where all county business has been transacted as in other regularly organized counties; that in May, 1906, an action was instituted in the district court of Stark county by one J. Granteer, on behalf of himself and several others, challenging the validity of the organization of such county, and in the month of November, 1906, an action was instituted in the federal court, southeastern division, by the Northern Pacific Railway Company for the same purpose, which actions are still pending and undetermined; that the relator, Frish, is a resident and property owner in said territory.

We are clearly of the opinion that the application should be denied. By granting the same we would recognize the right of a mere private relator to invoke the original jurisdiction of this court in a matter in which he shows no greater interest than that of any other resident and property owner of the county, and this, without first invoking the jurisdiction of the district court, properly having jurisdiction in such cases. It has repeatedly been held by this court that the writ here prayed for is strictly a prerogative writ, and

that the same will be issued only in exceptional cases: State v. McLean County, 11 N. D. 356, 92 N. W. 385, and cases cited. In that case this court quoted approvingly from the opinion of the supreme court of Utah, in State v. Elliott, 13 Utah, 200, 44 Pac. 248, as follows: "It will be noticed that there are five writs of which the supreme court has original jurisdiction, and very probably many controversies will arise for which one or the other of these writs will afford a proper remedy. Hence, if we were to assume jurisdiction of every such controversy which might be brought before us, regardless of whether the state had a special interest therein, or whether it presented any special exigency, it can readily be perceived that most of our time would be consumed in hearing and determining cases which could more speedily and conveniently be heard and determined in an inferior court. This would seriously impair the usefulness of [171] this tribunal as an appellate court, and yet its appellate power was the main object of its creation. No construction which would render such a result possible is warranted by the provisions of the constitution relating to the judicial department. From the general policy indicated, and the language used, it is manifest that this tribunal was intended by the framers of the constitution to be essentially a court of appeals; and therefore we will not assume jurisdiction, under the grant contained in section 4 at the relation of private parties, except in cases which present some special reason or some special or peculiar emergency, or where the interests of the state at large are shown to be such as to render it apparent that the interests of justice require its exercise. The remedy provided by the constitution, authorizing proceedings in inferior tribunals, must in all cases be followed, unless it shall be made to appear to the satisfaction of this court that there is an urgent necessity for the interposition of its power, where, as in this case, the appellate court of the state and inferior courts of general common-law powers are vested with jurisdiction in quo warranto, the appellate court may properly refuse to assume original jurisdiction in matters where the inferior courts have ample power and can, by entertaining the information, afford adequate relief; and the right of the appellate court to exercise its discretion in granting or withholding leave to file an information in the nature of quo warranto is not limited. Nor is the discretionary power of the court exhausted until it has permitted the information to be filed." The rule thus adopted by this court is clearly sound, and will be strictly adhered to by us as a settled rule of

practice in disposing of applications such as the one now under consideration. The fact that the attorney general indorsed upon the moving papers his consent to the exercise of such jurisdiction by this court will not operate to change the above rule. The very able and exhaustive opinion of Mr. Chief Justice Wallin in State v. McLean County, 11 N. D. 356, 92 N. W. 385, is to our minds, a conclusive answer to the arguments of relator's counsel, not only upon the practice question here involved, but upon the merits as well. In the opinion in that case, after referring to the facts, it is, among other things, said: "Upon the considerations already stated, we are in our judgment justified in refusing to assume original jurisdiction in these cases. But there is another factor of prime importance, and one relating to the merits of the application, which, in our opinion, leads to the same conclusion. In these cases the remedy of quo warranto is not sought as a means of exercising superintending control of an inferior [172] court, or in aid of the appellate jurisdiction of this court. On the contrary, the relator is before this court with the avowed purpose of invoking its original powers. In such cases it has been repeatedly held the enumerated writs are not writs of right, but are strictly prerogative writs, and the same will issue only in cases publici juris, where the sovereignty of the state, or its franchises and prerogatives, or the liberties of its people, are directly, and not remotely, involved. Ordinarily, a private person, who volunteers as a champion of only public rights, and as such invokes the prerogative writs, will be regarded as an intermeddler. It appears by the information, and more fully by the briefs of counsel on behalf of the relator, that the relator has suffered no wrongs peculiar to himself, but, on the contrary, the relator appears in this court solely as a champion of the state, and for the ostensible purpose of protecting governmental franchises from abuse. Before assuming jurisdiction of these cases, it is, in the opinion of this court, very important to consider the consequences which will necessarily ensue if the relief asked by the relators is granted by this court; and this more especially in view of the entire want of power in this court either to rehabilitate the political machinery sought to be destroyed, or to create a new governmental status within the extensive regions which would be affected if the relief asked were granted." The foregoing opinion is as applicable to the facts of this case as to those in the case then under consideration, and we unhesitatingly give our assent to all that was there held. The fact that

the relator in the case at bar made his application for the writ within two years from the date of the passage of the act in question does not, in our opinion, under the facts, exonerate him from the charge of laches. Relator does not attempt to excuse the delay of nearly two years in making his application. The stipulated facts do not show that he was a party to the other proceedings instituted for the purpose of adjudicating the question as to the validity of such county organization, nor that he had knowledge of such proceedings.

In applying the doctrine of laches or the rule of estoppel by acquiescence, no fixed time will be taken as controlling, but the facts in each particular case must govern the court's decision, and where, as in this case, although but about two years have elapsed since the county was organized, grave consequences would inevitably follow to a large number of people as a result of relator's successful prosecution of the proceedings, and no perceivable benefit to any person [173] would be obtained thereby, this court is justified, if not required, by the plainest principles of jurisprudence to deny the relief prayed for by exercising its undoubted discretion to refuse the writ. A circumstance of no little weight is the fact that the attorney general is not before the court asking that the writ be granted, but he has appeared in behalf of defendants and vigorously resists relator's application. Conceding the unconstitutionality of the law in question, as was done in State v. McLean County, 11 N. D. 356, 92 N. W. 385. we hold, as we held in that case, that it would be a gross abuse of the discretion lodged in this court in such cases to grant the relief prayed for, "and thereby precipitate the governmental chaos which would immediately and certainly result from such action." The supreme court of Illinois, in McCormick v. Kreinke, 179 Ill. 301, 53 N. E. 549, in disposing of a similar question in which relator had waited three years before making application, held to the same effect. To grant the relief which relator asks would, in our opinion, unnecessarily open up an indefinite field of strife, confusion and litigation without any corresponding benefits to relator or any other person, and as was said in State v. Des Moines, 65 N. W. 818, 59 Am. St. Rep. 381, 96 Iowa, 521, 31 L. R. A. 186, "the law does not demand such a sacrifice for merely technical reasons." It follows that the application should be denied, and it is so ordered.

Morgan, C. J., concurs.

SPALDING, J. I concur in that part of the foregoing opinion, holding that the record does not disclose such exceptional facts as to warrant this court in issuing the writ requested on the relation of a private relator, but am of the opinion that a case showing most extraordinary circumstances should be presented to justify a court in holding that a statute conceded to be invalid can in effect be validated by the laches of either the sparse population of a large territory, or state officials who have no constitutional authority to bind either the state or the county in such a matter. The fact that three or four months after the only election held in a county organized under an unconstitutional statute before a proceeding to determine its status was commenced does not, in my opinion, justify a finding of such laches as are necessary to put life into a statute void ab initio.

In my opinion, the facts in this case are entirely inadequate to make the doctrine of State v. McLean County, 11 N. D. 356, 92 N. W. 385, applicable.

QUO WARRANTO—WHEN MAY BE MAINTAINED BY A PRIVATE PERSON.

I. Introduction, 633.
II. When the Common-law Rule Prevails, 634.
III. Private Persons as Relators.
 a. General Principles Underlying Modern Statutes, 634.
 b. Discretion of the Court, 635.
IV. Illustrations of How Rule as to Interest of Relator has been Applied in Particular Cases.
 a. Public Offices.
 1. Citizens and Taxpayers as Relators, 635.
 2. Claimants for the Office as Relators, 638.
 3. Defeated Candidates not Entitled to the Office, 640.
 b. Against Public or Municipal Corporations, 640.
 c. Against Private Corporations.
 1. Dissolving the Corporation or Seizing Its Franchise, 643.
 2. Officers of Private Corporations, 646.
 d. Miscellaneous Illustrations, 647.

I. Introduction.

The origin, history and exercise of the writ of quo warranto presents an interesting study. The writ doubtless had its origin in the theory that all franchises, or special privileges conferred upon an individual or corporation, and not enjoyed by the public generally as a matter of common right, are gifts of the crown, and, consequently, when it was claimed that such special privileges had been usurped without gift or grant thereof from the sovereign, a writ was issued at the suit of the crown requiring the party alleged to be usurping the privilege, to show by what authority he thus acted. Properly speaking, therefore, the writ was never designed or used as a remedy at law by which individuals could contest the right to an office, but

at common law was a high prerogative and extraordinary writ of right to the king, in its nature a public proceeding to correct a public injury. At a later period, when the creation of corporate bodies by charters and the enactment of acts of incorporation by parliament became customary, the claim of right to offices, thus created, was so often set up by those not entitled to them, that the original purpose of the writ was greatly enlarged by the statute of Anne, which permitted private individuals, in certain cases, upon first obtaining leave of the court, to file an information in the nature of quo warranto, though no strictly public interest was concerned in the proceeding. But even under the statute of Anne, the writ did not run in the name of the private person who invoked it, but the symmetry of the original remedy was preserved, and the writ was issued and the proceeding conducted in the name of the king. In this country, where we have even a larger number of public offices created by legislative authority in connection with the grants of corporate franchises, the modification of the old common-law rule as made by the statute of Anne has been followed in most of the states by special statutes which authorize private individuals under certain circumstances, to maintain proceedings in quo warranto. In the absence of such statutory provisions, however, the rule of the common law still prevails, and the writ of quo warranto cannot be wielded by any individual who may choose to appear as the champion of the public interest, but can be invoked only upon the motion and information of the person appointed to represent the state. We shall endeavor to show in this note when the rule of common law still prevails, and to what extent and under what circumstances it has been changed by modern statutes.

II. When the Common-law Rule Prevails.

In the absence of any express statutory provisions regulating proceedings in quo warranto, the writ is still regarded as a writ of the state, and can only be maintained by one authorized to act for the state: Campbell v. Goodrich, 27 Ark. 14; Commonwealth v. Lexington & H. Turnpike Road Co., 45 Ky. (6 B. Mon.) 397; Attorney General v. Sullivan, 153 Mass. 446, 40 N. E. 843, 28 L. R. A. 855; Haupt v. Rogers, 170 Mass. 71, 48 N. E. 1080; State v. Taylor, 208 Mo. 442, 106 S. W. 1023; Osgood v. Jones, 60 N. H. 543; Meechan v. Bachelder, 73 N. H. 113, 59 Atl. 620; State v. Moffitt, 5 Ohio, 358; Cleary v. Deliesseline, 1 McCord, 35; State v. Schnierle, 5 Rich. 299; Wright v. Allen, 2 Tex. 158; United States v. Lockwood, 1 Pinn. 259.

III. Private Persons as Relators.

a. General Principles Underlying Modern Statutes.—Statutes similar to the statute of Anne are generally in force throughout the United States. These statutes uniformly restrict the right of private individuals to maintain proceedings in quo warranto, to those who have some interest in the subject matter of the controversy, and, as a rule, the right can only be exercised by a private person after the duly authorized agent of the state has refused or neglected to act. The authorities are uniform to the effect that an individual

who has no interest in the matter in controversy cannot maintain proceedings in quo warranto; and in some jurisdictions it is held that as a condition precedent to the right of a private person to invoke the writ, the relator must have some special interest in the subject matter, not common to other citizens: People v. Grand River Bridge Co., 13 Colo. 11, 16 Am. St. Rep. 182, 21 Pac. 898; Hardin v. Colquitt, 63 Ga. 588; Place v. People, 83 Ill. App. 84; Scott v. State, 151 Ind. 556, 52 N. E. 163; Hastings v. Amhurst & B. R. R. Co., 63 Mass. 596; State v. Vail, 53 Mo. 97; Mills v. State, 2 Wash. 566, 27 Pac. 560.

b. Discretion of the Court.—The granting of leave to file an information in the nature of quo warranto to a private person is in the sound discretion of the court: People v. North Chicago Ry. Co., 88 Ill. 537; State v. Des Moines, 96 Iowa, 521, 59 Am. St. Rep. 381, 65 N. W. 818, 31 L. R. A. 186; State v. Des Moines City Ry. Co., 135 Iowa, 694, 109 N. W. 867; State v. Dowlan, 33 Minn. 536, 24 N. W. 188; State v. Stewart, 32 Mo. 379; State v. Tolan, 33 N. J. L. 195; State v. Nohle, 16 N. D. 168, ante, p. 628, 112 N. W. 141; State v. Brown, 5 R. I. 1; State v. Mead, 56 Vt. 353. There is no fixed rule or standard by which to determine what is the sufficient interest required of a private relator to enable him to maintain proceedings in quo warranto. The matter has often been considered by the courts, and has resulted in sharp conflict of judicial opinion. The most satisfactory solution of the question can be obtained by a review of the different classes of cases, where the remedy of quo warranto has been sought by private persons, to see what tests have been applied by the courts in each particular case.

IV. Illustrations of How Rule as to Interest of Relator has been Applied in Particular Cases.

a. Public Offices.

1. **Citizens and Taxpayers as Relators.**—When the title to a public office is concerned, there are many cases which support the rule that any citizen and taxpayer has such an interest in the due administration of public affairs as will entitle him to maintain quo warranto to oust an incumbent who is unlawfully assuming to usurp such office: Churchill v. Walker, 68 Ga. 681; Davis v. City Council, 90 Ga. 817, 17 S. E. 110; State v. Kohkne, 109 La. 838, 33 South. 793; Taggart v. James, 73 Mich. 234, 41 N. W. 262; Lamereaux v. Ellis, 89 Mich. 146, 50 N. W. 812; State v. Hammer, 42 N. J. L. 435; State v. Hall, 111 N. C. 369, 16 S. E. 420; Commonwealth v. Brown, 1 Serg. & R. 382. And in Jackson v. State, 143 Ala. 145, 42 South. 61, where proceedings in quo warranto were brought on the relation of a private individual against one usurping the office of judge of an inferior court, it was held that the fact that the proceedings were brought on the relation of a private person was unimportant. Whether the relator in this case was a taxpayer or even a citizen of the county does not appear. Likewise, in People v. Hilliard, 72 N. C. 169, it was held that an action in the nature of proceedings in quo warranto to try the right of an incumbent to a public office may be brought

upon the complaint of any private party, as well as by the attorney general upon his own information. In State v. Barker, 116 Iowa, 96, 93 Am. St. Rep. 222, 89 N. W. 204, 57 L. R. A. 244, quo warranto proceedings were brought on the relation of a citizen and taxpayer of Sioux City, to test the validity of the appointment of defendants as a board of waterworks trustees, and of one of the defendants as superintendent of the waterworks system of said Sioux City. The county attorney had refused to institute the proceedings. Speaking to the contention that the relator had no such interest in the questions involved as would enable the court to render judgment upon the merits, the court said: "We think he has such interest. A private citizen and taxpayer is undoubtedly interested in the duties annexed to the several public officials who are authorized to levy taxes. This is not a contest over an office, ... but a matter of public interest, in which the relator has a special interest by reason of being a contributor to the funds."

The case of Lamoreaux v. Ellis, 89 Mich. 146, 50 N. W. 812, presents some very cogent reasons why a private citizen and taxpayer has sufficient interest to maintain proceedings in quo warranto against one usurping a public office. A private citizen in this case applied to the supreme court for a writ of mandamus to compel the attorney general to file proceedings in quo warranto on the relation of the citizen to test the right of the incumbent of the sheriff's office to hold that office. The writ was refused upon the ground that the applicant therefor had failed to show reasonable grounds for the belief that the incumbent of the office was not entitled thereto. Speaking, however, of the right of a citizen and taxpayer to maintain proceedings in the nature of quo warranto in case of a public office, the court said: "What particular individual shall hold a particular office is not of so much consequence, but it is vital to the existence of a free government that there shall be a free, legal ballot, and an honest count; and that no one shall be permitted to hold an office not legally elected thereto, or qualified under the constitution to hold it, if any elector and taxpayer shall object. Every honest citizen is interested and concerned in this matter, and has a legal right to be so. The courts ought not to consent to any holding which will put the power arbitrarily and without remedy or redress into the hands of any one, two or three men to prevent a candidate for office from establishing his election to any office, or any citizen from inquiry, in good faith, into the rights of any person to hold an office." In State v. Bedell, 67 N. J. L. 148, 50 Atl. 364, the members of a municipal board of excise commissioners had been chosen at an annual charter election, instead of having been appointed by the court of common pleas, as required by statute. It was held that a citizen and taxpayer of the city had such interest in the due selection of the city's officers, that he could question the right of the members of the commission to their office by quo warranto, as such question involved only the question of the right of the members to sit on the board and not the legality of the board itself; and to the same effect is Decker v. Dandt (N. J.), 67 Atl. 375. In Commonwealth v. Fletcher, 180 Pa. 456, 36 Atl. 917, it

was held that members of a school board, as such, may maintain quo warranto to test the right of a certain person to act as a member of the board, and the right of other members of the board to act as officers thereof. In State v. Hammer, 42 N. J. L. 435, the relators claimed to be members of the board of assessment and revision of taxes in the city of Newark, and that such offices had been usurped by defendants. Counsel for defendants challenged the sufficiency of the proofs as to the relator's right to the office, but this was regarded by the court as of no importance in the inquiry as to their right to maintain the action, Chief Justice Beasley, saying: "The objects here in litigation are public offices, and are, therefore, things of public concern, in which every resident of the city of Newark has an interest, and I know not how the suit of a taxpayer of that locality is to be repulsed when the ground of complaint is—for such is the allegation—that the assessment and revision of taxation which affects his property is in unauthorized hands. All that the court requires, in such instance, is to be satisfied that the relator is of sufficient responsibility, is acting in good faith and not vexatiously, and has not become disqualified by his own conduct, with respect to the election that he is seeking to impeach." And under a statute which provides that an action may be brought by the attorney general in the name of the state upon his own information, or upon the complaint of any private party, when any person shall usurp or unlawfully exercise any public office, or that such action may be brought in the name of the state by a private person on his own complaint when the attorney general refuses to act, or when the office usurped pertains to a city or school district; it was held, that a property owner and taxpayer of a city who had children in the public schools might lawfully maintain proceedings in quo warranto to oust persons assuming to act as and for a board of school directors of that city: State v. Lindemann, 132 Wis. 47, 111 N. W. 214. While it so happened in the cases referred to that the moving party was both a citizen and a taxpayer, we see no reason why he should be both. The interest in governmental affairs is by no means restricted to either citizens or taxpayers. Doubtless, the failure to pay taxes does not deprive a citizen of his right to redress in the courts. Nor are taxpayers usually denied redress because they are not citizens. We assume, though we know of no case so deciding, that the right of the applicant may, in many cases, be complete, if he is a citizen, though not a taxpayer, and perhaps in some cases if he is a taxpayer, though not a citizen. But the rule supported by the foregoing cases is by no means of universal application. There are many cases which hold that quo warranto against the usurper of a public office cannot be maintained on the relation of a citizen and taxpayer who has no interest different from other members of the general public: State v. Reardon, 161 Ind. 249, 68 N. E. 169; Hudson v. Conklin, 77 Kan. 764, 93 Pac. 585; King v. Kahne, 27 Ky. Law Rep. 1080, 87 S. W. 807; Barnum v. Gilman, 27 Minn. 466, 38 Am. Rep. 104, 8 N. W. 375; State v. Stein, 13 Neb. 529, 14 N. W. 481; State v. Taylor, 50 Ohio St. 120, 38 N. E. 24; Commonwealth v. Cluley, 56 Pa. 270, 94 Am. Dec. 75;

Ney v. Whitely, 26 R. I. 464, 59 Atl. 400; Mills v. State, 2 Wash. 566, 27 Pac. 560; State v. Mathews, 44 W. Va. 372, 29 S. E. 994. These cases all insist that the modern statutes which confer upon "any person or persons" the right to maintain an action in quo warranto mean only those persons who have some special interest, or personal grievance affected. Perhaps the want of uniformity in the statutes of the several states regulating quo warranto proceedings may account, in part, for the apparently irreconcilable conflict of judicial opinion as to the right of a citizen and taxpayer, who has no greater interest than other members of the general public, to maintain quo warranto to oust the incumbent of a public office, who illegally holds the same; but the opposing opinions seem mainly based on the bent of the different judicial minds.

Then, too, there are cases which, while not denying absolutely the right of a private citizen to maintain quo warranto when a public office is the subject of litigation, hold that it is only in very exceptional cases that the court in its discretion will permit such citizen to obtain the writ, where he has suffered no wrongs peculiar to himself, but appears solely as a champion of the state. Such is the ruling in State v. McLean County, 11 N. D. 356, 92 N. W. 385; State v. Noble, 16 N. D. 168, ante, p. 628, 112 N. W. 141; and this rule was also announced in State v. McDonald, 101 Minn. 349, 112 N. W. 278, where a private citizen sought by quo warranto to test the validity of the proceedings for the creation of a new county, without consent of the attorney general.

2. **Claimants for the Office as Relators.**—It is generally held that the claimant for a public office has such an interest therein as to entitle him to maintain proceedings in quo warranto to oust one who unlawfully usurps the office: Gonkey v. State, 27 Ind. 236; Roane v. Mathews, 75 Miss. 94, 21 South. 665; People v. Ryder, 12 N. Y. 433; State v. Taylor, 50 Ohio St. 120, 38 N. E. 24; State v. Owens, 63 Tex. 261; and in People v. Campbell, 138 Cal. 11, 70 Pac. 918, it is held that this right exists, irrespective of whether the relator is entitled to the office—if the same is unlawfully held by the defendant—the relator, in this case, claiming to have been elected judge of the superior court, sought by proceedings in quo warranto to oust the incumbent who held over after his term of office had expired. The return of the election showed that the relator and another candidate had received the same number of votes, and it was contended by the defendant that there was, therefore, no election and that he was entitled to hold the office until his successor was duly elected. It was held that as the defendant had no right to hold the office beyond the term for which he was elected, the question whether the relator was entitled to the office did not concern the defendant, and was one upon which he was not entitled to be heard. Likewise, in Dunton v. People, 36 Colo. 128, 87 Pac. 540, the relators in quo warranto proceedings contended that defendants were wrongfully usurping the offices of alderman of the city. The relators had been nominated by certain citizens of their ward, and had accepted the nomination, after which the city officials concluded that the proper practice was for the

electors of the entire city to vote for the candidates from each ward. The relators knew of this decision, but took no steps to prevent the election from being so conducted, but filed a protest after the election with the canvassing board. The defendants in the quo warranto proceedings contended that the relators were estopped from contesting the right of defendants to hold the offices. It was held that acts of the relators which would estop them did not prevent the court from determining whether the defendants were rightfully entitled to exercise the functions of their offices; and this ruling is approved in People v. Lawson, 36 Colo. 442, 87 Pac. 543, and People v. Burrell, 36 Colo. 444, 87 Pac. 543. In State v. Sadler, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, the right of a claimant of a public office to maintain proceedings in quo warranto against one unlawfully holding or exercising the same was clearly upheld, by the court, saying: "The only remedy a person has who may be duly elected to a state office, to oust one unlawfully holding the same, and have himself instated, is by proceeding in quo warranto; and when the prosecuting officer refuses to institute such proceedings there is no remedy, unless the contestant be permitted to bring the action on his own relation. Evidently the legislature did not intend to deny to any person the right to have his claim to an office adjudicated by the courts in the event of the refusal of the prosecuting officer to act, when such person's claim is based on such alleged facts as show him to be entitled to the office." In People v. Miller, 16 Mich. 56, it was held that where a certificate of election had been issued to one person, who has taken the oath of office, it is not necessary for another claiming the office to take, or offer to take, the oath of office as a condition precedent to the maintenance of quo warranto to determine the title to the office; and to the same effect is Little v. State, 75 Tex. 616, 12 S. W. 965. In Hardin v. Colquitt, 63 Ga. 588, the claimant for the office of justice of the peace sought by quo warranto to oust the incumbent. The petition averred that the election was illegally conducted and a fraud upon the relator. It was held that he could not be heard by quo warranto to attack the validity of the entire election, without alleging an interest in the office as a citizen or otherwise. This case has sometimes been cited as opposing the doctrine that a claimant for a public office can maintain quo warranto to test the title of one who wrongfully holds or usurps the office, but this seems to be an erroneous inference. The court merely held that a relator who presented himself in the character of claimant of the office by virtue of the same election which he sought to attack, and in no other character, was not in a condition to raise any question touching the validity of the entire election; but it was further held that he might, nevertheless, have a hearing upon such part of the case made, as involved the question as to whether he, and not the incumbent, received a majority of the legal votes. Speaking generally of a claimant's right to be heard in such cases, Judge Bleckley said: "A man who claims an office is entitled to a hearing somewhere, and there can be no doubt of the general jurisdiction of the courts by quo warranto."

3. **Defeated Candidates not Entitled to the Office.**—There are cases which hold that a defeated candidate not entitled to the office in any event cannot maintain quo warranto against the successful candidate, though the latter may not be entitled to the office. Thus in State v. Bieler, 87 Ind. 320, where the defeated candidate for the office of county recorder filed an information in the nature of quo warranto against his opponent, but did not aver in the information that the relator was eligible to the office, though averring that he had been duly elected, and had an interest in the office; it was held on demurrer that the information was bad, because it did not allege any facts which showed that the relator was eligible to the office. In Marrison v. Graves, 59 Miss. 453, the defeated candidate for mayor of a town sought by quo warranto to oust the incumbent and have himself installed as mayor; it was held that he was not entitled to the office, and had no more interest in the matter than any other citizen, and could not maintain the proceeding. So, also, in Andrews v. State, 69 Miss. 740, 13 South. 853, the defeated candidate for clerk of the circuit court sought to oust the incumbent. It appeared that the incumbent was exercising the functions of the office after the expiration of his term, and had no right to continue in the office, but it was held that the relator showed that he was not eligible to the office, and, moreover, that if he had been eligible, he had not qualified to discharge the duties of the office by giving the required bond, and that, therefore, the petition should be dismissed. And in Miller v. English, 21 N. J. L. 317, in quo warranto proceedings to determine who were the duly-elected trustees of a certain religious society, it was held that relators, on application for quo warranto against intruders into offices claimed by the relators, must show a title in themselves, or the proceedings would be dismissed. But the rule laid down by these cases does not meet universal approval. In Londoner v. People, 15 Colo. 557, 26 Pac. 135, it was held that the defeated candidate for the office of mayor of Denver could maintain proceedings in quo warranto to test the validity of the election of his opponent, although it appeared that the relator was not entitled to the office; and in Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891, it was held that a defeated candidate for mayor, whether he does or does not claim the office, if a citizen of the city, has such an interest in the office, as to entitle him to maintain the action. So, too, in People v. Londoner, 13 Colo. 313, 22 Pac. 764, 68 L. R. A. 444, it was held that the fact that a freeholder, resident and elector, within the city, was an opposing condidate, did not disqualify him from maintaining the quo warranto proceedings to test the validity of the election of one unlawfully holding the office of mayor of a city, even though the relator was himself estopped from asserting any right to the office.

b. **Against Public or Municipal Corporations.**—An information on the relation of a private individual will not lie against a city to test the validity of its incorporation. Thus in Chicago v. People, 80 Ill. 496, proceedings in quo warranto were begun by private individuals against the city of Chicago asking that the city be required

to answer by what warrant it claimed to use and enjoy the franchises conferred by its charter. In speaking of the right of the relators to maintain the action, Justice McAllister said: "If private individuals may institute and prosecute such cases against the city of Chicago as a body, they may, by parity of reasoning, against the county of Cook as a body, to test the validity of its organization. And if the proceeding will lie, then, by the default of mispleading of an attorney, judgment of ouster may go, and three-quarters of a million of people be devested of all corporate rights and privileges under such local government. It would lead to confusion and disorganization of society, if not revolution. If it will lie as to cities and counties, why may it not as to states? Why may not individuals institute suits in the federal courts, against the state of Illinois, to determine whether the constitution of 1870 was regularly adopted, and in the same way, by default, or the verdict of the jury, obtain a judgment of ouster? Such cannot be the law."

In Miller v. Palermo, 12 Kan. 14, the relators, who were citizens and taxpayers of the town of Palermo, brought an action in quo warranto against the inhabitants of the town and certain persons named, as trustees of the town. The petition alleged that the town claimed to be a municipal corporation, and that the persons named as trustees of said corporation claimed certain land described in the petition as such trustees, upon which land the relators and many other citizens lived, and that said trustees claimed that said lands were included within the limits of said town, and claimed to exercise all the rights, powers and privileges of a municipal corporation over said lands. It further alleged that the town was not a municipal corporation, and prayed that said pretended corporation be dissolved. It was held that the action could not be maintained by private individuals having no other interest than that of citizens, residents and taxpayers. A case quite similar to this is that of State v. Tracy, 48 Minn. 497, 51 N. W. 613. In this case the relators, private individuals, sought by information in the nature of quo warranto to attack the validity of the incorporation of a town, which included within its corporate limits, certain lands of the relators comparatively remote from the village settlement. The proceedings were instituted in the name of the state and with the approval of the attorney general, but were not prosecuted by the attorney general on behalf of the state. The objection was urged that the action could not be sustained on the relation of private persons, and this contention was upheld. The relators contended that they were especially aggrieved, but it was held that their interest was common to all the inhabitants of the village, that the incorporation, if invalid, was so as respects all the lands included, and that the court could not modify or change the limits of the act of incorporation upon the relation of private persons. Said the court: "Municipal, as well as private, corporations can only exist by the authority of the state. They derive their franchises from the state, and it is therefore the peculiar province of the state to inquire into the misuser or usurpation of such franchises.

Assuming the existence of a corporation, a private citizen, if he has sufficient interest to support the application, may, by this proceeding, be allowed to contest the right of an alleged intruder to an office of such corporation. But where the object is to test the right of a corporation to exercise the corporate franchise, a privilege derived from the sovereign, the information must be filed by the attorney general on behalf of the state. The proceeding is necessarily one of a public nature, and must be prosecuted by and in behalf of the public." Speaking of the fact of the attorney general's approval of the application, the court continued: "It is true that the application is indorsed with his approval, but that is mere matter of form. He does not appear. It is not his application, and it was not presented or prosecuted by him or in behalf of the state. This does not satisfy the requirement of the law in such a case." Another excellent illustration of the doctrine that the validity of a municipal corporation cannot be attacked in quo warranto proceedings on the relation of private persons is afforded in State v. Vickers, 51 N. J. L. 180, 14 Am. St. Rep. 675, 17 Atl. 153. Here information in the nature of quo warranto, in the name of the attorney general, was filed in the relation of private persons, to test the legal right of the defendant to the office of common council of a de facto municipality, on the ground that such public corporation had no legal existence. It was held that such existence cannot be called in question, either directly or indirectly, at the instance of a private person, but only by the interposition of the attorney general acting for the state. "If this defendant," said Chief Justice Beasley, "is to be ousted from his office of common councilman on the ground that the corporation has no life, so for the same reason can his associates be removed from their posts; and the same fate would await all the other functionaries of the borough, and thus this local government would, for all useful purposes be at an end." In State v. Town Council of Cahaba, 30 Ala. 66, it was held that the right of a private citizen to file information in the nature of quo warranto to vacate the charter of a municipal corporation, on account of the passage of an unauthorized ordinance cannot be sustained on any principle of the common law, nor under a statute giving right of action in case any "association or number of persons act within this state as a corporation without being duly incorporated, or when any private officer has done any act by which he forfeits his office." Hence, no such information can be filed on the relation of a private citizen to vacate the charter of a municipal corporation on account of the passage of an unauthorized ordinance fixing the price of license of retailing liquors at one thousand dollars. In Robinson v. Jones, 14 Fla. 256, it was held that the right to file an information in the nature of quo warranto to arrest a usurpation of a municipal franchise does not belong to the individual citizen; but that the right to institute such proceedings against an existing de facto municipal corporation is in the state, and the institution of such action is a matter in the discretion of the attorney general. In State v. Shufford, 77 Kan. 263, 94 Pac. 137, it was held that a private citizen cannot maintain proceedings in quo warranto in the name

of the state, for the disorganization of an incorporated city; the purpose of the action being to withdraw the property of the relators from municipal taxation. The case of State v. Jenkins, 25 Mo. App. 484, has sometimes been cited, as opposed to the doctrine so strongly advocated in the foregoing cases, and as holding that quo warranto can be maintained on the relation of private persons to test the existence of a municipal corporation, but we think the ruling hardly justifies this conclusion. The information in this case was against the defendants, acting as trustees of a de facto municipality, and charged that no such municipality ever existed as a corporation created by law, and that the defendants were usurping powers not vested in them, and levying taxes, passing municipal ordinances, and otherwise assuming municipal control over certain territory described, beyond the limits of the village as originally laid out. The information was framed in the name of the state by the prosecuting attorney of the county, in his official capacity, and also on the relation of certain private persons. The question as to the right of a private person to attack the existence of a municipal corporation does not seem to have been strongly insisted upon by counsel, though the point was raised by defendants' counsel that the information failed to disclose any interest of the relation in the subject matter of the suit. In deciding that the action could be maintained, the court said: "The prosecuting attorney presents it in his official capacity, in the name of the state, and as a measure needed to preserve the sovereignty of the state, and to arrest an alleged intermeddling with her governmental functions by unauthorized persons. The officer, while using the names of relators, at the same time avers and informs of the facts alleged, as upon his own official knowledge. If it be considered, nevertheless, that the relators should show an interest in the matter of controversy, this requisite is supplied in the averment that they are residents within the described territory." It may be that the names of the private relators inserted in the information were regarded as mere surplusage, at any rate, this case can hardly be said to hold that the action would have been sustained, if it had not been filed and prosecuted by the prosecuting attorney in behalf of the public. There are two Nebraska cases, however, which hold that the owner of lands illegally included within the boundaries of a city or village, and who was not a voter therein, can maintain proceedings by quo warranto for the purpose of determining the validity of the act of incorporation: State v. Dimond, 44 Neb. 154, 62 N. W. 498; State v. Mote, 48 Neb. 683, 67 N. W. 810. These decisions are based upon a statute which provides that information in quo warranto may be filed against persons who act as a corporation without being authorized by law, and the pretended corporations against which the information in these cases were filed, were held to have never had any legal existence.

c. Against Private Corporations.

1. **Dissolving the Corporation, or Seizing Its Franchise.**—The right of private individuals to maintain proceedings in quo warranto to

annul the charter of a private corporation for misuser or nonuser of its franchise, is a question upon which there is considerable conflict of judicial opinion. This difference of opinion arises largely, however, from the statutory provisions of the various states regulating such proceedings. Thus, in Alabama, information in the nature of quo warranto will lie against a private corporation to annul its charter at the relation of any private individual in the name of the state, who will give security for costs: Tuscaloosa Scientific & Art Assn. v. State, 58 Ala. 54; State v. United States Endowment & T. Co., 140 Ala. 610, 103 Am. St. Rep. 60, 37 South. 442. But in People v. Colorado E. Ry. Co., 8 Colo. App. 301, 46 Pac. 219, it was held that under the Colorado code a private individual cannot maintain quo warranto for the dissolution or forfeiture of the charter of a corporation, even though with the consent of the law officer of the state, when the only injury alleged or threatened is to the private interests of the relator, in which the public has no concern, and where the complaint discloses that the purpose of the suit is to redress private wrongs, for which ample remedy is afforded by an ordinary action.

In Attorney General v. Adonai Shomo Corporation, 167 Mass. 424, 45 N. E. 762, it was held that quo warranto proceedings to annul the charter of a corporation for nonuser and misuser of it franchise cannot be maintained on the relation of the inhabitants of a town and prosecuted by private counsel, but must be brought by the attorney general in behalf of the commonwealth. So, too, application of a judgment creditor for leave to file an information in the nature of quo warranto, to enforce a forfeiture for nonuser of the corporate rights and franchises of a manufacturing company will be denied in the absence of any showing that the statutory remedy provided for judgment creditors, is not available: People v. Wayland Wood Mfg. Co., 33 Mich. 413; and under the statute of New Jersey quo warranto against a turnpike corporation for alleged violation of its charter cannot be instituted on the application of private individuals, but only by and in the name of the attorney general for the state: State v. Patterson & H. Turnpike Co., 21 N. J. L. 9. Neither a stranger having no interest in the corporation, nor a creditor who has an action at law pending to enforce his debt, can bring quo warranto against a bank for the forfeiture of its charter: Commonwealth v. Farmers' Bank, 2 Grant Cas. (Pa.) 392. And in South & W. Ry. Co. v. Commonwealth, 104 Va. 314, 51 S. E. 824, it was held that the Virginia statute authorizing the award of a writ of quo warranto against a corporation, not municipal, for misuse or nonuse of its corporate privileges and franchises by a private person if attorney general refuses to act, is limited, and that the writ on the relation of a private prosecutor could not be maintained to terminate the franchises of a railroad company for failing to construct its road in the time allowed. In State v. Point Roberts Reef Fish Co., 42 Wash. 409, 85 Pac. 22, an action in the nature of a quo warranto proceeding was brought on the relation of certain private persons in the name of the state to annul the charter of the defendant corporation upon the ground that it had fraudulently possessed itself of more fishing

locations that it was entitled to under the law, to the detriment of the relators, who had taken out fishing licenses. The statute provided that information in quo warranto could be filed by the prosecuting attorney "or by any other person, on his own relation, whenever he claims an interest in the office, franchise or corporation which is the subject of the information." It was held that the relators had no such interest under the statute, as authorized them to maintain the proceeding. In State v. Milwaukee Independent Telephone Co., 133 Wis. 588, 114 N. W. 108, 315, action in the nature of quo warranto was instituted on the relation of a resident and taxpayer of the city of Milwaukee to oust the defendant from the exercise of public rights, and privileges in conducting a telephone business in said city. It was contended on behalf of the defendant that the relator had not sufficient interest in the subject matter of the action to enable him to maintain it, but it was held that, under the terms of the statute providing for actions of quo warranto in the name of the state, by private persons, when the attorney general refuses to act, a resident taxpayer has sufficient pecuniary interest in the matter to entitle him to maintain the proceedings in the name of the state, when the attorney general refuses to act, if the exercise of the powers and franchises, may involve the city in a pecuniary way. In Kenney v. Consumers' Gas Co., 142 Mass. 417, 8 N. E. 138, an information in the nature of quo warranto was brought in the name of the attorney general on the relation of a private citizen, to restrain the defendant gas company from digging in certain streets, and from further use of its corporate power, and from usurping public franchises to which it was not entitled. It was held that if the attorney general seeks such a remedy, it should be by an information ex officio, and not by an information brought primarily for the protection of private interests. The right, however, of a private citizen to maintain such an action in a proper case made is clearly recognized by the court, it said: "We have no doubt that the court has jurisdiction, in proper cases, to restrain acts like those now complained of, upon the information of the attorney general, either on behalf of the commonwealth, or at the relation of a private individual. But, while not doubting that cases might exist in which the interposition of the court would be properly sought to restrain the digging up of streets, ... the court will not interfere when the obstruction to the rights of the public is of such a character that it may with equal facility be removed by other constituted authorities and public officers. There must be a want of adequate, sufficient remedy, and the injury to public rights must be of a substantial character, and not a mere theoretical wrong." In Teshume v. Potts, 47 N. J. L. (18 Vroom) 218, application was made in the name of the attorney general on the relation of the holder of certain mortgage bonds and shares of original stock of a railroad company, for leave to file an information in the nature of quo warranto to test the validity of the act of consolidation of two railroad companies, one of which was the company in which he held mortgage bonds at the time the application was made, the relator's only status was as holder of income-

bearing bonds of the reorganized company which he received after the consolidation. His ground of complaint was that the consolidation impaired the value of the securities he held against one of the companies. In denying the application Judge Depue said: "It is undeniable that this corporation was organized under the forms of law; that it acquired existence as a corporation de facto, and has been exercising corporate powers ever since the consolidation was effected, and that the applicant is seeking its dissolution by these proceedings as the means of enforcing rights personal to himself. The law is entirely settled that the court may grant leave to file such an information, at the instance of a private relator, against an officer of a corporation for an unlawful intrusion into an office on grounds affecting his individual title, although the same objections apply to the title of every other officer and member of the corporation, and the application is incidentally, in effect, against the whole corporate body. But when the proceeding is against certain individuals for claiming to act as a corporation, and its object is to try the legality of the charter and to determine the corporate existence of a corporation, it can be instituted only by the attorney general as the representative of the state, and in behalf of the state. For that purpose a private relator cannot have the use of this writ." In Thirteenth & Fifteenth Sts. Pass. Ry. Co. v. Broad Street Rapid Transit St. Ry. Co., 219 Pa. 10, 67 Atl. 901, one street railway company filed a bill in equity to enjoin another street railway company from laying tracks on a certain street in the city of Philadelphia. The basis of the relief sought was the invalidity of the franchise purported to be granted. It was held that the proceeding was in effect a quo warranto to challenge the validity of the defendant's charter itself, and could not be sustained by a private relator.

2. **Officers of Private Corporations.**—The rule as to the right of a private individual to maintain quo warranto to oust one who unlawfully usurps an office in a private corporation is not so strict as when the object of the writ is to annul the charter, or curtail some of its privileges under its franchise. Any person interested in the election of an officer or member of a corporation can maintain quo warranto to test the validity of the election of such officer: Commonwealth v. Union F. & M. Ins. Co., 5 Mass. 230, 4 Am. Dec. 50. Thus, a relator who is one of three persons constituting the board of directors of a private corporation, who have possession of all of its property and business, has such a special interest in the corporation as justifies him in maintaining quo warranto in the name of the state, to oust one who unlawfully usurps the office of president of such corporation: Place v. People, 83 Ill. App. 84. A rather peculiar case bearing upon the right of a member of a private corporation to maintain quo warranto proceedings against the officers of such corporation is that of Goddard v. Smithett, 69 Mass. (3 Gray) 116. In this case one of the members of a religious society sought leave to file an information in quo warranto against various persons as wardens and vestrymen, and other persons exercising office in the

society, calling upon them to show by what authority they held the offices and sold or rented the pews in the church. This proceeding was instituted under a statute which permitted "any person whose private right or interest has been injured, or is put in hazard, by the exercise, by a private corporation, or any persons claiming to be a private corporation, of a franchise or privilege not conferred by law, whether such person be a member of such corporation or not," to apply for leave to file an information in the nature of a quo warranto. It was held that the illegal sale of the pews in the church, or the illegal laying of a tax upon the members, by the defendant officers did not entitle the relator to file the information. "He has no private right or interest," said the court, "which has been injured or put at hazard by the alleged misconduct of the corporation or its officers, for which he has not an adequate and complete remedy. The interest which he has as a parishioner and proprietor is one in common with all the other parishioners and proprietors. He avers that his interest as a proprietor is injured by the sale of the pews. It may be remarked, in passing, that if there were pews in the hands of the society unsold, it was for the common interest of all the proprietors that they should be sold to suitable and proper persons; and that thereby the corporation as a religious society would be strengthened and benefited, both in numbers and resources. But even if they were sold illegally, or sold too low, it was not an injury to the applicant in his private rights, but one sustained by the whole body, and by every member of it."

d. **Miscellaneous Illustrations.**—In State v. Bryan, 50 Fla. 29, 39 South. 929, proceedings in the nature of quo warranto were brought by the attorney general in the relation of private persons to oust certain persons exercising the functions and powers of the state board of control. It was contended by the defendants that the information would not lie because it had been set on foot by others than the attorney general of the state. It was held that though the proper practice in proceedings of this character is to institute it in the name of the state upon the relation of the attorney general, that the court would treat the action as so brought, and consider the mention of the so-styled relators as mere surplusage in no way affecting the validity of the information, nor in any way affecting the absolute control of the case by the attorney general in his official capacity. In Porter v. People, 182 Ill. 516, 55 N. E. 349, it was held that under a statute which authorizes only the attorney general, or the state's attorney of a county to present petition of quo warranto of his own accord in cases affecting public right alone, and at the instance of an individual relator if private rights are also involved, private individuals cannot, for the redress of private injury, present such petition in the name of the state's attorney without his consent. "While it may be true," said Judge Wilkins, "that the only remedy available to petitioners is by quo warranto, we are not prepared to hold that private individuals may, notwithstanding the provision of our statute, avail themselves of this extraordinary remedy without

the consent of the attorney general or state's attorney." But the mere fact that private citizens may be interested in quo warranto proceedings, and may have employed counsel to assist the public officers of the law, does not render erroneous action of the court in permitting such writ to be maintained: Heidelberg Gorden Co. v. People, 124 Ill. App. 331. Hence where an information in quo warranto against the president and board of trustees of a village to oust them from office is signed by the state's attorney, and purports to have been brought and filed by him on behalf and in the name and by authority of the people of the state, the interests involved were public, and the mere fact that the people of the community became interested, and employed counsel to assist in the prosecution, does not render the information objectionable as being filed by private parties: McGahan v. People, 191 Ill. 493, 61 N. E. 418. In State v. Smith, 32 Ind. 213, it was held that an information under the statute against a person for an unlawful exercise of a franchise by him cannot be filed by a private person on his own relation, where he has no interest in the franchise alleged to be unlawfully exercised.

In People v. Sutter St. Ry. Co., 117 Cal. 604, 49 Pac. 736, an information was filed by the attorney general on relation of a private citizen against the defendant for unlawfully maintaining tracks on a public street. It was contended by defendants that the writ could only be brought by the attorney general in the name of the people, and not on the relation of a private person. Said the court: "If the proceeding is one in which a private person can have no interest, the proceeding is not properly by relation. But the attorney general had the power to institute the proceeding, and in either form it is by him. If, unnecessarily, he has added that it is by relation of a named person, that does no harm. It does not convert the proceeding into a private action." And to the same effect is Attorney General v. Booth, 143 Mich. 89, 106 N. W. 868, where it was said: "The attorney general was doubtless moved to act by the complaint of a private corporation, and upon its relation, but the cause is not prosecuted by the private corporation alone, but by the attorney general. Judging from the title of the cause, the attorney general has acted at the suggestion or instigation of a private person, but the proceeding is in the name of, and for the benefit of, the public, and it may be doubtful if a private person could be permitted to move the filing of the information in this case, under the general rule that the state only can question the validity of a corporation and its right to do business." In State v. Des Moines City Ry. Co., 135 Iowa, 694, 109 N. W. 867, it was held that, under a statute which permitted private individuals having an interest to maintain an action in the nature of quo warranto in case the state's attorney neglects or refuses to commence the action, where relators obtain leave to sue, and thereafter, and before issue joined, the county attorney did appear and filed an amendment to the petition, served a new original notice, and defendant appeared thereto, it was immaterial whether the relators instituting the proceedings had any

interest. In Commonwealth v. McCarter, 98 Pa. 607, a police constable of a city, commissioned for one year, who had been dismissed during his term by the mayor for unfaithful performance of his duties, sought by quo warranto to oust the mayor from his office upon the ground that he had failed to take the oath of office prescribed by the constitution. It was held that the petitioner, having no claim to or interest in the office of mayor, and no absolute title to be restored to his position in the event of the ouster of the mayor, was not entitled to the writ. In Deavor v. State, 27 Tex. Civ. 453, 66 S. W. 256, an information in the nature of quo warranto was instituted by the county attorney, in the name of the state, on the relation of a private individual, to remove one of the trustees of a public school district. It was held that it was within the discretion of the district judge to refuse to allow the information to be filed, and when filed, upon it appearing that the relator had no interest in the controversy, the court should have refused to remove the respondent and dismissed the information.

In State v. Samuelson, 131 Wis. 499, 111 N. W. 712, it was held that, under a statute which provides that quo warranto may be brought against the party offending, in the name of the state, by a private person on his own complaint, when the attorney general refuses to act, the appearance by the attorney general for the respondent in quo warranto showed a refusal to act, so as to warrant the maintenance of the action by a private person. In State v. McDonald, 101 Minn. 349, 112 N. W. 278, it was said that the court may, in its discretion, permit private suit in the nature of quo warranto to determine the validity of proceedings for the creation of a new county, without the consent of the attorney general; but leave will be granted only in exceptional cases. In Mills v. State, 2 Wash. 566, 27 Pac. 560, the mayor of a city sought by quo warranto to oust a member of the city council. The statute relating to quo warranto provided that the information might be filed by the prosecuting attorney, or any other person on his own relation whenever he claims an interest in the office, franchise or corporation which is the subject of the information. In holding that the mayor had no such interest as entitled him under the statute to maintain the action, Judge Dunbar, said: "The legislature has looked out for the interest of the public by providing that the information shall be filed by the prosecuting attorney, either on his own relation or when directed by the court or other competent authority; and private interests are provided for in the latter part of the section by the words, or by any other person on his own relation. When? When he 'claims an interest in the office, franchise or corporation which is the subject of the information.' What interest is meant? Surely, not an interest in common with other citizens, for the protection of that interest is already provided for in the first part of the section. If the statute is to be construed as having any meaning at all, and if words are to be given their ordinary meaning, and the ordinary grammatical construction is given to the language and sentences, it

must mean that the interest must be a special interest, not common with the interest of the community."

An excellent illustration of the reluctance of the appellate courts to interfere with the discretionary powers of the trial courts in passing upon the necessary interest which a relator must have to entitle him to maintain proceedings in quo warranto is afforded by State v. Des Moines, 96 Iowa, 521, 59 Am. St. Rep. 381, 65 N. W. 818, 31 L. R. A. 186. A private citizen in this case sought to test by quo warranto, the right of the defendant city to extend corporate jurisdiction over certain territory added to it by legislative enactment. The relator was not a citizen of the city as enlarged, but was the owner of land within the added territory of the assessed value of eighty dollars; and on which he paid city taxes to the amount of one dollar and thirty cents. It was continued that he did not have sufficient interest to authorize him to invoke the writ in behalf of the state. The lower court allowed him to file the information, and, on appeal, the supreme court, speaking of the small interest of the relator, said: "This is thought to be too trifling an interest to permit him to institute the action. The law provides that when the county attorney, on demand, refuses or neglects to commence such an action, any citizen of the state having an interest in the question may apply to the court in which the action is commenced, or to the judge thereof, for leave to do so, and, upon obtaining such leave, he may prosecute the action to final judgment. This provision of the law was complied with, and leave granted by the district court. This action is conclusive upon us. The law does not define what the interest shall be, and, conceding that it must be a substantial one, it was a question for the district court. It was a question to be settled before the suit was commenced. The language of the law is that 'upon obtaining such leave he may prosecute the action to final judgment.' Certainly, the question of fact, as to the extent of the interest, is one confided to the court to which application is made."

STATE FINANCE COMPANY v. MULBERGER.

[16 N. D. 214, 112 N. W. 986.]

TAXATION.—A Tax Deed that Runs in the Name of a County, instead of in the name of the state, is void. (p. 651.)

TAXATION.—Notices of Tax Sales, and Notices of the time when redemption will expire, must accurately describe the land, otherwise they are not effectual. (p. 652.)

TAXATION.—Service of Notice of the Time When Redemption will expire on the holder of void tax deed as owner is ineffectual. (p. 652.)

TAXATION.—A Certificate of Sale of Land for Taxes has no evidentiary force to establish a tax, if the sale was void, because of an insufficient description of the property. (p. 653.)

TAXATION.—A Description of the Land Assessed is Essential to a valid tax; a defective description vitiates the assessment and all subsequent proceedings. (p. 653.)

Marion Conklin and F. G. Kneeland, for the appellants.

John Knauf and Wicks, Paige & Lamb, for the respondent.

[214] MORGAN, C. J. This is an action to quiet title, and involves the east half of the northeast quarter, and the southwest quarter of the northeast quarter of section 7, township 139, range 63. The complaint is in the statutory [215] form, and alleges that plaintiff is the owner in fee of the land. The defendants Beck and Myers answered separately, and denied the plaintiff's ownership of the land, and the defendant Beck claimed to be the absolute owner thereof by virtue of tax deeds and tax certificates subject to the defendant Myers' interest in the same. The plaintiff claims title to the land under a deed from the former owner, L. F. Cale, dated in 1903. The defendant Beck contends that Cale's title had been devested by virtue of tax proceedings which had vested the absolute title to the land in him. The tax titles under which Beck claims are the following: 1. A tax deed dated December 17, 1898, under the sale of the land in 1895 for the tax of 1894; 2. A tax deed dated January 11, 1901, under a sale of the land in 1897 for the tax of 1895. 3. A tax deed dated January 11, 1901, under a sale in 1897 for the tax of 1896; 4. A tax certificate under a sale of the land on November 21, 1898, on a judgment rendered under chapter 67, page 76, Laws of 1897, known as the "Wood law."

There are many objections brought forward to the defendant's title, identically the same as in the cases just decided between these same parties: State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76; State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984. These objections, so far as passed upon in those cases, will not here be noticed. The defendants have also raised the same objections to the plaintiff's title as they did in those cases. Those objections will not be further noticed.

It is conceded that the tax deed of 1898 under the sale of 1895 for the taxes of 1894 is void, for the reason that said deed runs in the name of Stutsman county, and not in the name of the state of North Dakota. This question was passed upon in a recent decision of this court in State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357, and in Beggs v. Paine, 15 N. D. 436, 109 N. W. 322.

Appellant Beck introduced in evidence the tax certificate on which this deed was based, and claims that he is entitled to judgment against the plaintiff for the taxes paid by him. This follows, if the sale was a valid one and based on a valid

assessment and levy. The plaintiff attacks the sale as not based on a legal notice of sale, alleging that the land was erroneously described. The land was described in the notice as the "E. ½ of S. W. ¼ of N. E. ¼." This was a description of twenty acres only, while the land sold was one hundred and twenty acres, as evidenced by the certificate. The notice [216] was fatally defective, and not in compliance with the provisions of the revenue law of 1890. The trial court did not err in refusing to render judgment for the taxes paid at the sale of 1895. There was no proof of a valid tax.

The deed under the 1895 tax, which was issued in 1901, is attacked on various grounds, among them that there was no legal notice of the time when the redemption period expired. This deed is void for that reason. The notice of expiration of the redemption period was not directed to nor served upon the owner of the land. It was served upon H. Mulberger, who claimed to own the land. His title, however, was based on a void tax deed. He was not the actual owner. He was attempting to hold said land under a void tax deed. Service of redemption notice upon the holder of such a deed is not a compliance with the statute: Nind v. Myers, 15 N. D. 400, 109 N. W. 335, 8 L. R. A., N. S., 157.

The plaintiff also attacks the validity of the defendant Beck's title under the "Wood law" sale. It is claimed that the title never vested in the defendant, for the reason that no sufficient notice was given of the expiration of the redemption period. The objections are that the description was insufficient and erroneous and that the notice was not served on the owner. One Cale was the owner, unless his title had been devested by prior tax proceedings. Appellant claims that notice was served on Mulberger and one on Beck as owners of the land under prior tax deeds. They were claiming under void tax deeds, and service upon them was not a compliance with the statute: State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357. The deeds under which they claimed were void for want of a proper description in the assessment-roll. Each of these deeds was based on an assessment of the land described as follows: "S. W. ¼ E.[2] and S. W.[4] N. E.[4] Sec. 7, Twp. 139, R. 63." Under previous decisions of this court, since the cases of Power v. Larabee, 2 N. D. 141, 49 N. W. 724, and Power v. Bowdle, 3 N. D. 107, 44 Am. St. Rep. 511, 54 N. W. 404, 21 L. R. A. 328, such descriptions in the assessment-roll have been held to be no description at all, and that they are not a proper founda-

tion for subsequent tax proceedings: See, also, Nind v. Myers, 15 N. D. 400, 109 N. W. 335, 8 L. R. A., N. S., 157.

The defendant Beck concedes that the deed given for the 1896 tax was void because of the insufficiency of the description of the land in the notice of sale. He contends, however, that the [217] taxes paid by him should be held valid, and judgment entered that plaintiff shall pay the same. If the sale was void, as conceded, then the certificate could have no evidentiary force to establish a tax.

The assessment for the year 1897 is attacked on the ground that there was no description of the land in the assessment-roll. A tax deed was issued in 1901 under this assessment. The land was described in the assessment-roll and in the deed as the "E. ½ S. W. ¼ N. E. ¼," section 7, township 139, range 63, containing one hundred and twenty acres. This description was only at best a description of twenty acres, and it cannot possibly be said to describe one hundred and twenty acres without adding to the description, which is not permissible. The mere fact that it is said to contain one hundred and twenty acres does not help out the description. If by any means the description in the assessment-roll could be read to mean one hundred and twenty acres, then it might be that the numbers, read in connection with the description, might make the description definite and certain. This defective description vitiated the assessment and all subsequent proceedings. There was no valid tax, and no judgment can be rendered against the plaintiff for the same.

It follows that plaintiff is entitled to a judgment declaring all the adverse claims of Beck and Myers null and void upon payment of the tax on which the land was sold under the "Wood law" and the taxes paid under the 1895 assessment. The district court is directed to modify its judgment in this particular. No costs will be allowed to either party in either court.

Modified and affirmed.

All concur.

A Description of Land in an Assessment-Roll must be sufficiently accurate and definite to enable the owner to identify the property therefrom as his, otherwise the assessment is void; a sufficient description is necessary not only for his benefit, but as a basis for future titles: Grand Forks County v. Frederick, 16 N. D. 188, ante, p. 621, and see cases cited in the cross-reference note thereto.

MOSHER v. MOSHER.

[16 N. D. 269, 113 N. W. 99.]

DIVORCE—Cruelty Caused by Objectionable Language.—The habitual use of profane language and the telling of obscene stories by a woman to her husband in the presence of his children and third persons may constitute ground for divorce where his characteristics are such that this course of conduct causes him humiliation and mental suffering. (p. 656.)

DIVORCE.—A Continuous Course of Fault-finding, Threats, and other acts persisted in by a woman to aggravate and annoy her husband, may, though each act is trifling in itself, occasion grievous mental suffering. (p. 656.)

DIVORCE—Statements by One Spouse Provoked by Other.—Statements or insinuations by a man reflecting on his wife are not ground for divorce when they have been provoked by her own improper behavior. (p. 657.)

DIVORCE.—A Condonation is Revoked and the Original Cause of Divorce revived where the offending party resumes her former improper conduct. (p. 657.)

APPEAL—Trial De Novo.—The Supreme Court has the Power, under section 7229, Revised Codes, finally to determine the issues between the parties by trying the case de novo on the same evidence submitted to the district court. (p. 659.)

DIVORCE—Allowance of Alimony and Suit Money by Supreme Court.—The supreme court has inherent power at all times after appeal to allow the wife from the estate of her husband the means necessary to enable her to prosecute or defend an action of divorce. (p. 659.)

DIVORCE—Allowance for Cost of Appeal.—The Supreme Court will not deny the application of a wife for an allowance from her husband's estate to effect her appeal from a decree of divorce, simply because she has been able to effect the appeal without it. (p. 660.)

J. F. Callahan and M. A. Hildreth, for the appellant.

Chas. E. Stowers and Engerud, Helt & Frame, for the respondent.

270 SPALDING, J. Action by Alfred Mosher against Eugenia Mosher for divorce, on the ground of extreme cruelty, consisting in intentionally worrying and annoying the plaintiff, and pursuing a systematic course of ill-treatment, using profane language, and telling obscene stories, and other acts, all of which are alleged to have caused the plaintiff grievous mental suffering. The defendant denies these charges, and asks affirmative relief, charging the plaintiff with failing to provide her with the necessaries of life, and with repeatedly accusing her of having married him from mercenary motives, and of her having loved other men, and of her having illicit intercourse with other men. The answer also sets out that the plaintiff is the owner of property to the amount of $24,000,

and asks for suit money and permanent alimony in the
271 sum of $5,000. The plaintiff replied, denying the charges of the defendant, and also that he is the owner of property of the value of $24,000, and alleges that he is worth a very much smaller sum, and that his property is encumbered in the amount of $3,600.

The trial court granted a decree to the plaintiff, and we think it was justified in doing so. It appears that plaintiff was a widower, with married children living within a few miles of his home at Erie, a very small village in Cass county. He is seventy-one years of age, and the defendant is about forty-six years of age. The plaintiff is a farmer, apparently accustomed to living economically, but it does not appear that he was parsimonious to any greater extent than thrifty, saving farmers usually are. His residence was very comfortably furnished, and he appears to have provided the necessaries of life, and the defendant's claim that he did not do so arises from his failure to obtain items for household consumption which she requested him to procure on different occasions, on some of which his failure was by reason of inability to procure them at Erie, where they resided. On one or two occasions when she requested certain articles to be procured, he suggested that she might be able to use something else as a substitute. The defendant is a nurse by profession, and married the plaintiff about two months after their first meeting, she having been the one to solicit an introduction, and having been twice before married. Testimony is introduced showing that before promising to marry the plaintiff she desired to know what provision he would make for her in a financial way, and that she told different people that she had worked long enough, and wanted a home, and was willing to marry any one to secure it, and preferred an old man to a young man, and that she most certainly would not have married him if he had had no money. One of the witnesses testified that she told her that she preferred to marry an old man, because she would probably get the property sooner, and that after marriage she contemplated separation, and procuring a settlement of the property in her favor. After separation came by her leaving him, she had her attorney write immediately to the plaintiff, soliciting an arrangement for a division of the property. From the evidence on this branch of the case, it appears that her desire to acquire property was an important factor in the marriage. They lived together some time over one year, during which time she repeatedly threatened to leave him, and the

evidence indicates that she was planning to [272] cause the plaintiff, by her aggravating conduct, to so far forget himself as to turn her out of doors, thereby laying the ground for an action for divorce in her own favor.

The plaintiff was a religious man, had been a church member for thirty-five years, and did not tolerate profanity or vulgarity in his family. One of the principal charges against the defendant was that she was very profane in her conversation in the presence of the plaintiff, and sometimes of third parties, and that she repeatedly told in his presence, and in the presence of his children, obscene stories, some of which are related by witnesses, and it is charged that these were the cause of grievous mental suffering on the part of the plaintiff, and the trial court so found. We cannot assume that the finding of the trial court is erroneous in the absence of evidence to the contrary. Whether the telling of obscene stories and the use of profanity by the wife in the presence of the husband and others is the cause of grievous mental suffering on the part of the husband depends very largely upon the temperament, religious training, and characteristics of the man, and his degree of sensitiveness to such improprieties. We can imagine a man whose moral nature may be so inactive as to render such conduct on the part of the wife inoffensive, but we think a great majority of men would be humiliated and chagrined by such conduct, which would cause in most cases more grievous mental suffering than other acts more violent in their nature. The evidence on this subject, taken as a whole, we think clearly indicates that it had the effect on the plaintiff which might be expected in a man of ordinary sensibilities and of a high standard of propriety. No general rule can be laid down on this subject, but each case where charges of this nature are made must be governed by its own peculiar facts.

Many other acts are shown to have been committed by the defendant, some of them trifling, and the most of them so, but occurring as they did, at short intervals, in the way they did, they constitute a continuous course of conduct intended to aggravate and annoy the plaintiff. We shall not enter into details regarding these acts, as to do so would serve no purpose, and it is sufficient to say that, taken together, we are of the opinion that they warranted the judgment of the trial court. There is no issue of the marriage. The plaintiff, so far as the records disclose, was patient and considerate to a high degree. The fault findings, threatenings, [273] and complaints of the defendant seldom brought any retort from him.

The defendant claims that the charges made against her by the plaintiff entitle her to a decree. To this we cannot agree. The allegations of the answer state these much stronger than the evidence supports. Whatever the plaintiff may have said, seeming to reflect upon the defendant in this respect, was occasioned by her own conduct. There is no evidence in the case establishing that she was guilty of unfaithfulness, but there is evidence of indiscretion, and a kind of brazen delight on her part in doing and saying things, not only wanting in propriety, but highly improper, and we are of the opinion that the record contains enough such evidence to bring this case within the rule established by this court in McAllister v. McAllister, 7 N. D. 324, 75 N. W. 256, to the effect that, her own conduct being the cause of any statement or insinuation on the part of the plaintiff reflecting upon her, such statements, even if made by her husband, do not constitute a ground for divorce. It is further contended by the defendant that the record shows condonation by the plaintiff. Some time prior to the final separation they met at the residence of a relative in Wheatland, and each party stated his or her version of their troubles in the presence of others, and, after spending some hours in their consideration, they were advised to start anew, and it is claimed that this constituted condonation. Section 4061, Revised Codes of 1905, reads: "Condonation is revoked and the original cause of divorce revived: (1) When the condonee commits acts constituting a like or other cause for divorce; or, (2) when the condonee is guilty of great conjugal unkindness, not amounting to cause of divorce, but sufficiently habitual to show that the conditions of condonation had not been accepted in good faith or not fulfilled." If there was at this time a condonation, and it is not clear that there was, the record shows that almost immediately the defendant resumed her former course of conduct toward the plaintiff, and thereby revoked the condonation, and revived the original cause for divorce: Taylor v. Taylor, 5 N. D. 58, 63 N. W. 893.

The printed evidence in this case occupies over three hundred pages. Considerable of it is immaterial, and of a frivolous character, which would not be offered in any case except one involving a family quarrel. It would serve no purpose to set it out in this opinion.

[274] It cannot be expected that either party will be absolutely spotless. The day is past when the court holds to any such doctrine. It is beyond the possibilities of human nature that the husband shall never give way to or express

his indignation, when the wife nags, threatens and pesters him daily during their married life, and takes delight in calling his attention to foolish and indiscreet acts of her own, which she knew would, and evidently intended should, arouse suspicion and jealousy on his part. The plaintiff may be subject to censure in some particulars, but we think it is shown that, considering the record made by the defendant he conducted himself with a high degree of circumspection and exhibited great self-restraint.

One other point requires consideration. April 11, 1905, the district court entered an order requiring the plaintiff to pay the defendant $75 suit money, $100 attorney's fees, and $25 per month temporary alimony, during the pendency of this action. On June 26, 1906, a further order was entered requiring the plaintiff to pay defendant for printing abstract and brief $175 and for clerk's fees $12.50, and an additional $150 for counsel fees. The original judgment was entered August 31, 1905, and the appeal taken the thirtieth day of August, 1906, and on the twenty-sixth day of March, 1907, application was made to the district court for a further allowance to defendant in the sum of $500 counsel fees $5 for surety bond on appeal, and $80.25 costs for printing abstract and brief. On the hearing the counsel moved to dismiss the application upon the grounds and for the reason that the district court had lost jurisdiction of the case by its having been appealed to the supreme court. The learned judge of the district court before whom the application was heard took the same view of the law as taken by the counsel for the plaintiff, and denied the application, and in his order denying it stated that, in the former order, he had intended to make the allowance sufficient to pay the cost of printing the abstract and brief of the defendant and the incidental expenses, but that the expenditure had been greater than was anticipated by the sum of $90.25; that, if he had known the exact amount needed, he would have made the order cover this additional sum, and that he would have done so upon application had he deemed it within the power of the district court to do so. Before the argument of the appeal in this court, the defendant appeared and submitted an application for an allowance in the sum of $90.25 [275] for printing and other sums for counsel fees. On such application, the plaintiff appeared by his attorney, and contended that the supreme court had no jurisdiction in the premises, but that the matter was solely within the jurisdiction of the district

court. This court might rest the matter by holding that the plaintiff having succeeded in convincing the district court that its jurisdiction was lost, and that the supreme court alone had jurisdiction of such application after appeal, he would not be heard to deny the power of this court to grant such an order; and ample authority might be cited to support this doctrine, but, as this question has not been passed upon by this court, we have decided to consider it very briefly on its merits, and construe the law applicable thereto. Section 4071, Revised Codes of 1905, provides that, while an action for divorce is pending, the court may, in its discretion, make allowance, etc. This action is appealed under section 7229, Revised Codes of 1905, and is an action wherein the supreme court has power, and it is made its duty, to finally determine the issues between the parties by trying the case de novo on the same evidence submitted to the district court. Appellate courts are held to have jurisdiction to make such allowance on either one of two grounds. Many states construe the word "court," as used in section 4071, Revised Codes of 1905, as referring to the court in which the action is pending at the time the application is made, and that, when the appeal is perfected, all proceedings in the lower court are stayed, and that the appellate court now has complete jurisdiction over the parties. It is unnecessary for us to determine this question, because we are agreed that this court has the inherent power at all times after appeal to allow the wife from the estate of the husband the means necessary to enable her to prosecute or defend the action. The power is incident to divorce cases. The statute on this subject is confirmatory of the common law.

This is supported by a long array of authorities, of which we cite only a few. Nelson, in his work on Divorce, says: "Where the practice is not controlled by the statute, the ordinary rules of practice, as well as the plain principles of law, would suggest that the jurisdiction of the lower court is lost when the appeal is perfected. When the appeal is perfected, all proceedings in the lower court are stayed, and the application must be made to the appellate court which now has complete jurisdiction over the parties. The appellate court has the inherent power to allow alimony [276] and counsel fees, although not authorized by any statutory provision on this subject; for the jurisdiction to review decrees of divorce carries with it by implication the incidental power to make such allowances. It must be conceded that the ap-

pellate court retains at all times its inherent power to compel the husband to furnish the wife means to prosecute or defend the appeal, and that such court cannot be deprived of such power without express prohibition": Nelson on Divorce, sec. 863; Lake v. Lake, 17 Nev. 230, 30 Pac. 878; Pleyte v. Pleyte, 15 Colo. 125, 25 Pac. 25; Van Voorhis v. Van Voorhis, 90 Mich. 276, 51 N. W. 281; Disborough v. Disborough, 51 N. J. Eq. 306, 28 Atl. 3; Pollock v. Pollock, 7 S. D. 331, 64 N. W. 165; Grant v. Grant, 5 S. D. 17, 57 N. W. 1130; Freind v. Freind, 65 Wis. 412, 27 N. W. 34; Chaffee v. Chaffee, 14 Mich. 463; Drake v. Drake (S. D.), 110 N. W. 270; Phillips v. Phillips, 27 Wis. 252; Goldsmith v. Goldsmith, 6 Mich. 285.

We cannot agree with the respondent's contention that this allowance should not be made, because the appellant has been able to effect her appeal without it. He contends that such allowance should only be made to enable her to procure services or printing when she would otherwise be unable to do so. Some courts do adhere to this strict rule, but our code provides that this allowance may be made in the discretion of the court to enable the wife to prosecute or defend the action. The construction which limits this literally to the question of her ultimate ability to prosecute or defend is extremely technical. She may have friends able or willing to provide the funds, or some printer may have confidence enough in her case to take his chances on future payment, and give her credit in the necessary amount. The printing may be done for the attorneys representing her, and the fact that she may be able on the strength of one or all of these considerations to procure the necessary printing to get her side of the case before the court in no way relieves the husband of his obligation to provide these necessaries for the wife. This seems to us to be an especially strong requirement when the husband is the plaintiff. He brings his wife into court either with or without cause, and then denies to her the necessary funds with which to establish her innocence or maintain her good name. He owns the property, and she has neither property nor money. The fact that she may have credit to a limited extent should not work to her disadvantage in [277] making the proper presentation of her version of the family difficulties. We do not mean to intimate that she should be upheld in incurring credit beyond the bare necessities of the case, but the courts will protect the husband against abuse of this privilege. The correct rule, as

we think, is that she should be placed upon an equality in this respect with her husband. In view of the statement made in the order of the district court, we think the defendant should be allowed the sum of $90.25 for additional expense of printing, and we allow the same. This action must not, however, be taken to indicate that this court will take jurisdiction of such applications as a matter of course. Whenever there is a reasonable opportunity to intelligently present them to the district court before an appeal is perfected, they should be heard in that court. We do not allow the application of defendant for additional attorney fees. The allowance already made is fairly liberal, and the record shows that it was partially made for the purpose of enabling the defendant to perfect her appeal. The value of the legal services could be determined at the time the various applications were acted upon by the district court. No new facts or necessities appear to have arisen requiring an increase of such allowance. While the appellant had the whole record, which was quite voluminous, printed, the legal questions involved were simple and required comparatively little research. In view of these facts, we do not feel justified in allowing any additional sum for this purpose.

The judgment of the district court is affirmed.

All concur.

Cruelty as a Ground for Divorce is the subject of a note to Reinhard v. Reinhard, 65 Am. St. Rep. 69. It is well settled that cruelty, as cause for divorce, is not confined to acts of personal violence, but includes such treatment as endangers health and renders cohabitation intolerable: Gardner v. Gardner, 104 Tenn. 410, 78 Am. St. Rep. 924.

Condonation is a Conditional Forgiveness, and a repetition of the injury revives the condoned offense: Smith v. Smith, 4 Paige, 432. 27 Am. Dec. 75; Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227; Robbins v. Robbins, 100 Mass. 150, 97 Am. Dec. 91; Sewall v Sewall, 122 Mass. 156, 23 Am. Rep. 299; Gordon v. Gordon, 88 N. C. 45, 43 Am. Rep. 729; Cummings v. Cummings, 135 Mass. 386, 46 Am. Rep. 476.

Recrimination as a Defense in divorce proceedings is the subject of a note to Decker v. Decker, 86 Am. St. Rep. 333.

JOHNSON v. GRAND FORKS COUNTY.

[16 N. D. 363, 113 N. W. 1071.]

ELECTIONS.—A Primary Election is an "Election" Within the constitutional provision which prescribes the qualifications of voters at "any election." (p. 666.)

CONSTITUTION—Application to New Conditions.—Constitutions do not deal in details, they compromise general principles and general directions which are intended to apply to all new facts that may come into being, and that may be brought within these general principles or directions. (p. 666.)

ELECTIONS—Qualification of Voters and Officers.—When the constitution of a state has prescribed qualifications for voters and defined the qualifications of an officer, it is not competent for the legislature to add to or in any way alter such qualifications, unless the power to do so is conferred by the constitution itself. (p. 668.)

ELECTIONS—Fees for Placing Name on Ballot.—A statute requiring candidates to pay two per cent of the annual salary of the office as a condition to having their names printed on the official primary ballot is unconstitutional. (p. 673.)

PAYMENT—Recovery of Fees Unlawfully Exacted.—Candidates for office who have, under protest, paid fees under an unconstitutional statute in order to have their names printed on the official primary election ballot may recover the same by action. (p. 674.)

Bangs, Cooley & Hamilton, for the appellant.

J. B. Wineman, for the respondent.

865 SPALDING, J. This action was brought to recover fees paid by two candidates for nomination for treasurer and one for clerk of court of Grand Forks county at the primary election held on the nineteenth day of June, 1906. The complaint sets forth the necessary qualifications of the persons affected to entitle them to become candidates for the offices named, and that each presented a petition, complying with all the requirements of chapter 109, page 207, Laws of North Dakota of 1905, known as the "primary election law," to the county auditor of that county, and demanded that their names be printed on one of the ballots to be used at such election as candidates for such offices. The complaint alleges that the county auditor demanded of each of them a fee equal to two per cent of the annual salary of the offices to which they respectively aspired, namely, from each of the candidates for treasurer forty-eight dollars, and from the candidate for clerk of court forty dollars, and that he refused to print their names on such ballots unless paid such sums; that they paid the amounts demanded to procure their names to be so printed, but that they paid the same under protest,

and so notified the auditor. No claim is made that he demanded a greater sum than that required by law referred to. Two of the claims were, before this action was brought, assigned to the plaintiff, he being the third candidate. The defendants demurred to the complaint on the ground that it did not state a cause of action against them or either of them. This appeal is from the order sustaining such demurrer, and it raises the question of the constitutionality of those provisions of section 4 of the act in question (Rev. Codes 1905, sec. 555), requiring candidates for nomination for county and district offices at the primary election to pay certain fees to the county to entitle them to have their names printed on one of the ballots to be used at the primary election.

[366] The fee required of candidates for nomination for county and district offices, except for some of the minor offices, is fixed by that section at two per cent of the annual salary of the office, except candidates for the state Senate, who are required to pay the sum of thirty dollars, and representatives, the sum of ten dollars, and candidates for sheriff, who pay the same as those for county auditor. The section referred to also provides that the money so received shall be covered into the general fund of the county. Prior to the enactment of this law, nominations had been made by the caucus and convention system. A caucus held in each precinct in which the voters of a party desired to participate in the nominations of candidates for the various offices at the ensuing election, and delegates were elected to a county or district convention, as the case might be. This county or district convention, composed of delegates elected by the various caucuses, made the nominations of candidates, whose names, on being certified to the county auditor by the officers of the convention, were printed as the party nominees to the various offices on the official ballot to be used at the general election. The same system prevailed for the nomination of representatives in Congress, judges and state officials, except, as to them, the county convention elected delegates to the state or judicial convention which placed the candidates in nomination for the party. The methods pursued in such caucuses and conventions, it was believed had become unrepresentative and unfair, if not corrupt, and the people demanded the enactment of a law under which direct nominations could be made, hoping thereby to eliminate many of the abuses which were thought to have become a part of the old system. Chapter 109, Laws of 1905, was the result. This provides for the nomination of county and legislative candi-

dates and the election of delegates to state conventions at a primary election to be held in June of each year at which a general election may occur. The objects of this chapter, though we think not of the provisions complained of in this action, were sought to be stated in the first section, which says: "It is the intention of this act to purify and reform the methods by which organized political parties shall make nominations of candidates for the several public offices, to perpetuate and strengthen political parties by eliminating therefrom the evils hereby sought to be corrected, and to secure each individual member and delegate of such party an absolute freedom and independence in the expression of his preferences relating to nominations [367] by such parties, and to prevent and prohibit the use and influence of methods, similar to that known as the unit rule, and this statute shall be so construed as to give force and effect to this expressed intention."

In trying to arrive at a decision of the questions at issue, it may be well to consider some of the principles underlying a republican form of government, and particularly those principles recognized by the people of this state in the organic law which they enacted, and which must serve as a guide, not only to them, but to their representatives and agents in the legislative, executive and judicial departments of the state. This law is the warrant under which they all act, and to the legislative department it is a limitation of authority. In determining its scope and meaning it often becomes necessary to consider what its terms imply, as well as what it says. Even if an act is not prohibited by the strict letter, it may still conflict with the objects sought to be attained, as gathered from the whole instrument in connection with a study of contemporaneous history. If so, it is equally as invalid as though the conflict was in express terms. In a republic the people are sovereign. They express this sovereignty through the ballot, by means of which they select their agents by whom it is exercised. The elective franchise is the most valuable right of the American citizen, and should be most sacredly treasured by them and as sacredly protected by the courts. The acts of the lawmakers are the acts of the people themselves, except as they may conflict with the limitations prescribed in the constitution, or necessarily implied from its language and purpose. The constitution prescribes the qualifications and requisites to entitle a resident or citizen of the state to use the franchise. Sections 121 and 127 define these qualifications in the following language:

"Sec. 121: Every male person of the age of twenty-one years or upward belonging to either of the following classes, who shall have resided in this state one year, and in the county six months, and in the precinct ninety days next preceding any election, shall be a qualified elector at such election: First. Citizens of the United States. Second. Civilized persons of Indian descent who shall have severed their tribal relations two years next preceding next election."

"Sec. 127: No person who is under guardianship, non compos mentis, or insane, shall be qualified to vote at any election; nor any persons convicted of treason [368] or felony unless restored to civil rights; and the legislature shall by law establish an educational test as a qualification, and may prescribe penalties for failing, neglecting or refusing to vote at a general election."

The provisions of the constitution are mandatory and prohibitive, unless by express words they are declared to be otherwise: Const., sec. 121. It is unquestioned that the legislature can neither enlarge nor diminish the qualifications necessary to entitle one to vote at a constitutional election. It cannot add to the term of residence required, either in the state, county or precinct; neither can it lessen either of these periods, nor by creating classes of voters deprive one qualified under the constitution from voting, or make one a voter not so made by such provision. The people in adopting the constitution containing these provisions recognized the necessity of stability and uniformity in such qualifications, and thereby protected all citizens from being subjected to the uncertainty which would arise if the standard of citizenship and qualifications for voting were left to the whims and caprice of the different legislative assemblies, governed, as they might be, by varying purposes and ideals. The legislature cannot prescribe a property qualification as a prerequisite to being allowed to vote. It cannot require a voter to pay a sum of money to any officer or to any department of government before he can vote. The standard by which his rights must be measured are fixed by the constitution: Spier v. Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196; People v. English, 139 Ill. 622, 29 N. E. 678, 15 L. R. A. 131; McCafferty v. Guyer, 59 Pa. 109; State v. Findlay, 20 Nev. 198, 19 Am. St. Rep. 346, 19 Pac. 241; Livesley v. Litchfield, 47 Or. 248, 114 Am. St. Rep. 920, 83 Pac. 142; Cooley's Constitutional Limitations, 6th ed., p. 753. In Spier v. Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196, the supreme court of California, in considering the primary election law of that state

adopted in 1897, said: "The legislature has no power to deprive any citizen of the state who fills all the requirements demanded by the section of the constitution quoted from voting at an election provided for by this act. In this country the right to vote is recognized as one of the highest privileges of the citizen. It is so recognized, not only by the citizen, but by the law; and any infringement by legislative power upon that right as granted by the constitution is idle legislation. If the legislature has by this act deprived citizens of the right to participate in the elections therein provided who are qualified to participate under the constitution [369]—aye, even if the legislature has deprived one citizen so qualified of such right—the act is void, as an attempted exercise of power it does not possess." This must not, however, be construed to mean that the legislature has no right to prescribe reasonable rules and regulations by which the conduct of elections shall be governed in the interest of good order, fairness and honesty. The legislature has the right to make any reasonable regulations to prevent fraud in the conduct of elections, voting by persons not qualified under the constitution, and for the speedy conduct of the business incident to elections. The question for courts to determine is whether they go beyond the bounds of reason, and whether they place any restrictions around the exercise of the right of suffrage which limits it arbitrarily or unnecessarily.

It is contended that the primary election authorized by the law under consideration is not such an election as was contemplated by the framers of the constitution. In other words, that it is not a constitutional election, and that, therefore, it is not governed by the constitutional limitations. We cannot agree with this contention. Section 121 of the constitution prescribes the qualifications for voters at "any election." It is true that at the time of the adoption of the constitution a primary election law was unknown in this state, but constitution makers are not presumed to foresee and take into consideration every new condition which may arise or every new remedy which may be devised for application to old conditions. Constitutions do not deal in details. They comprise general principles and general directions which are intended to apply to all new facts and conditions which may come into being, and which may be brought within the terms of these general principles or directions, and, when the constitution says "any election," in prescribing the qualifications of voters, it does not mean simply any election then known to the people of the state. It means, not only any election

then provided for by the laws and constitution, but any election which may thereafter be established or required to be held pursuant to law. This principle has been recognized by numerous courts. The constitution of the state of California provides the qualifications necessary to entitle a person to vote at elections "authorized by law," and in Spier v. Baker, 120 Cal. 370, 53 Pac. 659, 41 L. R. A. 196, the court holds that primary elections thereafter provided for are elections "authorized by law," and says that any infringement by the legislative power upon the right to vote as granted by [870] the constitution is idle legislation, and that any attempt of this kind is an exercise of power it does not possess. In the same case the court says: "It must be an election under this provision of the constitution, or the legislature would have no power to provide that money should be taken from the state and county treasuries to pay the expenses of conducting it. The validity of any taxation looking toward the raising of money for such purposes would be absolutely void if the elections provided for by the act are not elections recognized by and referred to in this constitutional provision. These things being true, the legislature has no power to deprive any citizen of the state who fills all the requirements demanded by the section of the constitution quoted from voting at an election provided for by this act." In People v. Board of Election Commissioners of Chicago, 221 Ill. 9, 77 N. E. 321, the supreme court of Illinois held that, although at the time the constitution was adopted primary elections as such were not within the contemplation of the convention or the people and had not been made a part of the election system, yet that the primary election subsequently provided for by the law was an election within the meaning of that word as used in the constitution. To same effect see Leonard v. Commonwealth, 112 Pa. 607, 4 Atl. 220.

Two methods are recognized by which persons may become candidates for office. In popular parlance they are distinguished as the "man seeking the office," and the "office seeking the man." Under this provision of the primary election law, it may be presumed that the man seeking the office will first provide the necessary means with which to pay the fee required. But what if the office seeks the man, and the man whom the people demand is inactive or indifferent and either unable or unwilling to pay the fee? It necessarily follows, if the voters are entitled to exercise their privilege of placing a man in nomination who declines to be an active candidate or to pay the fee, that they themselves must contribute

the amount necessary to secure his recognition as a candidate for nomination under this law, and it seems clear that such a necessity imposes upon the voters a burden not contemplated or permitted by the constitution. It may be answered that it is unnecessary that the name of a candidate be printed on the ballot, that provision is made and a space left in which the name can be written, and that by means of this provision, each voter is left free to express his choice. Abstractly considered, this is true, [371] but in the practical operation of the system it is false. We all know that the candidate whose name is printed on the official ballot is the only one who, under any ordinary circumstances, can be successful in a state whose boundaries are as extended as those of this state, and whose population is as sparse. Necessarily the people of one part of the state are strangers to those of another part; the issue which may be thought paramount in one part of the state may be unfamiliar to the voters in a remote part, and to secure the co-operation necessary to make the candidacy of any person whose name is not printed on the ballot used in all parts of the state successful, or even to secure his recognition in a small way, is utterly impracticable. So, to all ordinary intents, and in all except extraordinary emergencies, this provision is valueless.

Of course, we have discussed this not solely with reference to the county or district, but with reference to the general principles involved, as it is general principles that must govern. While this law only applies to counties and districts, similar provisions and requirements have now been made applicable to the nomination of state officials. The same principles which apply to the qualifications of a voter are also applicable to those of a candidate. In a general way, the qualifications required of candidates for office are the same as those for voters. The constitution makes some exceptions by prescribing that some officials shall be a greater age than twenty-one years, or that they shall have resided in the state a longer period than is necessary to qualify them to vote, or that they shall be members of a certain profession, but these are qualifications deemed essential to fit a person for a particular office, and do not affect the general principle; namely, that the legislature can neither increase nor diminish the qualifications fixed by the constitution for holding office. The rule is that, when the constitution of a state has prescribed qualifications for voters and defined the qualifications of an officer, it is not competent for the legislature to add to or in any way alter such prescribed and defined

qualifications, unless the power to do so is expressly or by necessary implication conferred upon it by the constitution itself; McCrary on Elections, 2d ed., secs. 72, 226-252; United States v. Slater (C. C.), 6 Fed. 824, 4 Woods, 356; Rison v. Farr, 24 Ark. 161, 87 Am. Dec. 52; Quinn v. State, 35 Ind. 485, 9 Am. Rep. 754; Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248, and cases cited in note 1; Spier v. Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196; People v. Board of Election Commrs., 221 Ill. 9, 77 N. E. 321; [372] State v. Stafford, 120 Wis. 203, 97 N. W. 921, 1043; State v. Drexel, 74 Neb. 776, 105 N. W. 174; State v. Holman, 58 Minn. 219, 59 N. W. 1006; Thomas v. Owens, 4 Md. 189; Dapper v. Smith, 138 Mich. 104, 101 N. W. 60.

It cannot be contended that the payment of this fee has any tendency to prevent fraud, or that it is conducive to orderly elections, but it is argued that the requirement is not unreasonable. The constitution requires no fee. If we once admit the power of the legislature to make even the smallest additions not contemplated by the constitution to the qualifications required to entitle one to vote, there is no limit to the requirements which may be added. What, then, was the object of this requirement? We can discover none, unless it was to prevent a multiplicity of candidates. But this object is something beyond the purview of legitimate legislation. It might be asked if we were to consider the policy of the legislation, whether it would not be the part of wisdom to encourage an increase in the number of candidates for the different offices, rather than to restrain the people from becoming candidates? The greater number of candidates, the greater variety of choice presented to the individual voter, and the more probable becomes the selection of those best fitted for representative positions. This election is intended as a party election. It takes the place of party conventions, and no provision is made for any except those candidates representing parties. The plain spirit of our system is to make it easy for voters to make their choice; and to this end that every aggregation of voters representing a party or principle shall have the opportunity for representation on the official ballot. We are of the opinion that the legislature has no power to pass any law having for its purpose the restriction or limitation of the number of candidates who have otherwise qualified to hold office. If the fee as fixed is to stand, the practical working of the law is to discourage and possibly eliminate all party effort, except on the part of the majority party. In a county, district or state

in which from sixty-five per cent to eighty per cent of the voters affiliate with one party, few candidates of minority parties can be expected to make the payment required. The legislature might with greater propriety and fairness have limited it to the dominant party. It is a practical prohibition on all voters of the minority party participating in the primaries as members of such parties. "Active political parties, parties in opposition to the dominant political [373] party, are, as has been said, essential to the very existence of our government. The right of any party of men holding common political beliefs, or government principles, to advocate their views through party organization, cannot be denied. The law which will destroy such party organization or permit it fraudulently to pass into the hands of its enemies cannot be upheld. The procedure of political parties may be regulated, and the wisdom of the legislature may well be exercised in devising methods to check political corruption and fraud, but the legislature itself under the guise of regulation cannot be permitted to throw open the doors to these very abuses": Britton v. Board of Commissioners, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115; Mr. Wigmore, at page 54 of his work on the Australian Ballot System, says: "But it is to be remembered that in this country a candidacy may be hopeless as regards the election of the nominee, and yet important and highly desirable as a means of exhibiting the strength of a section of electors or of a particular movement and, of, course, compelling the attention of the leading parties, and the modification of their platforms and legislative policies. It will be seen, therefore, that the plan of requiring a reasonable deposit is not adapted to our political methods, and that its adoption would be ill-advised." We are of the opinion that the constitutional provisions are not only applicable to primary elections provided for and required to be held as elections, but that they are applicable to them as steps looking toward the election of officials. It would be the greatest folly to prescribe qualifications for voters and candidates at the general election, and then let down the bars or make greater restrictions applicable to voters in the selection of candidates to be voted for at such election. The caucus and the primary are at a foundation of the elective system. If anybody can vote regardless of constitutional restrictions at the primary, or if the legislature can increase the qualifications of voters or candidates at a primary, the constitutional restrictions applicable to voters and candidates at the general election have no meaning. We read in the words of the con-

stitution what are the tests of a legal voter at a general election; but of what avail is the express language of that instrument on that subject if the legislature may nevertheless fix other and different tests before one can take the first steps necessary to enable him to take part in that election? The plain implication is that nowhere on [374] the way to the general election can additional tests be required. It is said in People v. Board of Election Commrs. of Chicago, 122 Ill. 9, 77 N. E. 321, that "every eligible person has a right to be a candidate for office without being subject to unreasonable burdens. The voters have a right to choose any eligible person, and he owes a duty to the public to qualify and serve"; and again: "There can be no discrimination between candidates based on the ground that one has money and chooses to pay for the privilege of being a candidate, and the other has no money or is unwilling to pay for being a candidate": See, also, People v. Williams, 145 Ill. 573, 36 Am. St. Rep. 514, 33 N. E. 849, 24 L. R. A. 492. If the legislature can require the candidate to buy his way to office, it simply lends the legislative sanction to an additional means of corruption quite as vicious in principle as any which the primary law was intended to correct. Section 127 of the constitution permits the legislature to prescribe the penalties for failing, refusing or neglecting to vote. If the law under consideration is valid, it becomes possible for the legislature to penalize both for failing to vote and for voting.

The supreme court of Illinois and Nebraska, in addition to the quotations already made, have given additional reasons for their invalidity, which we must notice and approve as applicable to the law in question. In 1901 the legislature of Illinois enacted a primary election law by which anyone desiring to become a candidate for governor, United States senator, or Congress was required to pay a fee of one hundred dollars and each candidate for state senator fifty dollars, and for member of the House of Representatives, twenty-five dollars; and in considering the constitutionality of that requirement, that court said: "These payments bear no relation to the services rendered in filing the papers or the expenses of the election. They are purely arbitrary exactions of money to be paid into the public treasury as a monetary consideration for being permitted to be a candidate. The payments are not intended to be a compensation for filing papers"; and held requirements as to fees unconstitutional: People v. Board, 122 Ill. 9, 77 N. E. 321. The legislature of Nebraska in 1905 also provided a primary election law, and in relation to the payment of fees

required of candidates (one per cent of the emoluments of the term) that court said: "It is to be observed that the amount thus required to be paid before one can have his name submitted to the voters at the primary is fixed arbitrarily, and wholly regardless [375] of the services performed in filing nomination papers. A person aspiring to be nominated for clerk of the district court would be required to pay perhaps two hundred dollars, a candidate for the nomination of county clerk probably forty dollars; other candidates for county office different sums, ranging between the two extremes. Is it competent for the legislature to impose burdens of this character on those desiring to become candidates for public offices, the nominations for which come within the provisions of the primary election law? Can a test of ability to pay fees of the magnitude mentioned be made as to one's right to be voted for at a primary election? It is at first glance apparent that these enormous fees prevent many from becoming candidates for party recognition who otherwise would be willing to yield to a public demand that they become candidates for public office. It is said the fees required to be paid in the manner stated are for the purpose of defraying the expenses of the primary. It is not so stated in the act. It is expressly provided the expenses of the primary are to be paid out of the public treasury. It is not, therefore, required of us to pass upon the question of the power of the legislature to require those submitting their names to be voted for at a primary to pay the expenses of the election. It appears from the act itself that there is no relation between the charges made for filing nomination papers as therein provided and the expenses incident to a primary election, nor to the value of the services in filing the nomination papers. The charges are arbitrary and unreasonable. They make the pecuniary ability of the person to pay the same a test as to his qualification to become a candidate for party nomination. The law is as objectionable as if the test was based on a property qualification or the amount the elector had contributed to the public revenues. The primary election contemplated in the act may not in and of itself be an election within the meaning of the constitutional provisions, which guarantee that 'all elections shall be free,' and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise: Const., art. 1, sec. 22. It is, however, a means to an end. It is a part of the election machinery by which it is determined who shall be permitted to have their names appear on the official ballot as candidates for public office." "To say that

the voters are free to exercise the elective franchise at a general election for nominees in the choice of which unwarranted restrictions and hindrances were interposed [376] would be hollow mockery. The right to freely choose candidates for public office is as valuable as the right to vote for them after they are chosen": State v. Drexel, 74 Neb. 776, 105 N. W. 174. The supreme court of Minnesota, in State v. Scott, 99 Minn. 145, 108 N. W. 828, in passing on the provisions of the primary election law of that state, which require the payment of a fee of twenty dollars when the petition of the candidate is required to be filed with the Secretary of State, and ten dollars when filed with the county auditor, referring to the Nebraska and Illinois cases cited, apparently approves of those decisions as applied to the fees required by the laws of those states, for it says: "We need not deny that both acts were arbitrary and unreasonable in the exaction of fees"; but held that the fee of twenty dollars or ten dollars requested by the Minnesota law was not an unreasonable regulation.

It is insisted that the reasons for the Illinois and Nebraska decisions do not apply in this state, because our law requires a space on the official ballot for writing additional names of candidates which was not provided for in one of those states, and for the further reason that our constitution carries no requirement that all elections shall be free and equal. We are, however, satisfied that neither of such distinctions affects the principles involved, and think they need no answer in addition to what we have hereinbefore given. We may add that courts hold that the expression "free and equal" has no reference to payment of fees. For these reasons we think the provisions of the law in question attacked in this action are invalid, and so hold.

The respondents argue that the appellant should have applied to the court for a writ of mandamus to compel the auditor to cause his name to be printed upon the ballot without the payment of a fee, and that, by failing to do so, he waived his right to question the constitutionality of the act. A discussion of this proposition is unnecessary, because the plaintiff alleged in his complaint that there was insufficient time before said primary election for the candidates named in the complaint to institute an action or any special proceedings either at law or otherwise, for the purpose of compelling the county auditor to place their names upon the ballot, and that they were compelled by reason of this fact to make the payments demanded. The defendants by de-

murrer to the complaint admitted this allegation and the case comes to this court on the pleadings, and we are precluded from inquiring into the facts [377] further than is admitted by the demurrer of the defendants. We must take such admissions as true. We must, therefore, hold that the procedure adopted in this case was proper. Lest this opinion be misconstrued, we add that it applies to no part of the act referred to, except that requiring the payment of a fee.

The district court erred in sustaining the defendant's demurrer, and its order doing so is reversed.

All concur.

The Power of the Legislature to Regulate Elections is undoubted, provided the elective franchise is regulated and not denied. The legislature has no power expressly to deny or take away the right, or unreasonably to abridge or impede its enjoyment by laws professing to be merely remedial. Its power is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise and by preventing its abuse. All reasonable latitude should be given the legislature in the exercise of this power of regulation, but statutes must be reasonable, uniform, and impartial. They must be calculated to facilitate and secure, rather than to subvert or impede, the right to vote: See notes to Chamberlain v. Wood, 91 Am. St. Rep. 685; Livesley v. Litchfield, 47 Or. 248, 114 Am. St. Rep. 920.

GRADY v. SCHWEINLER.

[16 N. D. 452, 113 N. W. 1031.]

BAILMENT—Liability for Death of Animal.—Where a person hires a horse, without any special contract, the law imposes on him the duty to take ordinary care of the animal; and in case of its death without his fault, he is not responsible. (p. 678.)

BAILMENT—Liability for Death of Animal.—Where a person hires a horse and agrees positively and unequivocally to pay for the animal if he is unable to return it for any reason, he is liable for the death of the horse while in his possession, though without his fault. (p. 678.)

Lee Coombs, for the appellant.

Herman Winterer and D. S. Ritchie, for the respondent.

[454] MORGAN, C. J. Plaintiff brings an action for damages against the defendant for the value of a stallion delivered by him to the defendant on a contract of bailment. The stallion was delivered to the defendant for serving his mares for the agreed sum of five dollars a foal. The complaint alleges plaintiff's ownership of the stallion, the value

thereof, his delivery to the defendant under an express contract that defendant would return him to the plaintiff, and, in case that he should be unable to return him, then defendant would pay plaintiff the value of said stallion, and that plaintiff demanded his return to him or payment of the value thereof, which was refused by the defendant. judgment is demanded for the sum of four hundred dollars. The answer admits that said stallion was delivered to the defendant for the purposes alleged in the complaint, but denies that he agreed to pay for said stallion in case of his inability to return him upon demand. The answer further alleges that the stallion was sick when delivered to defendant, and that plaintiff knew of such sickness, and, that in consequence of such sickness, the stallion died soon after his delivery to defendant, without any fault or negligence on his part. A jury was impaneled, and, at the close of plaintiff's case, the trial court directed a verdict for the defendant, and judgment was thereafter entered on the verdict, and plaintiff has appealed from said judgment.

The only assignments of error relate to the action of the court in directing a verdict for the defendant. These assignments render it necessary to determine the plaintiff's rights under the contract as set forth in plaintiff's evidence. The motion for a directed verdict was based upon the alleged grounds that the evidence shows that the stallion died before the contract of hire under which he was turned over to defendant had terminated, without any fault or [455] negligence on defendant's part, and that the contract of hire was not binding on defendant, for the reason that a return of the stallion became impossible by reason of his death without any fault on defendant's part. The question is squarely presented whether plaintiff can recover under the facts, independent of any question of negligence or fault on defendant's part. The complaint contains no allegation of fault or negligence as a basis for recovery, but is framed upon the theory of liability on a contract of hiring, and in addition, of insurance, if the horse was not returned. Plaintiff's evidence was as follows, which must be assumed to be true for the purposes of this appeal. Plaintiff testified: "He said, 'I will take the horse and return him in as good or better shape than I got him, and, if I don't, I will, pay for him. I am good for him.' I agreed to let him have the horse to breed his mares at five dollars a colt, provided he returned the horse as he got him, and, if he didn't,

he should pay for him. Mr. Schweinler said he would take him on those terms, and if he didn't return him as good as he got him, he would pay for him." A witness for plaintiff testified: "Mr. Schweinler said he would fetch the horse back in as good condition as he took him, or, if anything happened, he would pay for him." The appellant's contention is that the relative rights of the plaintiff and defendant, as bailor and bailee, must be determined from the contract of bailment, and not by the general rules of liability under the law of bailments. We have no doubt of the correctness of this contention. Parties are permitted to make their own contracts in reference to their mutual rights and liabilities under bailments of property as well as in reference to other subjects, but, of course, are not permitted to contract in contravention of positive law or public policy, and perhaps may not in all cases relieve themselves from the results of their own negligence. In this case the language was positive and unequivocal that the bailee was to pay for the horse if he was unable to return him for any reason. If anything happened to the horse, making a return impossible, payment was to be made. This language permits of no exceptions, but implies an unconditional liability if the horse could not be returned. It does not permit of the meaning that the horse was to be paid for only in case of its loss through the bailee's fault or negligence. It creates the bailee an insurer of the return of the horse when the purposes of the bailment have been accomplished and a return demanded. The authorities firmly indorse this principle. [456] As stated by Shouler in his work on Bailments, section 106: "Whatever lawful terms may have been introduced by their contract for the purpose of qualifying the method or risk of performance should be given full force, whether expressly set forth or only implied." In Steele v. Buck, 61 Ill. 343, 14 Am. Rep. 60, the court said: "The principle that lies at the foundation of the series of authorities, English and American, on this question, is that the party must perform his contract, and, if loss occurs by inevitable accident, the law will let it rest upon the party who has contracted that he will bear it." In that same case the following was cited with approval: "Where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his own contract. If a party entered into an absolute contract, with-

out any qualifications or specifications, and receives from the party with whom he contracts the consideration for such engagement, he must abide by the contract, and either do the act or pay damages, if liability arises from his own direct and positive undertaking." In Drake v. White, 117 Mass. 10, the court said: "In the present case the parties have reduced their contract to writing and have omitted to attach to the defendant's liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of two things—either to return the property specifically, or to pay for it in money. There can be no doubt that if a creditor sees fit to accept a deposit of security upon such terms, and to place himself in the position of an insurer of its safety, he can legally do so. It is not difficult to suppose a case in which the party might find it convenient that the business of guarding against the risk of fire or other accident should be attended to by the depositary. But, however, that may be, the proper interpretation of the contract is to be determined by the general rules of construction recognized by the law; and, if the parties have improvidently made their contract more onerous than they expected, the difficulty cannot be removed by a violation of these rules." In Butler v. Greene, 49 Neb. 280, 68 N. W. 496, the court said: "If the defendant contracted to keep the watch in the vault of the bank, and if it was lost by reason of his failure to do so, he was liable without regard to the general principles of the law of bailment. He had made a contract, and he was liable for all damages resulting from his failure [457] to perform it. If he had no right to keep the watch in the vault, that was his affair, and not the bailor's. The contract was not to keep the watch in the vault if the bank permitted it, but it was absolute; and it was the pledgee's business to see that he had authority to keep it there. If he had not, he should not have made the contract": See, also, Hale on Bailments and Carriers, p. 28, and cases cited: Lance v. Griner, 53 Pa. 204; 5 Cyc. 185, and cases cited; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. Rep. 99, 37 L. ed. 1093; Harvey v. Murray, 136 Mass. 377; Rohrabacher v. Ware, 37 Iowa, 85; Standard Brewery v. Bemis & Curtis Malting Co., 171 Ill. 602, 49 N. E. 507; Fairmont Coal Co. v. Jones & Adams Co., 134 Fed. 711, 67 C. C. A. 265; Reinstein v. Watts, 84 Me. 139, 24 Atl. 719; Austin v. Miller, 74 N. C. 274.

Respondent contends that the contract imposes only such liability as the law would impose without it. Without any special contract, the law would impose on the defendant the duty to use ordinary care, and, in case of the death of the animal without defendant's fault, he would not be responsible. In this case, as we have shown, the contract went further, and enlarged the obligations of the bailee in respect to those devolving on him where no special contract exists. The principle contended for, therefore, has no application. The fact that the horse died while in defendant's possession without his fault is not a defense in view of the existing contract shown by the evidence and presumed to be true for the purposes of this appeal. The plaintiff having alleged and proved the contract, a breach thereof, demand and a refusal to comply therewith, stated a cause of action in the complaint, and the same was established by the evidence without any showing of negligence.

The judgment is reversed, a new trial granted, and the cause remanded for a new trial.

All concur.

A Bailee for Hire is Held to the Exercise of a reasonable degree of care and diligence in protecting the property bailed, but ordinarily he is not an insurer of the property, and is not responsible for unavoidable accidents; Higman v. Camody, 112 Ala. 257, 57 Am. St. Rep. 33; Drudge v. Leiter, 18 Ind. App. 694, 63 Am. St. Rep. 359; Knights v. Piella, 111 Mich. 9, 66 Am. St. Rep. 375.

CASES

IN THE

SUPREME COURT

OF

OHIO.

HOFFMASTER v. BLACK.

[78 Ohio St. 1, 84 N. E. 423.]

PAYMENT, Authority to Receive—Presumption.—The burden rests upon the person making the payment of a negotiable instrument to prove that he to whom such payment was made was authorized to receive it, though it was by its terms payable in his office. (p. 681.)

PAYMENT, Authority to Receive.—The Fact that a Negotiable Instrument is Made Payable at the Office of a Designated Person does not constitute him the agent to receive such payment, when he is not in possession of the instrument nor of the mortgage given to secure it. (p. 681.)

PRINCIPAL AND AGENT.—The Ratification of One Unauthorized Act is not the Ratification of Another and entirely distinct act, nor is the acceptance of the result of a series of unauthorized acts of the same kind, the creation of an implied agency to do an entirely different thing. (p. 682.)

PAYMENT—Authority to Receive Principal is not Implied from the Reception of Interest.—There is no presumption from the collection of interest by the payee who has ceased to be the holder of a note and the payment thereof by him to the latter that such original payee had authority to receive payment of the principal. (pp. 682, 683.)

Action upon a promissory note made in February, 1897, payable to Frank P. Hood, or order, "principal and interest payable at the office of F. P. Hood, No. 5 East Federal street." Two weeks after the delivery of the note, Hood transferred it and the mortgage given to secure it to the plaintiff, Hoffmaster. Though the note and mortgage were delivered, no assignment was recorded, nor were the makers notified that the plaintiff owned them. The interest upon the note was paid to Hood at his office up to August 19, 1903. The defendants claimed to have paid three hun-

Respondent contends that the contract imposes only such liability as the law would impose without it. Without any special contract, the law would impose on the defendant the duty to use ordinary care, and, in case of the death of the animal without defendant's fault, he would not be responsible. In this case, as we have shown, the contract went further, and enlarged the obligations of the bailee in respect to those devolving on him where no special contract exists. The principle contended for, therefore, has no application. The fact that the horse died while in defendant's possession without his fault is not a defense in view of the existing contract shown by the evidence and presumed to be true for the purposes of this appeal. The plaintiff having alleged and proved the contract, a breach thereof, demand and a refusal to comply therewith, stated a cause of action in the complaint, and the same was established by the evidence without any showing of negligence.

The judgment is reversed, a new trial granted, and the cause remanded for a new trial.

All concur.

A Bailee for Hire is Held to the Exercise of a reasonable degree of care and diligence in protecting the property bailed, but ordinarily he is not an insurer of the property, and is not responsible for unavoidable accidents; Higman v. Camody, 112 Ala. 257, 57 Am. St. Rep. 33; Drudge v. Leiter, 18 Ind. App. 694, 63 Am. St. Rep. 359; Knights v. Piella, 111 Mich. 9, 66 Am. St. Rep. 375.

CASES

IN THE

SUPREME COURT

OF

OHIO.

HOFFMASTER v. BLACK.

[78 Ohio St. 1, 84 N. E. 423.]

PAYMENT, Authority to Receive—Presumption.—The burden rests upon the person making the payment of a negotiable instrument to prove that he to whom such payment was made was authorized to receive it, though it was by its terms payable in his office. (p. 681.)

PAYMENT, Authority to Receive.—The Fact that a Negotiable Instrument is Made Payable at the Office of a Designated Person does not constitute him the agent to receive such payment, when he is not in possession of the instrument nor of the mortgage given to secure it. (p. 681.)

PRINCIPAL AND AGENT.—The Ratification of One Unauthorized Act is not the Ratification of Another and entirely distinct act, nor is the acceptance of the result of a series of unauthorized acts of the same kind, the creation of an implied agency to do an entirely different thing. (p. 682.)

PAYMENT—Authority to Receive Principal is not Implied from the Reception of Interest.—There is no presumption from the collection of interest by the payee who has ceased to be the holder of a note and the payment thereof by him to the latter that such original payee had authority to receive payment of the principal. (pp. 682, 683.)

Action upon a promissory note made in February, 1897, payable to Frank P. Hood, or order, "principal and interest payable at the office of F. P. Hood, No. 5 East Federal street." Two weeks after the delivery of the note, Hood transferred it and the mortgage given to secure it to the plaintiff, Hoffmaster. Though the note and mortgage were delivered, no assignment was recorded, nor were the makers notified that the plaintiff owned them. The interest upon the note was paid to Hood at his office up to August 19, 1903. The defendants claimed to have paid three hun-

dred and fifty dollars on the principal of the note at Hood's office to a Miss Jurey, who was then acting for him. The sum so paid was not received by plaintiff, nor did he ever authorize Hood or Miss Jurey to collect any part of the principal. The trial court found in favor of the plaintiff, but the circuit reversed the judgment for the reason, "that the use of said words in said promissory note made said F. P. Hood agent of the plaintiff below to collect the money named and made payable upon said note, notwithstanding said Frank P. Hood did not have possession of said note and mortgage." The plaintiff appealed.

R. B. Murray and S. M. Thompson, for the plaintiff in error.

Emil J. Anderson and A. M. Henderson, for the defendants in error.

[5] DAVIS, J. The circuit court reversed the judgment of the court of common pleas upon the ground, as stated in the journal entry, that the words, "Principal and interest payable at the office of F. P. Hood, No. 5 East Federal street," contained in the note, "made said F. P. Hood agent of the plaintiff below to collect the money named and made payable upon said note, notwithstanding said Frank P. Hood did not have possession of said note and mortgage." This has very much the appearance of an invitation to reverse, inasmuch as the controlling questions now presented have been decided and reported at least twice, in the lower courts of this state (Hitchcock v. Kelley, 18 Ohio C. C. 808; Antioch College v. Carroll, 25 Week. Law Bul. 289), and this judgment of the circuit court is distinctly contrary to an array of authorities so uniform, direct and abundant, that we shall not even attempt to enumerate all of them. Reference to many of the cases will be found in the places cited below: Daniel on Negotiable Instruments, [6] sec. 326; 7 Cyc. 1035, art. "Commercial Paper," by Randolph, and notes 80, 81; 1 Am. & Eng. Ency. of Law, 2d ed., 1026; 22 Am. & Eng. Ency. of Law, 520, 521, n. 7; Kohl v. Beach, 107 Wis. 409, 81 Am. St. Rep. 849, 83 N. W. 657, 50 L. R. A. 600. The principle on which these cases have been decided was stated in Lord Holt's time in Whitlock v. Waltham, 1 Salk. 157, as follows: "If the scrivener be intrusted with the custody of the bond, he may receive the interest; and though he fails, yet the mortgagee shall bear the loss.

So it is also in such case if he receive the principal and deliver up the bond; for, being intrusted with the security itself, it shall be presumed that he is intrusted with a power over it, and with a power to receive the principal and interest; and the rather because the giving up of the bond upon payment of the money is a discharge thereof; otherwise if the obligee take away the bond, for then he hath no power to receive the money."

Modern cases have gone further than this, and have held that even the possession of negotiable securities, unindorsed, is not conclusive evidence of authority to receive payment: Mechem on Agency, sec. 373; Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502. The burden, therefore, rests on the party making payment to show that the one receiving payment was authorized. This is particularly so if, in the meantime, as in this case, the note has passed into the hands of a bona fide indorsee before maturity. The contract of the maker is to pay to the payee or his order. By the terms of his contract he is bound to take notice of the fact that his obligation is liable to turn up in the hands of another party at maturity. The mere designation of the place at which payment shall be made does [7] not of itself alter the obligation of the maker as to the person to whom, or through whom, payment shall be made. He still is bound to see for himself that payment is made to the legal holder, whether he be the original payee or an indorsee, or to his authorized agent. He cannot safely pay to any person at the designated place who, in the absence of the securities properly indorsed, cannot show authority to receive payment for the party entitled to the money: Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502; Williams v. Walker, 2 Sand. Ch. 325; Cowing v. Cloud, 16 Colo. App. 326, 65 Pac. 417; Richards v. Waller, 49 Neb. 639, 68 N. W. 1053; Gilbert v. Garber, 62 Neb. 464, 87 N. W. 179; Hollinshead v. Stuart & Co., 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659; Stolzman v. Wyman, 8 N. D. 108, 77 N. W. 285; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Adams v. Hackensack Improvement Commission, 44 N. J. L. 638, 43 Am. Rep. 406.

The law of the case being so well defined, and the plaintiff having denied that he ever authorized or directed Hood, the original payee, or his clerk, Miss Jurey, to receive payment of the principal, or any part of the same, and he having also denied that he knew of the payment of three hundred and fifty dollars on the principal, it was plainly in-

cumbent on the defendants to show that the plaintiff had either expressly or impliedly made Hood and Miss Jurey his agents. On the contrary, no claim of express authority is made, and it is conceded that Hood never had possession of the note or the mortgage after they were transferred to the plaintiff, and the defendants say that they had asked for them "dozens of times" at Hood's office and they were never produced.

But it is shown that interest was paid semi-annually and was receipted for by "F. P. Hood, [s] Ag't," that it was regularly paid over to plaintiff by Hood, and was credited by plaintiff on the note on the several dates up to August 31, 1903; but it is not shown that plaintiff ever saw any of Hood's receipts for interest, or that he ever knew that Hood had signed receipts therefor as "Ag't." The significant fact does appear, however, that from the time of the payment of the three hundred and fifty dollars to Hood, the receipts given by Hood to the defendants are for the exact amount of interest on the principal remaining unpaid, while the credits indorsed on the note by plaintiff are for the full amount of interest on the principal of the note without deduction, indicating that Hood was concealing from the plaintiff the payment of the three hundred and fifty dollars, and that he made up the interest to the full amount out of his own pocket. Now, it is claimed that these circumstances constituted Hood the agent of the plaintiff for the purpose of receiving payment of both principal and interest.

It is hardly necessary to discuss the proposition that the ratification of one unauthorized act is not a ratification of another and entirely distinct act; or that the acceptance of the results of a series of unauthorized acts of the same kind is the creation of an implied agency to do an entirely different thing. To state the proposition in a concrete form, the plaintiff having recognized the course of dealing as to payment of interest through Hood may be presumed to have authorized him to collect interest; but no implied agency to collect the principal, or any part of it, could arise therefrom. These are accepted principles in the law of agency: Baldwin v. Burrows, 47 N. Y. 199; 1 Am. & Eng. Ency. of Law, 2d ed., [s] 1002. There was no recognition of the act of Hood in collecting a part of the principal, because the plaintiff did not know that the money had been paid to Hood, nor that the latter was deceiving the defendants by assuming to act for him. The cases are numerous and directly to the point that an authority to receive interest does

not imply an authority to receive payment on the principal: Whitlock v. Waltham, 1 Salk. 157; Williams v. Walker, 2 Sand. Ch. 325; Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Cox. v. Cutter, 28 N. J. Eq. 13; Ilgenfritz v. Mutual Benefit Life Ins. Co., 81 Fed. 27; Palmer v. Wistanley, 23 U. C. C. P. 586; Walsh v. Peterson, 59 Neb. 645, 81 N. W. 853; Gilbert v. Garber, 62 Neb. 464, 87 N. W. 179; Stolzman v. Wyman, 8 N. D. 108, 77 N. W. 285; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570. In a case in which it appeared that the scrivener, not having possession of the security, had received not only the interest but part of the principal also and paid it to the obligee, it was held that such circumstances did not imply that the scrivener had any authority to receive a part of the principal which he received and did not account for: Wostenholm v. Davies, Freem. Ch. 289.

When the defendants made payments to Hood without requiring the production of the securities, it was no more than if they had intrusted such payment to a messenger boy. That which reached the plaintiff was good payment. That which did not reach the plaintiff was at their own risk.

The judgment of the circuit court is reversed, and that of the court of common pleas is affirmed.

Shauck, C. J., Price, Crew and Summers, JJ., concur.

Payment.—The Maker of a Promissory Note can satisfy it only by payment to the owner at the time, or to such owner's authorized agent. If the recipient of the money is not actually authorized, the payment is ineffectual, unless induced by unambiguous direction from the owner or justified by actual possession of the note. This rule applies generally to all negotiable paper, independently of the existence of any mortgage or other security: Marling v. Nommensen, 127 Wis. 363, 115 Am. St. Rep. 1017.

Where a Principal has Placed His Agent in such a position with reference to a note and mortgage that a person of ordinary prudence, conversant with business usages, is justified in presuming him authorized to collect the amount due, payment to him discharges the obligation: Harrison Nat. Bank v. Austin, 65 Neb. 632, 101 Am. St. Rep. 639.

Payment of a Note Secured by a Mortgage, made to the agent of the original mortgagee after he had assigned the indebtedness, is nevertheless good, if the assignee permitted such agent to represent himself as having authority to do what he did, and he had for many years acted as the agent of such assignee in receiving payment of principal and interest on loans made by him: Bautz v. Adams, 131 Wis. 152, 120 Am. St. Rep. 1030.

HAMMOND v. STATE.

[78 Ohio St. 15, 84 N. E. 416.]

CONSTITUTIONAL LAW—Statute Making Reputation Evidence.—A provision in a statute respecting trusts and unlawful combinations providing that in prosecutions thereunder the character of the trust or combination alleged may be established by proof of defendant's general reputation as such is unconstitutional and void. (p. 685.)

EVIDENCE, Limitation upon—Power of the Legislature Respecting.—The legislature may not arbitrarily create a conclusive presumption of guilt against an accused as to any element of crime charged by giving an artificial and evidentiary force to certain facts which otherwise would be wholly irrelevant and inconclusive. (p. 685.)

EVIDENCE—Conspirators.—The acts and declarations of a conspirator in the absence of the alleged co-conspirator can be received in evidence against the latter only after the fact of the conspiracy has been established. (pp. 687, 688.)

Richie & Richie and Ridenour & Halfhill, for the plaintiff in error.

B. F. Welty, prosecuting attorney, for the defendant in error.

[18] CREW, J. At the April term, 1906, of the court of common pleas of Allen county, the plaintiff in error, Harry G. Hammond, was indicted for engaging, with others, in a conspiracy against trade, contrary to the provisions of sections 4427-1 to 4427-12, Revised Statutes, inclusive. He was tried upon said indictment, was found guilty, and adjudged by the court to pay a fine of five hundred dollars and the costs of prosecution, and to stand committed until said fine and costs were paid. This judgment was affirmed by the circuit court. On the trial of said indictment in the court of common pleas the state, to maintain the issue on its part, was permitted by the court, over the objection of counsel for the accused, to propound to divers witnesses the following question: "You may state whether or not you have the means of knowing the general reputation of the Canton Bridge Company, as to whether or not the Canton Bridge Company, together with other bridge companies and persons doing business in Allen county, Ohio, have been organized in a trust for the purpose of dealing in highway bridges and bridge materials and preventing competition in the sale of highway bridges and bridge material from the first day of January, 1904, to the twenty-fifth day of May, 1906." To this interrogatory the several witnesses each answered, in substance, that there was reputed to be such combination

or trust. The foregoing question was put by counsel and permitted by the court, under [19] favor, and because of, the provisions of section 4427-6, Revised Statutes, which reads as follows: "In prosecutions under this act, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based; or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such." While many of the provisions of the so-called Valentine anti-trust law have heretofore been reviewed and passed upon by this court, there is presented to us in this case for the first time the question of whether or not the last paragraph of the above section 4427-6, whereby it is provided that "The character of the trust or combination alleged may be established by proof of its general reputation as such," is a valid and constitutional provision. After careful consideration of this question, we are of opinion that it must be answered in the negative. It may be conceded that, within proper constitutional limits, the legislature has the general power to prescribe rules of evidence and methods of proof—to determine what may or may not be competent evidence in a particular case—and, with certain qualifications, has perhaps the power to enact and prescribe that in criminal prosecutions certain facts, when duly established, shall be held to be presumptive or prima facie evidence of guilt. But this power is not without its limitations, one of which is, that the legislature may not arbitrarily [20] create a conclusive presumption of guilt against the accused, as to any element of the crime charged, by giving artificial and evidential force and effect to certain facts which otherwise would be wholly irrelevant and inconclusive. It has well been said that presumptions of law—at the best, uncertain instruments in the investigation and discovery of truth—are especially dangerous in the administration of criminal justice when used to control or impair the natural fundamental presumption of innocence, their effect being to give to evidence a technical probative force beyond that which it would naturally and ordinarily possess in producing conviction in the minds of the jury. It is said in State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26: "Indeed, to hold that a legis-

lature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed, is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it, the very element which makes it judicial. To hold so is to hold that the legislature has power to bind and circumscribe the judgments of courts and juries in matters of fact, and in an important measure to predetermine their decisions and verdicts for them." The provision of the statute under consideration in the present case, does not, it will be observed, provide merely that a presumption or inference shall arise, or may be drawn, from proof of the general reputation of the unlawful or criminal character of the alleged trust or combination. But it enacts in express terms that its unlawful and criminal character may be established by proof of its general reputation. [21] Thus, the statute in terms makes proof of the general reputation of the trust or combination, not only competent evidence against the accused, but sufficient and conclusive evidence of the unlawful and criminal character of the combination to which he may belong. This in effect is to deprive the accused of the protection of the cardinal presumption that every person is to be presumed innocent until he is legally proven guilty, a presumption which attends the accused throughout his trial, and has referenec and relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt. If the General Assembly, in order to make conviction easier under this act, can rightfully provide that one of the essential and constituent elements of the crime charged, viz., the unlawful character of the trust or combination, may be shown and made certain, by proof of common rumor, or general reputation, and the guilt of the accused be thus established, it is difficult to see why it may not, with equal right, provide that murder, arson or any other crime, may be thus established by proof that the person accused thereof is generally reputed to be the person who committed the same; a proposition at once so obnoxious and repugnant to the plainest principles of reason and justice, that none would yield assent to it. It is a matter of common and universal knowledge that bad reputation may, and oftentimes does, originate in malice, from mistake, or irresponsible rumor, and once suggested or set going, the rapidity with which such a reputation gathers vigor and volume is proverbial. Hence,

as is very fittingly and appropriately said by Durfee, C. J., in State v. Kartz, 13 R. I. 528: [22] "To introduce into the law the principle that a person can be punished for what other people say about him, is to render all the constitutional safeguards of life, liberty and property unavailing for his protection; for it is impossible to say to what purposes so pernicious a principle may not be applied if it is once permitted to take root." To concede to the legislature the power to provide, in prosecutions under the act here in question, that the unlawful character of the combination to which the defendant belongs, may be established—that is, made certain—by proof of its general reputation as such, is to grant that the legislature has power to, and may, in a criminal case, prescribe a rule of conclusive evidence as to a vital and controlling fact, that shall be binding alike upon court and jury. This the General Assembly may not do. In the present case we are of opinion that the last paragraph of section 4427-6, whereby it is provided that "The character of the trust or combination alleged may be established by proof of its general reputation as such," is invalid, in that it not only permits the conviction of a defendant upon purely hearsay evidence, but it in effect deprives him of the benefit of the presumption of innocence, as to a vital and essential fact which the state is bound to affirmatively establish by competent evidence, by substituting for proof of such fact, proof merely of general reputation as to its existence. This, we think, is not "due process of law," but is violative of section 1, aricle 14, of the constitution of the United States, which provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United [23] States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It follows that the judgment of conviction in this case should be set aside and the case remanded to the court of common pleas for a new trial. Inasmuch as the case must go back for retrial, it is perhaps proper that we should state, in view of the doubtful character of certain evidence admitted by the court of common pleas, other than that above referred to, that the rule is, that the acts and declarations of a conspirator in the absence of an alleged co-conspirator can be given in evidence against the latter only after the fact of conspiracy has been established; and until the conspiracy

is shown by other and independent evidence, the acts and declarations of an alleged co-conspirator are inadmissible to establish the connection with such conspiracy of one charged as a co-conspirator.

Judgment reversed.

Shauck, C. J., Price, Summers, Spear and Davis, JJ., concur.

Evidence.—The Validity of Statutes declaring that a certain fact shall be deemed prima facie evidence of another is discussed in the note to People v. Cannon, 36 Am. St. Rep. 682. A statute making the failure of a banker within thirty days after receiving a deposit prima facie evidence of an intent on his part to defraud, is held constitutional in Meadowcroft v. People, 163 Ill. 56, 54 Am. St. Rep. 447; a statute making the possession of registered bottles prima facie evidence of a violation of a statute forbidding the use and sale of such bottles without the consent of the person whose name appears thereon, is held constitutional in Commonwealth v. Anselvich, 186 Mass. 376, 104 Am. St. Rep. 590; and a statute providing that the failure or refusal of any person who has entered into a contract for service and obtained any money or property thereby, to perform such service or refund such money or property without just cause, shall be prima facie evidence of an intent to defraud, is held constitutional in State v. Thomas, 144 Ala. 77, 113 Am. St. Rep. 17.

MARSH v. KOONS.

[78 Ohio St. 68, 84 N. E. 599.]

NEGLIGENCE, Contributory, Failure to Plead.—If the plaintiff's evidence shows him to have been guilty of contributory negligence, the court may direct a verdict against him, although the defendant has not pleaded such negligence. (p. 689.)

ANIMALS, Owners of, When not Made Answerable for Injuries Due to Their Being on the Highways.—A statute making it unlawful to suffer cattle to run at large is not presumed to have for its object the safety of travelers on the public highways, and therefore does not render the owners of such animals liable for injuries suffered by their being in such highway, where no liability existed at the common law. (p. 892.)

ANIMALS, Liability of Owner of Cattle for Injuries Resulting to Traveler on Public Way.—The owner of a cow which was lying in a public highway is not answerable for injuries suffered by a person riding in a vehicle who was thrown therefrom because his horse was scared by the cow getting up from such lying position. (p. 693.)

Hamilton Bros. and John A. Price, for the plaintiff in error.

West & West and Samuel H. West, for the defendant in error.

[68] SUMMERS, J. This is an action to recover damages for personal injuries. The plaintiff was driving a white horse, which frightened at a red cow at large on the public highway and upset the buggy in which she was riding. The accident happened in the daytime. The cow was lying [69] cater-cornered across the traveled way in front of the defendant's farm. The plaintiff, a widow lady seventy-seven years of age, says that it was a very bright, pretty day and that she was driving east, on the Sidney pike, to the city of Bellefontaine; that she saw the cow lying in the road, some distance ahead; that "The horse was walking and I was humming along, just alone. I had to drive around her; just went to drive around her, but I didn't. When I got just to her head, she made a lunge to get up and my horse reared on his hind feet, reared around and took up the side of the bank and threw me out on the side and cut my head, as you can see."

The plaintiff was badly hurt. The trial court directed a verdict for the defendant, for the reason, it is said, that the petition did not state a cause of action, and the circuit court affirmed, for the reason that the plaintiff was guilty of contributory negligence.

Counsel for plaintiff in error call attention to the fact that contributory negligence was not set up as a defense, and contend that the judgment cannot be sustained on that ground. The defendant offered no evidence, and if the evidence offered on the part of the plaintiff raised a presumption of negligence on her part contributing directly to her injury, then the court properly directed the verdict. A cow, unlike a horse, gets up first on her hind legs, and in doing so appears to lunge forward, and it was to be expected that the horse would, under the circumstances, try to give the cow plenty of room. The circuit court took judicial notice of the fact that one never can tell [70] what an old cow will do, and so concluded that the plaintiff was negligent in driving so closely to her.

At common law it was the duty of the owner of cattle to fence them in, but in this state it was not his duty to do so until made so by statute. The burden was upon the occupier of the land to fence them out. The reason for the distinction was that here at an early day but a very small part of the soil was under cultivation, and it much better suited the condition of the people and was a lighter burden on them to inclose the land for the purpose of cultivation and to fence

against the animals running at large: Cincinnati etc. R. R. Co. v. Waterson, 4 Ohio St. 424; Kerwhaker v. Cleveland etc. R. R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Marietta etc. R. R. Co. v. Stephenson, 24 Ohio St. 48. But conditions changed; the larger part of the land having been brought under cultivation, the public welfare required that the burden be transferred to the owners of the cattle.

Accordingly, in 1865 an act was passed making it unlawful to suffer cattle to run at large. There had been previously to that time laws respecting animals running at large, estrays, fences and inclosures, but it is not necessary to notice them. The act of 1865 has been carried into the Revised Statutes, and for the present it is sufficient to refer to sections 4202, 4206 and 4251. Section 4202 makes it unlawful for any owner of cattle to suffer the same to run at large in any public road or highway, and prescribes a penalty therefor. Section 4206 provides that the owner shall be liable for [71] all damages done by such animal upon the premises of another without reference to the fence that may inclose the premises, and section 4251 provides that if any cattle running at large break into or enter any inclosure, other than inclosures of railroads, the owner of any such animal shall be liable to the owner or occupant of such inclosure for all damages occasioned thereby.

At common law the owner of cattle did not owe to travelers on the highway the duty to prevent his cattle from being at large upon the highway, but if that had been his duty, the common law would have afforded the traveler a remedy by an action in damages against the owner for the injuries he sustained because of the owner's negligence in the performance of that duty; and so it is held in numerous cases that when it is made unlawful for cattle to be at large in the highway, that the owner owes such a duty to the traveler, and that he is entitled to the common-law remedy in damages, although the only remedy given by the statute is a penalty not made payable to the party injured.

It is so held in Shipley v. Colclough, 81 Mich. 624, 21 Am. St. Rep. 546, 45 N. W. 1106, where one of two cows that were running at large in the highway contrary to law hooked and pushed the other against and under the wheel of a sulky that was being driven along the highway, overturning and injuring the vehicle. The decision is based upon the following statement of the law: "The violation of any statutory or valid municipal regulation, established for the purpose

of protecting persons or property from injury, is of itself sufficient to prove such a breach [72] of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur: 1 Shearman and Redfield on Negligence, sec. 13.

"These principles apply not only where the statute or ordinance declares that persons violating it shall be liable for any damages sustained by reason of its breach, but also where it contains no such provisions, and simply imposes a penalty, by way of fine or otherwise, for disobedience. Nor is the plaintiff, in such a case, bound to prove that the act required by the law was one which by its nature was essential to the exercise of due care by the defendant": 1 Shearman and Redfield on Negligence, sec. 13.

A similar case is Jewett v. Gage, 55 Me. 538, 92 Am. Dec. 615, where the plaintiff's wagon and minor child were injured by his horse taking fright at a hog lying by the side of the highway. And in Bott v. Pratt, 33 Minn. 323, 53 Am. Rep. 47, 23 N. W. 237, where a team of horses that had been left standing unfastened and unguarded in violation of a city ordinance ran away and caused injury to a traveler on the streets.

The law is stated as follows in Cooley on Torts, third edition, 1399: "Where the statute imposes a new duty, where none existed before, and gives a specific remedy for its violation, the presumption is, that this remedy was meant to be exclusive, and the party complaining of a breach is confined to it. So if performance of a duty is enjoined under a penalty, the recovery of this penalty is in general the sole remedy, even when it is not made payable to the party injured. But the rule is not without its exception; for if a plain duty is imposed for the benefit of individuals, and the penalty is obviously inadequate [73] to compel performance, the implication will be strong, if not conclusive, that the penalty was meant to be cumulative to such remedy as the common law gives when a duty owing to an individual is neglected."

The cases above cited seem to make the exception the rule.

In Couch v. Steel, 3 El. & Bl. 402, Lord Campbell laid down the rule that wherever a statutory duty is created, any person who can show that he has sustained injuries from the nonperformance of that duty can bring an action for damages against the person on whom the duty is imposed, but in Atkinson v. New Castle etc. Waterworks Co., L. R. 2

Ex. D. 441, the judges, Carins, L. C., Cockburn, C. J., and Brett, L. J., each of them doubted its correctness. They expressed the opinion that the correctness of the rule "must, to a great extent, depend on the purview of the legislature in the particular statute and the language which they have there employed."

In Cowley v. Newmarket Local Board, [1892] App. Cas. 345, Lord Herschell expressly concurs in the opinion expressed by Lord Cairns.

In Gorris v. Scott, [1874] 9 Ex. 125, in an action to recover for loss of sheep washed overboard, in consequence of there being no pens and no battens or footholds, as required by certain regulations adopted under authority of the contagious diseases act, it is held: "That the object of the statute and the order being to prevent the spread of contagious diseases among animals, and not to protect them against perils of the sea, the [74] plaintiffs could not recover." And again: "When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind is not entitled to maintain an action in respect of such loss."

Looking to the statute and the previous legislation in this state it cannot be said that the object was to provide for the safety of travelers upon the highway; the object was to prevent trespasses upon the premises of others. The remedy in damages given by section 4251, Revised Statutes, was not entirely satisfactory. In many, if not in most, instances of trespass the injury was slight, and the amount of damages recovered would not equal the amount expended in recovering it, to say nothing of the inconvenience and the animosities engendered, and so in addition to the liability for the injury done by cattle running at large upon the premises of another, without reference to the fence that inclosed them, it was made unlawful for the owner to suffer them to run at large, and it was made the duty of public officers, on view or information that cattle were running at large, to take them up and confine them, and if an officer willfully neglected his duty in that respect, he was liable to a fine and imprisonment.

In the absence of the statute it is the duty of the owner not to suffer a known vicious animal to run at large upon the highway, or one not vicious under circumstances where he

should [75] apprehend that the safety of travelers would be in danger.

In Dickson v. McCoy, 39 N. Y. 400, it is held: "It is such negligence for the owner of a horse to turn him loose, to go from the stable into the street of a city, unattended, as will make him liable for all injuries occasioned thereby." In Wasmuth v. Butler, 86 Hun, 1, 33 N. Y. Supp. 108, it is held that it is actionable negligence to leave a horse untied and unattended in the streets of a city. In Goodman v. Gay, 15 Pa. 188, 53 Am. Dec. 589, it is held: "If the owner of a horse suffers it to go at large in the streets of a populous city, he is answerable for a personal injury done by it to an individual without proof that the owner knew that the horse was vicious." In Barnes v. Chapin, 4 Allen, 444, 81 Am. Dec. 710, Chapman, J., states the rule thus: "The general doctrine of the common law as to injuries done by domestic animals seems to be, that the owner is not liable unless he has been in some fault. He is liable for their trespasses when it was his duty to confine them and he has neglected to do so. In Leame v. Bray, 3 East, 595, Lord Ellenborough says: 'If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass.'"

Zumstein v. Shrumm, 22 Ont. App. 263, is a case not unlike the case under consideration and it was there held: "The owner of a turkey cock, which without negligence strays upon the highway contrary to a by-law of the municipality is not liable for damages resulting from a horse [76] taking fright and running away at the sight of the bird acting as turkey cocks usually do."

The object of the statute not being the safety of travelers on the highway, the petition does not state a cause of action in the absence of an averment of facts implying that the injuries resulted from the negligence of the defendant in the performance of a duty owing to the plaintiff, and the court of common pleas properly directed a verdict.

Judgment affirmed.

Shauck, C. J., Price, Crew, Spear and Davis, JJ., concur.

Animals in Highway.—The principal case is not supported by some authorities. Thus it has been held that one who turns his cattle loose into a highway, leaving them unattended, in violation of a statute, assumes all the risks of such action, and is liable for damage done by them in overturning a sulky lawfully in the highway: Shipley v. Colclough, 81 Mich. 624, 21 Am. St. Rep. 546. A horse

unlawfully at large on a highway is a nuisance, and its owner is liable for any damage done by it, whether the animal is vicious or not: Baldwin v. Ensign, 49 Conn. 113, 44 Am. Rep. 205; where the owner of a sucking colt kicked and killed by a horse which has been turned loose in the highway, without a keeper, while it is following its dam led by her owner in the highway, he being in the exercise of reasonable care, may recover damages of the owner of the horse, although the horse was not vicious: Barnes v. Chapin, 4 Allen, 444, 81 Am. Dec. 710; and the owner or custodian of swine is liable for injury occasioned by permitting them to run at large in the highway without a keeper, although he did not know they were in the highway at the time of the injury: Jewett v. Gage, 55 Me. 538, 92 Am. Dec. 615.

DAVY v. FIDELITY AND CASUALTY INSURANCE COMPANY.

[78 Ohio St. 256, 85 N. E. 504.]

ATTORNEYS AT LAW—Contingent Fees, Contracts for.—An attorney and client may lawfully agree upon compensation to the attorney contingent upon the amount to be recovered, and such contract may be a valid consideration for the assignment of an interest in the judgment if already obtained, and may be enforced in equity. (p. 695.)

ATTORNEY AND CLIENT, Contract Containing Express or Implied Assignment of the Cause of Action.—If a contract between an attorney and client contains an express or implied assignment of an interest in the subject of the litigation, or otherwise limits the right of the client to settle or compromise with his adversary without the consent of anybody else, such limitation makes the statute voidable at the option of the client, and its illegality may be pleaded as a defense in any action founded upon the contract, and the claim may be settled or compromised without the consent of the client and without creating any liability in favor of the attorney against the party so settling or compromising. (p. 696.)

ATTORNEYS AT LAW, Contract with—Entirety of.—A contract between an attorney and his client for the prosecution of a claim by the former and that the latter shall have no power to settle or compromise his claim without the consent of the attorney is entire and indivisible, and if this stipulation is invalid, there can be no recovery on the contract. (p. 696.)

ATTORNEY AND CLIENT—Contract for Fees, When cannot Make the Adverse Party Answerable.—If, by the terms of a contract between an attorney and his client, the former becomes entitled to a share of the recovery, and the adversary is deprived of the right to settle or compromise without the consent of the attorney, and the latter becomes entitled to a specified share in the amount to be recovered, such contract is indivisible and wholly void as against such adversary, and no recovery can be sustained against him by the attorney, because of his settlement of the demand sued upon. (p. 698.)

Action by plaintiffs, copartners in the practice of the law, against the defendant corporation for two-fifths of the amount

paid in settement of a claim against it. The plaintiffs, on the fourteenth day of September, 1903, entered into an agreement with Margaret R. Slagle to prosecute an action upon a policy issued to her late husband insuring her against disability or death resulting from accident. By the terms of the contract between her and the plaintiffs they were to have forty per cent of the amount realized from the policy, whether by judgment or by settlement. After the plaintiffs had brought an action, the plaintiff therein made a settlement with the defendants in the present action, and caused her suit to be dismissed.

The trial court, on June 29, 1905, directed judgment in favor of the defendant and against the plaintiffs, and such judgment was subsequently affirmed by the circuit court.

William H. Gilbert and Leonard H. Shipman, for the plaintiffs in error.

A. F. Broomhall, for the defendant in error.

265 DAVIS, J. The theory upon which this action is based is that an attorney may not only contract with his client for a contingent fee, but that he may, at the same time and upon the same consideration, acquire such an interest in his client's cause of action before judgment as to prevent the latter from settling his case without consent of the attorney. If this theory is sound, the motion for judgment on the pleadings should have been overruled; otherwise it was properly sustained.

266 It is, beyond question, the law in this state that attorney and client may lawfully agree upon compensation to the attorney contingent upon the amount to be recovered, either by settlement or by judgment; and it is also settled that such contract may be a valid consideration for an assignment of an interest in a judgment already obtained, such as might be enforced in equity (Pittsburg etc. Ry. Co. v. Volkert, 58 Ohio St. 362, 50 N. E. 924); but, as we remarked recently (Pennsylvania Co. v. Thatcher, 78 Ohio St. 175, 85 N. E. 55), an attorney's lien before judgment has not been heretofore distinctly recognized in this state, and it has hitherto remained an open question, and one of much doubt, whether an attorney may before judgment acquire such an interest in the subject matter of his client's claim or cause of action as that the defendant to such claim or cause of

action is bound to take notice of it. The questionable character of such a proposition arises from two considerations. First, an interest in a cause of action would seem to imply the right to be consulted in negotiations for settlement and the right to prevent a settlement which might be acceptable to the client; second, an interest in the proceeds of a settlement is an interest in a fund which has no existence until the settlement is agreed upon and the money paid over, and therefore the attorney's interest is in the fund in the hands of the client. In the case in hand, although the plaintiffs aver in their petition that their client "thereby"—that is, by the contract in writing—"made an equitable assignment to the plaintiffs of an undivided two-fifths interest in said cause of action and of the proceeds to be [207] realized therefrom, either by settlement or judgment"; yet it appears from the contract itself, which is set out in full in the defendant's answer, that there was no express assignment of an interest in the cause of action or of the proceeds to be realized therefrom, but that there was an express agreement that the client should not compromise or settle the cases without the approval and consent of the others.

It appears, therefore, that whatever may be the form of the contract, whether it contains an express assignment of an interest in the subject matter of the client's claim or an implied assignment thereof, or no assignment at all, the really vital question in all of these cases is this: Does the contract contain an express or implied limitation upon the right of the client to compromise and settle his claim with his adversary without the consent of anybody else? When such a limitation appears in the contract, the contract is voidable at the option of the client, and its illegality may be pleaded as a defense in any action founded on the contract; and the defendant to the suit concerning which the contract was made may, with or without notice of the contract, compromise with the plaintiff without the knowledge or consent of the plaintiff's attorney, and will not be liable to the attorney for his part: North Chicago St. R. R. Co. v. Ackley, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177, reversing the judgment of the appellate court in the same case: 58 Ill. App. 572; Boardman v. Thompson, 25 Iowa, 487.

This court has spoken on this subject so frequently and definitely that there ought to have been no misunderstanding of its position. Key v. [208] Vattier, 1 Ohio, 132, resulted

in a judgment for the defendant upon a demurrer to the declaration. The plaintiff declared upon a contract in which the plaintiff agreed to prosecute suits for the recovery of property, to pay the costs and be compensated by a part of the property to be recovered, and it was further stipulated between the parties "that if any compromise should be effected, the same should be the joint act and consultation of the parties to said indenture." At the conclusion of the opinion is the following clear and unmistakable statement: "The stipulation in the contract, on which the opinion and judgment of the court are chiefly predicated, and to which they have directed it to be confined, is that which prevents Vattier from compromising and settling the matters in controversy, without the consent and concurrence of the other contracting parties. This point being considered sufficient, the court forbear to give an opinion on any other. As the provision on the subject of cost is not set out in the declaration, and the defendant has demurred without oyer, that feature in the contract has not been considered."

So that Key v. Vattier, 1 Ohio, 132, is a decision upon the precise question now under review. The court was equally explicit in Weakly v. Hall, 13 Ohio 167, 42 Am. Dec. 194, when it said: "It is unnecessary, perhaps, to say anything in reference to the lien which is set up in the replication, and which, it is insisted, could not be discharged by the release of Weakly to Hall. But we take this occasion to say that the law of Ohio will [269] tolerate no lien in or out of the profession, as a general rule, which will prevent litigants from compromising or settling their controversies, or which, in its tendencies, encourages, promotes or extends litigation. We think the replication is bad, and the demurrer is sustained. Judgment for defendant."

The question was again before this court in Lewis v. Lewis' Admx., 15 Ohio, 715, and it was again said that: "A contract with an attorney to prosecute a suit containing a stipulation that the party should not have the privilege to settle or discontinue it, without the assent of the attorney, would be so much against good policy, that the court would not enforce it. Much less will a court raise an implied contract, in order to encourage and foster litigation."

In Brown v. Ginn, 66 Ohio St. 316, 64 N. E. 123, the court, Spear, J., delivering the opinion, said: "Again, if this paper effected the object, and was a real transfer of these accounts to the attorney, the several parties of the second part

thus parted with all right to control the litigation or to compromise it without the consent of the attorney, and this inability was made doubly so by the fact that no one of the second parties had any sort of interest in the portion of the demand which rested upon the services of any other. Upon all the authorities, such an arrangement is champertous, and will not be maintained by the courts. So that if the agreement vested in the attorney the legal title to the accounts so as to constitute him the real party in interest, and thus enable him to bring [270] an action in his own name, such action cannot be maintained because against public policy, while, if he is not, within the meaning of section 4993, the real party in interest, the case would fail for that reason."

We have brought together these quotations from former decisions in order to present a conspectus, which demonstrates that this court has always maintained a consistent and unambiguous attitude in regard to contracts of the kind which we have in this case. Some further instructive illustration may be found in Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 29 N. E. 573, 14 L. R. A. 785, opinion by Minshall, J., 5, 6; Stewart v. Welch, 41 Ohio St. 483; and remarks of Okey, J., in Diehl v. Friester, 37 Ohio St. 473.

These cases also show that the illegal stipulation renders the whole contract illegal and indivisible; and that whenever the illegal stipulation was inserted, it so far tainted the whole contract that no relief whatever was granted upon the contract. It could not well be otherwise. If the plaintiffs may waive the clause as to consent, ratify the compromise made by the client and recover from the defendant, when both parties to the compromise have acted on the theory that the contract is illegal and voidable, then the doctrine of the cases which we have cited means nothing in practice; for it may be evaded in every case. If, notwithstanding the illegal restriction upon the right to compromise, an attorney may nevertheless acquire such an interest in his client's cause of action that the defendant thereto is answerable over to him after a compromise effected with the client, the real party in interest, then the doctrine of the cases [271] is a mere figment, and may as well be ignored; for the attorney will thereby have gained as much as if the veto on his client's right to compromise had been sustained. It does not seem to us that the contention of the plaintiffs is supported by law

or considerations of justice: 15 Am. & Eng. Ency. of Law, 2d ed., 988, and note 4.

Affirmed.

Price, C. J., Shauck, Crew, Summers and Spear, JJ., concur.

Contracts Between Attorneys and Their Clients are discussed in the note to Shirk v. Neible, 83 Am. St. Rep. 159; and the extent to which a litigant may control a cause in which he has appeared by attorney is discussed in the note to Cameron v. Boeger, 93 Am. St. Rep. 169. A clause in a contract of retainer between an attorney and client prohibiting the latter from making a settlement of the litigation without the consent of the former is void as against public policy; and a clause in a contract of retainer fixing the attorney's fee at a percentage of the money recovered, so closely connected with another clause void because forbidding the client to settle the litigation as to be part of a single plan, falls when the client repudiates the latter clause, and the attorney may then recover for his services according to the real value, independently of the original provision for compensation: Matter of Snyder, 190 N. Y. 66, 123 Am. St. Rep. 533, and see cases cited in the cross-reference thereto.

MILLER v. BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

[78 Ohio St. 309, 85 N. E. 499.]

NEGLIGENCE, Damages Recoverable Because of.—The defendant in an action for negligence can be held liable to respond in damages only for the immediate and proximate result of the negligent act, and in determining what is the direct and proximate cause, the rule requires that the injury sustained be the natural and probable consequence of the negligence alleged. (p. 706.)

NEGLIGENCE—Damages Resulting from Fright, When not Recoverable.—In an action for negligence, unaccompanied by any act of wantonness or intentional wrong, there can be no recovery for the alleged physical injury caused by mere fright or shock. (p. 706.)

Wallace D. Yaple, for the plaintiff in error.

Edward Barton and John P. Phillips, for the defendant in error.

315 CREW, J. The amended petition in this case contained two alleged causes of action, each separately stated and numbered. The wrong complained of by plaintiff in her first cause of action was, that the defendant railroad company, in operating and managing a certain locomotive to

which were attached a number of cars, negligently and with great force shoved or pushed said cars off of the end of its switch track, across a public street and against and into the dwelling-house of plaintiff, thereby injuring and damaging said dwelling-house and other property of the plaintiff to the extent of five hundred dollars. As a second and separate cause of action, she alleged that at the time of said accident she was standing on her own premises [316] within a few feet of the point where said cars struck her dwelling-house, and in consequence, and as the result of witnessing said accident, "she suffered a severe nervous shock that shattered her nervous system and caused her great bodily pain and mental anguish, and permanent injury to her person and health." There was no claim or allegation in said petition that plaintiff at the time of said accident received any actual bodily injury, or that the negligence of the defendant was willful or wanton. A demurrer addressed to this second cause of action was sustained by the court and said cause of action was dismissed, and the present record presents for determination the single question whether or not in an action for negligence, unaccompanied by any element of wantonness or intentional wrong, there can be a recovery of damages for alleged physical injury caused by mere fright or shock. While the precise question thus presented has not heretofore been determined by this court, it has received the consideration of, and been decided by, courts of last resort in many of the other states; and the right to recover for injuries so caused has been almost universally denied. In the case of Ewing v. Pittsburgh etc. Ry. Co., 147 Pa. 40, 30 Am. St. Rep. 709, 23 Atl. 340, 14 L. R. A. 666, a case very like the present case, the plaintiffs alleged in their petition, as and for their cause of action, that in consequence of a collision of trains on defendant's railway, "The cars of the defendant company were broken, overturned and thrown from the track, and fell upon the lot of ground and premises of the plaintiffs, and against and upon the dwelling-house of plaintiffs, and thereby and by reason thereof [317] greatly endangered the life of the said Eva Ewing, then being in said dwelling-house, and subjected her to great fright, alarm, fear and nervous excitement and distress, whereby she then and there became sick and disabled, and continued to be sick, and disabled from attending to her usual work and duties, and suffered and continues to suffer great mental and physical pain and anguish, and is thereby per-

manently weakened and disabled, and that she was and is thereby otherwise injured and damnified, wherefore she claims damages in the sum of five thousand dollars, and demands judgment therefor." To this petition the railway company demurred, and the common pleas court entered judgment for the defendant on said demurrer. This judgment was affirmed by the supreme court. The syllabus of the case is as follows: "A statement of claim averring that, by a collision on defendant's railroad, through the negligence of defendant's employés, the cars were derailed and thrown against plaintiff's dwelling, subjecting her to fright and to nervous excitement, permanently weakening and disabling her, exhibits no cause of action. Mere fright, occasioned by such an accident, producing permanent injury to the nervous system, is a result too remote to be actionable. No well-considered case has held that fright alone, not resulting from or accompanied by some physical injury to the person, will sustain an action for negligence." In Spade v. Lynn etc. R. R. Co., 168 Mass. 285, 60 Am. St. Rep. 393, 47 N. E. 88, 38 L. R. A. 512, the declaration of plaintiff, after charging certain specific acts of negligence on the part of defendant's agents and servants, alleged [318] that defendant "thereby frightened the plaintiff and subjected her to a severe nervous shock, by which nervous shock the plaintiff was physically prostrated, and suffered and has continued to suffer great mental and physical pain and anguish, and has been put to great expense." The syllabus of the case is as follows: "In an action to recover damages for an injury sustained through the negligence of another, there can be no recovery for a bodily injury caused by mere fright and mental disturbance." In the opinion the court say: "The law of negligence, in its special application to cases of accidents, has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is, that it is unreasonable to hold per-

sons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met." In Gulf etc. Ry. Co. v. Trott, 86 Tex. 412, 40 Am. St. Rep. 866, 25 S. W. 419, the plaintiff claimed and was allowed [319] damages in the county court for alleged negligence on the part of the railway company, whereby plaintiff's team of horses, hitched to a wagon in which plaintiff was traveling, became frightened and broke the wagon, putting plaintiff in fear for his own personal safety, and causing him, as he alleged in his complaint, "great mental suffering, vexation and anxiety of mind." There being evidence tending to support these allegations, the jury was instructed that if plaintiff was frightened and put in fear of his personal safety, and was caused mental pain or anxiety, they should allow him reasonable compensation therefor. Under the practice in that state, the court of civil appeals certified to the supreme court the following questions for decision: "1. In an action for damages based upon tortious and negligent conduct of a defendant, where the wrongful act causes damage to plaintiff's property, but no physical injury to plaintiff, is mental suffering an element of actual damages? 2. Can actual damages be recovered for mental suffering when there is no physical injury, no injury to property, nor other element of actual damages?" The court responded: "We are of opinion that these questions should be answered in the negative. So far as we have been able to discover, all the cases involving the question of the right to recover for fright alone are in accordance with that holding." In Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 56 Am. St. Rep. 604, 45 N. E. 354, 34 L. R. A. 781, it was held: "No recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury." The facts of that case were as [320] follows: Plaintiff was standing upon a cross-walk on Main street, in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse-car of the defendant came down the street. As the team attached to the car drew near, it turned to the right and came so close to the plaintiff that she stood between the horses' heads when they were stopped. She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious,

and also that the result was a miscarriage and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result. The court, in the opinion, say: "Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is, whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant [321] would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy." In Atchison etc. Ry. Co. v. McGinnis, 46 Kan. 109, 26 Pac. 453, the court say: "The jury found that the plaintiff below was damaged sixty-five dollars by reason of peril and fright. Damages of this kind are too remote. A person who is placed in peril by the negligence of another, but who escapes without

injury, may not recover damages simply because he had been placed in a perilous [322] position. Nor is mere fright the subject of damages. Fright must be accompanied by some actual injury caused thereby, and traceable directly thereto, to be the subject of damages. Mere fright, unaccompanied by any injury resulting therefrom, cannot be the subject of damages." In Victorian Ry. Commrs. v. Coultas, 13 L. R. A. 222, the facts were, that the gatekeeper at a railway crossing negligently permitted the plaintiff's carriage to cross the railway track just as a train was approaching. The approach of the train was discovered by the driver of the carriage in time to prevent a collision, but the peril was imminent and the plaintiff, a woman, was greatly frightened. It was said by Sir Richard Couch, in the opinion in that case: "The rule of English law as to the damages which are recoverable for negligence is stated by the master of the rolls in The Notting Hill, 9 P. D. 105, a case of negligent collision. It is that the damages must be the natural and reasonable result of the defendant's act; such a consequence as in the ordinary course of things would flow from the act. According to the evidence of the female plaintiff, her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot, under such circumstances, their lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gatekeeper. If it were held that they can, it appears to their lordships it would be extending [323] the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims." Scheffer v. Washington City etc. R. R. Co., 105 U. S. 249, 26 L. ed. 1070, was a suit to recover damages for the death of one Charles Scheffer, who was injured by the negligence of the defendant railroad company, and, as a result of the injuries received, he became insane, and while in that condition committed suicide. Mr. Justice Miller, in the course of the opinion in

that case, in discussing the relation of defendant's negligence to the cause of death, said: "The proximate cause of the death of Scheffer was his own act of self-destruction. The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible, or even logical, argument would lead back to that 'great first cause least understood,' in which the train of all causation ends. The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of [324] the circumstances attending the negligence of the officers in charge of the train. His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him and his death." The same general rules and principles announced and applied in the foregoing decisions are recognized and find support in the following additional cases: White v. Sander, 168 Mass. 296, 47 N. E. 90; Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Smith v. Postal Telegraph Cable Co., 174 Mass. 576, 75 Am. St. Rep. 374, 55 N. E. 380, 47 L. R. A. 323; Braun v. Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199; Kansas City etc. R. R. Co. v. Dalton, 65 Kan. 661, 70 Pac. 645; Haile's Curator v. Texas etc. Ry. Co., 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774; Sanderson v. Northern Pac. Ry. Co., 88 Minn. 162, 97 Am. St. Rep. 509, 92 N. W. 542, 60 L. R. A. 403; Deming v. Chicago etc. Ry. Co., 80 Mo. App. 152; Johnson v. Wells, Fargo & Co., 6 Nev. 224, 2 Am. Rep. 245; Canning v. Inhabitants of Williamstown, 1 Cush. 451. See, also, Morton v. Western Union Tel. Co., 53 Ohio. St. 431, 53 Am. St. Rep. 648, 41 N. E. 689, 32 L. R. A. 735.

There is a line of cases found in the reports in which it is held by the courts that the rule requiring actual physical injury or bodily hurt, in order to warrant a recovery in negligence cases for mental distress or nervous shock, does not apply where the negligent act complained of is committed by the defendant willfully, wantonly or maliciously. And there is yet another class in which it is held that if the physical injury is the natural, probable and proximate result

of a nervous condition, which itself is the natural and proximate [325] consequences of the defendant's negligence, that then there may be a recovery in damages, irrespective of any bodily injury to plaintiff at the time of his fright or mental shock. Many, if not all, the cases cited by counsel for plaintiff in error in support of the contention here made by him fall within one or the other of these two classes, and in consequence they are clearly distinguishable from the case at bar, and need not here be discussed. In the present case the plaintiff, Elizabeth Miller, does not allege intentional and willful negligence on the part of the defendant, nor does she claim that defendant knew, or could reasonably have anticipated, that its negligent act of which she complains would cause her "severe nervous shock, great bodily pain and mental anguish, and permanent injury to her person and health." The rule is elementary that a defendant in an action for negligence can be held to respond in damages only for the immediate and proximate result of the negligent act complained of, and in determining what is direct or proximate cause, the rule requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligent act. Being of opinion that, measured by this rule, the injury complained of by Elizabeth Miller in her second cause of action is not such that the defendant railroad company is legally liable therefor we hold, both upon that ground and upon the ground of public policy, [326] that, in a case like the present, no legal liability can be predicated upon injury resulting from mere fright or nervous shock. The judgments of the courts below are affirmed.

Price, C. J., Shauck, Summers, Spear and Davis, JJ., concur.

Fright as an Element of Recoverable Damages is the subject of a note to Hubbard v. Chicago etc. Ry. Co., 76 Am. St. Rep. 859. In Sanderson v. Northern Pac. Ry. Co., 88 Minn. 162, 97 Am. St. Rep. 509, it is held that there can be no recovery for fright resulting in physical injury, in the absence of contemporaneous injury, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant. And in Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, it is declared that fright alone, unaccompanied by any physical injury, is not a basis for damages. To the same effect are St. Louis etc. Ry. Co. v. Bragg, 69 Ark. 402, 86 Am. St. Rep. 206, and Lee v. Burlington, 113 Iowa, 356, 86 Am. St. Rep. 379. See, however, Watson v. Dilts, 116 Iowa, 249, 93 Am. St. Rep. 239; Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 91 Am. St. Rep. 324.

HOUGH AVENUE SAVINGS AND BANKING COMPANY v. ANDERSSON.

[78 Ohio St. 341, 85 N. E. 498.]

SAVINGS BANKS, By-Laws and Rules of, When Reasonable.—The by-laws of a savings bank requiring presentation of the passbook and notice to the bank in the case of loss of the book as a condition precedent to payment are reasonable, and, when brought to the notice of the depositor, become part of the contract between him and the bank. (p. 708.)

SAVINGS BANKS, Duties of, in Making Payment.—Notwithstanding any contract between a savings bank and its depositors, it must exercise good faith and reasonable care in making payment, so that payments shall be made only to persons entitled to receive them. (p. 708.)

SAVINGS BANK, When Liable, Though Payment has been Made to a Person Presenting a Passbook.—If a passbook is presented by a person not claiming to be the depositor, but to have a written order from the latter for the payment of the money, and payment is made thereon without comparing the signature with that of the depositor, the bank is guilty of negligence, and remains liable to him if the order is a forgery, notwithstanding the rules printed in the passbook, declaring that the book must be presented for the purpose of having payments entered therein, and that the company will not be held liable for loss sustained where the depositor has not given notice of his book being stolen or lost, and that payment upon presentation of the book shall be a discharge of the company for the amount paid. (pp. 709, 710.)

Action to recover the amount of two deposits. The complaint alleged that some person unknown to the plaintiff had stolen the passbook and forged his name to an order, and that the defendants in the action, on the presentation of the passbook and a forged order, negligently and without due care, paid the deposits to a party who was not entitled to it.

At the time of making the first deposit, the depositor signed a card assenting to the rules and regulations of the bank governing savings deposits, among which printed in the passbook, was the following: "5. Deposits may be withdrawn by the depositor in person, or by written order; but in either case this passbook must be presented, that such payments may be duly entered therein. As the officers of the company may be unable to identify every depositor, the company will not be responsible for loss sustained where a depositor has not given notice of his or her book being stolen or lost, if such book be paid, in whole or in part, on presentation. In all cases, a payment upon presentation of a deposit-book shall be a discharge to the company for the amount so paid."

One Christenson obtained possession of the plaintiff's passbook, and, by presenting a forged order, induced payment to him thereunder, and the question was whether the defendant savings bank was entitled to be credited the amount of such payment.

White, Johnson, McCaslin & Cannon, for the plaintiff in error.

Herman J. Nord, for the defendant in error.

344 DAVIS, J. The plaintiff in error contends that under the contract between the parties in this case it cannot be held liable where payment was made upon presentation of the passbook; and that, if this contention is wrong, the testimony in this case is not such as to charge it with negligence.

These questions are new in this state, although they have been the subject of frequent adjudication in other states. These adjudications have uniformly held, where that question was involved, that by-laws of a savings bank requiring the presentation of the passbook and notice to the bank in case of the loss of the book, as conditions precedent to payment, are reasonable, and, when brought to the notice of the depositor, become a part of the contract between the bank and the depositor. But notwithstanding the contract relations of the parties, it has been quite as uniformly held, and it does not appear to be controverted here, that the bank is bound to exercise good faith and reasonable care in making payment so that payment shall be made to the person entitled to receive payment; and this is so because public policy will not allow the bank to so strip itself of 345 responsibility by contract as to enable it to safely pay, intentionally or heedlessly, to one who has come into possession of the passbook fraudulently or criminally.

In this case the fact of negligence by the bank was submitted to and found by the jury; and we think properly so. The passbook was not presented by the depositor, but by another person, by virtue of what purported to be the depositor's written order. The teller of the bank, who paid the money, testified that he was not acquainted with the defendant in error, the depositor; that so far as he knew the latter had never been in the bank, except on the two occasions when he made deposits; that he was not familiar with his signature; and that he did not compare the signature to the order with the genuine signature in possession of the

bank. His only excuse for not scrutinizing the order and comparing the signatures is that he knew the man who presented the order and passbook, and that he had before cashed checks for him which had turned out to be good. This evidence was, of itself, sufficient to justify the court in submitting to the jury the question of good faith and reasonable care on part of the bank, and therefore the finding of the jury was conclusive upon that point and supports the judgment: Chase v. Waterbury Sav. Bank, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329.

The plaintiff in error insists that since the by-law required the depositor to give notice that his passbook had been stolen or lost, and provided that the bank should not be responsible in default of such notice, and that "in all cases a payment upon presentation of a deposit-book shall be a [346] discharge to the company for the amount so paid," and since the defendant in error did not give notice of his loss prior to the payment, the bank is therefore discharged. Upon the assumption that the bank acted in good faith and in the exercise of due care, this argument may be valid; otherwise it is not sound. If the bank may negligently or through bad motives pay to a thief who has possession of the bankbook, because the owner has not given notice of a loss of which he is not then aware, and of which he does not become aware for months afterward, or if the bank may so pay in any case to a person who is not lawfully entitled to receive payment, then the depositor has contracted away his right to protection in any case, and the responsibility of the bank for good faith and reasonable care, which the law has imposed for reasons of public policy, is entirely futile.

Under the by-law which is the contract in this case, "payment upon presentation of a deposit-book" could only be made to the depositor in person or to some person designated by his written order. It was not paid to him in person nor to any person designated by him. It was paid upon a forged order; and if not paid by the bank at its own peril (Ladd v. Augusta Savings Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288), it was at least, as found by the jury, negligently paid to a person who had no right to the deposit.

The authorities cited by counsel for plaintiff in error are not applicable to the present case, because all of them, as we read them, are cases in which the bank was not negligent; and one of [347] them—Schoenwald v. Metropolitan Sav. Bank, 57 N. Y. 418—has been distinguished several times,

and so limited to the facts of that case that it cannot be regarded as of much value as an authority: Allen v. Williamsburgh Sav. Bank, 69 N. Y. 314; Smith v. Brooklyn Sav. Bank, 101 N. Y. 58, 54 Am. Rep. 653, 4 N. E. 123; Kummel v. Germania Sav. Bank, 127 N. Y. 488, 28 N. E. 398, 14 L. R. A. 786. The judgment is affirmed.

Price, C. J., Shauck, Crew, Summers and Spear, JJ., concur.

The Duties of Savings Banks to Their Depositors are discussed in the note to Kelley v. Buffalo Sav. Bank, 105 Am. St. Rep. 728. A rule of savings banks that the depositor shall produce his bankbook in order to draw his deposit or any part of it, and that production of such book shall be authority to the bank to pay the person producing it is a reasonable and binding regulation, and if the bank pays to one having such book, there being no negligence and no circumstances to excite suspicion, the payment is good against the depositor, although the bankbook is presented by one who has no right or title to it: Langdale v. Citizens' Bank of Savannah, 121 Ga. 105, 104 Am. St. Rep. 94.

STATE v. MULLIN.

[78 Ohio St. 358, 85 N. E. 556.]

SALES—Delivery to Carrier, Effect of.—If goods are delivered to a common carrier to be forwarded to the purchaser, or to a place designated by him, this constitutes delivery to, and receipt by, him, and such delivery, if in the usual course of business or in pursuance of directions given by the purchaser, effects the transfer of the title to him. (p. 711.)

SALES, When Complete, Though the Purchaser has not Become Entitled to Possession.—When, upon the sale of personal property in the possession of the vendor, the terms of the sale are agreed upon by all the parties, and the vendor has fully performed all things required of him, and only delivery remains to be made, the contract is so far absolute that title passes to the purchaser, though he is not entitled to possession until the price agreed upon is paid. (p. 712.)

SALE, Where Deemed to have been Made When Property is Delivered C. O. D.—Where goods are sold and delivered to an express company marked "C. O. D.," to be forwarded to the purchaser, the company becomes his agent to receive the goods, and the agent of the purchaser to receive the price, and the sale is deemed made and completed at the place where the goods are received by the company, though the purchaser has not paid the purchase price and is not entitled to possession until he does so. (p. 716.)

INTOXICATING LIQUORS Sent C. O. D., Sale of, Where Deemed to have been Made.—If the terms of a sale of intoxicating liquors are agreed upon between the vendor and purchaser, and they are delivered to an express company for shipment C. O. D. to the purchaser, the sale is deemed made at the place of shipment, and the vendor is not guilty of selling such liquors where they are so received. (p. 716.)

Prosecution for selling intoxicating liquors in violation of the township local option law. The question submitted to the appellate court was whether such liquors were deemed sold at the place where the contract of sale was made or at the place where they were received by the purchaser from the express company. It was agreed that the defendant Mullin was a resident of Amsterdam, Jefferson county, Ohio, and was engaged in the business of selling intoxicating liquors, and that one Howard Dunn, being a resident of Green township, Harrison county, Ohio, mailed a letter to the defendant, which was received by him at Amsterdam, requesting a shipment of a case of intoxicating liquor to said Howard Dunn at Burton station, on the line of the Lake Erie, Alliance and Wheeling Railroad, in Green township. In the request for the liquor, Dunn stated that the purchase price and express charges would be paid upon delivery to him at Burton Station. The defendant delivered the liquor at his home place of business to the Adams Express Company, a common carrier, directed to Howard Dunn, C. O. D., and such liquor was afterward delivered accordingly.

The trial court found the defendant guilty and sentenced him to fine and imprisonment. He prosecuted error to the circuit court of Harrison county, which reversed the judgment, and error was thereupon prosecuted to the supreme court.

E. S. McNamee, for the plaintiff in error.

R. H. Minteer, for the defendant in error.

[364] CREW, J. The law is well settled, in the absence of agreement to the contrary, that the delivery of goods to a common carrier, and especially [365] to one designated by the purchaser, for conveyance to him or to a place designated by him, constitutes a delivery to and receipt by the purchaser; and such delivery, if in the usual course of business or in pursuance of directions given by the purchaser, effects a transfer of title to the property so delivered. In such cases the carrier is, in contemplation of law, the bailee of the person to whom, and not by whom, the goods are sent, the latter, in employing the carrier, being considered as the agent of the former for that purpose; Benjamin on Sales, 7th Am. ed., sec. 181; Story on Sales, 4th ed., sec. 306; 24 Am. & Eng. Ency. of Law, 1071, and cases there cited. When upon the sale of personal property in possession of the ven-

dor the terms of sale have been agreed upon and assented to by the parties, and the seller on his part has fully performed all things required of him by the terms of the contract, and only delivery remains to be made, the contract of sale between the parties is so far absolute that title to the subject matter of the sale passes to the purchaser, even though he be not entitled to possession of the goods purchased until he pays the consideration agreed upon. Judge Story, in his work on Sales, at section 300, states the law as follows: "Where the seller has performed all that is required of him by the terms of the contract, as to all of the goods, and the delivery alone remains to be made, the property vests in the buyer, so as to subject him to the risk of any accident which may befall the subject matter of the sale. It is not necessary for the seller to deliver the goods to the buyer in order to transfer [306] the title, since the right of property does not depend upon the actual possession. Although, therefore, the seller has a right of lien upon them and cannot be forced to surrender possession until payment is made of the price, yet the goods may be, nevertheless, the property of the buyer." The authorities in support of the principles above announced are so uniform and consistent that further citations seem unnecessary. Applying, then, to the case in hand, these apparently well-settled rules and principles, the sale of intoxicating liquors here in question must, we think, upon the agreed facts in this case, be held to have been made at Amsterdam, and not at Burton Station. The pertinent and essential principles of the law of sales which, applied to the agreed facts, must govern and control in the present case, are clearly and succinctly stated in Pilgreen v. State, 71 Ala. 368, a case directly in point. In that case a conviction was had under a statute making it unlawful to sell intoxicating liquors within five miles of certain churches in Columbiana. The defendant was a licensed liquor dealer doing business at Calera, twelve miles distant. He received by mail an order from one Dollar, requesting that he would send to him at Columbiana a half gallon of whisky by the Southern Express Company, marked C. O. D. The defendant filled the order at Calera, there delivered the whisky to the express company, and by the company it was delivered to Dollar at Columbiana, where he paid the price and all charges to the express company from whom the defendant received the price at Calera. Upon these facts the supreme court held that Calera was [307] the place of sale. Brickell,

C. J., delivering the opinion of the court, said: "All dealings between buyer and seller were at Calera. There the offer of the buyer was received, accepted and acted upon, and there every act was done which it was intended the seller should do. The general property in the thing sold there passed to the buyer by delivery to the carrier of his own appointment, though he could not entitle himself to possession until he paid the price to the carrier. The carrier was his agent to receive the thing sold at Calera, and was the agent of the seller to receive the price. It would have been a neglect of duty as a collecting agent, rendering the express company liable to the seller, if there had been a delivery of the whisky without payment of the price; and if possession had been wrongfully obtained, it may be the seller could have reclaimed it. The general property, however, passed to the buyer by the delivery to the express company at Calera; the risk of loss then passed to him though there may have remained in the seller a special property, and though the buyer could not, without payment of the price, entitle himself to the absolute property, and to the actual possession. A sale, which will be in violation of the statute under which the conviction was had, must, within the designated locality, pass the title; a sale made in a different locality, where the liquor is set apart and delivered to the purchaser, or to a carrier for him, passing title, is not within its words or spirit."

In State v. Intoxicating Liquors, 73 Me. 278, the claimant, Moffitt, sent [368] an order to a firm in Boston for whisky to be forwarded to him by express C. O. D. at Winthrop, in the state of Maine. The whisky was sent as ordered. Immediately upon its arrival, the package containing the whisky was seized by the authorities as liable to confiscation under the Maine liquor law. The claimant tendered the charges to the express company, and intervened in the legal proceedings claiming the package. The court held he was entitled to it, and ordered it returned to him. In the opinion by Peters, J., it is said: "Undoubtedly the initials 'C. O. D.' mean collect on delivery, or, more fully stated, deliver upon payment of the charges due the seller for the price and the carrier for the carriage of the goods. These initials have acquired a fixed and determinate meaning which courts and juries may recognize from their general information. Here, then, was a sale of the property to the claimant, the price payable on delivery. The title passed to the ven-

dee when the bargain was struck. Any loss of the property by accident would have been his loss. The vendor had a lien on the goods for his price. The vendor could sue for the price, and the vendee, upon tender of the price, could sue for the property. In this case both the seller and purchaser had a qualified right of possession, the seller upon the purchaser's neglect or refusal to pay for the goods, and the buyer by paying for the same." In the case at bar it appears from the agreed statement of facts that the sale in question was made upon a written order addressed to the seller, William Mullin, whose place of business was in the village of [369] Amsterdam. It was there that the offer of Dunn, the purchaser, was received, accepted and acted upon. Upon receipt of the order, the beer ordered was set apart, and, in accordance with the express directions of the purchaser, was delivered to and accepted by a carrier of his selection, to be transported to him at Burton Station, he, as purchaser and consignee, to pay the cost of transportation. When the order sent by Dunn was received and acted upon by Mullin, and the property ordered had been delivered by him to the express company, as requested by Dunn, the contract of sale was so far complete that title to the property passed to the purchaser, and a right of action accrued to the seller for the recovery of the purchase price. The mere fact that the goods were sent marked "C. O. D." did not, in this case, constitute the express company the agent of Mullin for the purpose of making delivery to the purchaser at Burton Station of the goods sold, for, in contemplation of law, delivery had already been made at Amsterdam. The express company, while undoubtedly the agent of Mullin to receive the price, was the agent of Dunn, the purchaser, to receive for him at Amsterdam the property purchased. Hence, the sale was a sale at Amsterdam, and title to the property sold there passed to the purchaser: Norris v. State, 25 Ohio St. 217, 18 Am. Rep. 291; Commonwealth v. Fleming, 130 Pa. 138, 17 Am. St. Rep. 763, 18 Atl. 622, 5 L. R. A. 470; Garbracht v. Commonwealth, 96 Pa. 449, 42 Am. Rep. 450; State v. Carl, 43 Ark. 353, 51 Am. Rep. 565; Black on Intoxicating Liquors, sec. 434; Higgins v. Murray, 73 N. Y. 252; 1 Parsons on Contracts, sec. 533.

The case of State v. O'Neil, 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586, and [370] Village of Bellefontaine v. Vassaux, 55 Ohio St. 323, 45 N. E. 321, are relied upon by counsel for plaintiff in error as supporting his contention that the sale

of intoxicating liquors here in question was a sale made at the place of destination and not at the place of shipment. Both of these cases, however, are upon the controlling facts, clearly distinguishable from the present case. In State v. O'Niel, 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586, at the time the liquor was delivered to the express company for transportation, there was attached to the bill of said liquor, as part of the contract of delivery, the following express written instructions: "Do not deliver the whole or any part of the goods accompanying this bill until you receive pay therefor. If goods are refused, or parties cannot be found, notify the office from whence received with names and dates, and await further instructions." The court, in the opinion in that case, discussing the effect of such a delivery to the carrier, say: "Attached to the very body of the contract, and to the act of delivery to the carrier, was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was intended by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee, and if he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise, to notify the consignor and hold them subject to his order. It is difficult [371] to see how a seller could more positively and unequivocally express his intention not to relinquish his right of property or possession in goods until payment of the purchase price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them deliverable upon the order of, his agent, with instructions not to deliver them except on payment of the price, or performance of some other specified condition precedent by the vendee." As showing that the case of Bellefontaine v. Vassaux, 55 Ohio St. 323, 45 N. E. 321, does not support the contention of counsel for plaintiff in error, but is in entire harmony with the authorities above cited, we need only call attention to the first two clauses of the syllabus in that case; they read as follows: "1. The general rule is that title to goods intended to be transported passes from the vendor to the purchaser upon delivery by the former to a common carrier consigned to the

purchaser, whether paid for or not. But if the vendor consigns the goods nominally to the purchaser, but actually in care of his own storekeeper, who is to retain them in control and give possession to the purchaser only on payment of the purchase price, then the delivery to the common carrier is not, in law, delivery to the purchaser. 2. Under such circumstances, the shipment being in effect to the vendor himself, the delivery, when it occurs, would be at the storehouse of the vendor; and the transaction would not be a completed sale at the point of shipment."

We are of opinion that upon the agreed facts, the judgment of conviction in the [872] present case was properly reversed by the circuit court and the defendant discharged.

Judgment affirmed.

Price, C. J., Shauck, Summers, Spear and Davis, JJ., concur.

Sales are Consummated upon the Delivery and Transfer of Title. Hence, where liquor is sold to be delivered f. o. b., the cars at a certain place, it becomes the property of the purchaser when it is delivered at such place to the carrier, who, for the purposes of delivery, represents the purchaser: Bollinger v. Wilson, 76 Minn. 262, 77 Am. St. Rep. 646. A sale of intoxicating liquor, ordered by express, is complete, and property passes to the purchaser, when the liquor is delivered to an express agent for transportation, and not when it is received of the express agent by the purchaser: State v. Flanagan, 38 W. Va. 53, 45 Am. St. Rep. 836. And if an agent for a liquor house takes a written C. O. D. order for liquor, the sale is consummated at the place of shipment, and not at the place of destination, although there is an oral agreement that the purchaser need not accept the liquor, and that the title shall remain in the seller until the liquor is paid for: Golightly v. State, 49 Tex. Cr. 44, 122 Am. St. Rep. 779. See, too, Hart v. State, 87 Miss. 171, 112 Am. St. Rep. 437.

If Whisky is Sent by Express from One State to Another to a person who knows nothing of it until it arrives at its destination, when others desiring liquor give him the money to pay the express charges, and he so uses the money, and turns the whisky over to them, he is guilty of making a sale of intoxicating liquor in violation of a local option law: Dunn v. State, 48 Tex. Cr. 107, 122 Am. St. Rep. 734.

CASES

IN THE

SUPREME COURT

OF

RHODE ISLAND.

MITCHELL v. DONANSKI.

[28 R. I. 94, 65 Atl. 611.]

MALICIOUS PROSECUTION—Issuance of Warrant.—An action for malicious prosecution does not lie for procuring the issuance of a warrant upon a charge not actionable per se, where no service of the warrant has been made and no judicial action has been taken in the proceeding and no special damage is alleged. (p. 719.)

Trespass on the case for malicious prosecution.

Edward G. Carr, for the plaintiff.

William T. O'Donnell and Edward DeV. O'Connor, for the defendant.

95 BLODGETT, J. The defendant's demurrer to the declaration in this action for malicious prosecution having been sustained by the superior court, the plaintiff seeks here a reversal of that ruling by his exceptions thereto.

The error alleged is thus stated:

"That said court made an error of law in sustaining said demurrer:

"a. In deciding that plaintiff had not alleged in said declaration such a commencement or beginning of the criminal prosecution declared upon as to entitle him to maintain the present action.

"b. In deciding that service of process, i. e., arrest of the defendant in the criminal prosecution, was necessary to the maintenance of the present action.

"c. In deciding that plaintiff had not alleged in his said declaration such a termination of the criminal prosecution as to entitle him to maintain the present action.

"d. In deciding that plaintiff had not set forth in said declaration a cause of action."

The declaration, after alleging a complaint under oath to the clerk of the fifth judicial district court by the defendant against the plaintiff, "falsely, maliciously, and without probable cause," charging him with threatening to assault and to kill the defendant, and the issuance of a warrant thereon and its direction and delivery to one James Hoard, Jr., the town sergeant of Bristol, for service, thus continues: "That the said James Hoard, Jr., had said warrant in his hands and possession for the purpose and with the intention of serving the same on the said plaintiff for a long time, to wit, till the twenty-second day of said month, and during all that time made divers efforts and attempts to serve the same on the said plaintiff; that on said last mentioned day the said defendant instructed said James Hoard, Jr., not to serve the said warrant upon the said plaintiff, but to forever desist from and abandon the same, and the said James Hoard, Jr., did thereupon desist from the service [96] of said warrant on said plaintiff and entirely abandon the same, and said defendant paid the costs of said prosecution to said last mentioned date, and withdrew, dismissed and entirely abandoned said complaint and prosecution."

It is evident that the charge preferred against the plaintiff was not the commission of a crime, and was not slanderous per se. In Fanning v. Chace, 17 R. I. 388, 33 Am. St. Rep. 878, 22 Atl. 275, 13 L. R. A. 134, this court says: "It therefore follows that, as mere intent to commit a crime is not a violation of law, and hence not punishable, to accuse one of having such an intent is not to accuse him of any crime or offence."

While there is not a uniformity of decision upon this question, cases are not wanting which hold that, in a criminal prosecution, service of process is necessary before an action of malicious prosecution will lie.

In Byne v. Moore, 1 Marsh, 12, it was said by Lord Chief Justice Mansfield: "I cannot see what damage a man can sustain by the preferring a bill of indictment against him which is not found. How, then, can the law say that a man can support an action for preferring an indictment against him by which he has sustained no actual damage? It does not appear that the plaintiff's personal security was ever endangered. It would be a very bad precedent if this nonsuit were set aside, as every bill that was thrown out by the grand jury would become the foundation of an action."

So in Cooper v. Armour, 42 Fed. 215, 8 L. R. A. 47, it was said by Judge Wallace: "Without doubt, libel or slander will lie for an accusation to a magistrate when made with no bona fide intention of prosecuting it. Unless such facts can be shown by the person accused, or unless he is subjected to the vexation and expense of process against him, upon principle, he ought not to be allowed to recover." And in Gregory v. Derby, 8 Car. & P. 749, there is also the dictum of Patteson, J., that "If the party was never apprehended, no action at all would lie." And it is also observed by Colcock, J., in O'Driscoll v. McBurney, 2 Nott & McC. 54: "There can be no prosecution without an arrest." And see Lawyer v. Loomis, 3 N. Y. Super. Ct. 395; Heyward v. Cuthbert, 4 McCord, 354; Sheppard [97] v. Furniss, 19 Ala. 760, and Savill v. Roberts, 12 Mod. 208.

It is quite evident that no action would lie for the malicious prosecution of a civil action if the plaintiff had not been arrested or his property attached, or he had not even been summoned; and we think the analogy should hold good in criminal cases, at least where the charge is not actionable per se or where there is no specific allegation of special damage accruing before the service. And the case at bar is of this class. Indeed, before the case can be said to have terminated in his favor the plaintiff here must in some way be made a party to it, and in strictness he is not a party until he is made so by the service of process.

The authorities are not agreed as to what constitutes the termination of the original action. But it clearly is not in the power of the complainant to instruct an officer, charged with the criminal process of the state, to disregard the mandate of the court which issued the process, and thereby to end the proceeding. For all that appears in the declaration, the warrant of arrest is still in the hands of the officer, who may serve it at any time. The action of the court in discharging the accused or in recalling the warrant is at least necessary before this proceeding can be held to be at an end. Thus, in White v. Apsley Rubber Co. (1902), 181 Mass. 339, 63 N. E. 885, it was said: "The warrant has never been returned, and since it was issued there has been no judicial action upon the complaint. The fact that the prosecution has not been terminated bars any recovery upon the counts for malicious prosecution," thus distinguishing between such an action and an action for the abuse of process: See, also, Knott v. Sargent, 125 Mass. 95; Commonwealth v. Hart,

149 Mass. 7, 20 N. E. 310; Commonwealth v. McClusky, 151 Mass. 488, 25 N. E. 72; Graves v. Dawson, 133 Mass. 419; Langford v. Boston & Albany R. R. Co., 144 Mass. 431, 11 N. E. 697.

The proceedings in case a charge of threatened violence or other criminal charge triable before a district court is not sustained are thus specified in section 157 of the court and practice act, viz., "the court shall forthwith discharge the accused."

In Chapman v. Woods, 6 Blackf. 504, in which the original
08 indictment was nol prosed and the court rendered the following judgment: "It is therefore considered that said defendant as to said indictment go hence, thereof acquit, without day," it was said that all the authorities concur that to support an action for malicious prosecution it must be shown that the prosecution is determined, "and perhaps it is equally true, that the entry of a nolle prosequi by the prosecuting attorney without any judgment of the court discharging the defendant from the indictment is not regarded as such a termination. Is the prosecution to which reference is made in this case at an end? We answer it is. Although a new indictment may be preferred against the defendant, new process cannot issue upon the former indictment. The judgment of the court puts an end to further proceedings against the defendant upon it. Where a man is maliciously indicted, he may not be able to obtain a trial on the merits, if the prosecuting attorney is determined to, and actually does, nol. pros. the indictment. It is, therefore, not unreasonable that he should, in that event, ask for and obtain a judgment of the court discharging him from further answering to the indictment; and in such a case, if no action lies, an innocent man may be harassed without the hope of redress." And see Hays v. Blizzard, 30 Ind. 457; Gallagher v. Stoddard, 47 Hun, 101; Stanton v. Hart, 27 Mich. 539; Fay v. O'Neill, 36 N. Y. 11; Lytton v. Baird, 95 Ind. 349; Kelley v. Sage, 12 Kan. 109; M'Cormick v. Sisson, 7 Cow. 715; Driggs v. Burton, 44 Vt. 134; Shackleford v. Smith, 1 Nott & McC. 36; Whaley v. Lawton, 57 S. C. 256, 35 S. E. 558; Combe v. Capron, 1 Moody & R. 398; Sayles v. Briggs, 4 Met. 291; Carpenter v. Nutter, 127 Cal. 61, 59 Pac. 301; 2 Greenleaf on Evidence, sec. 452; and see observation of Lord Tenterden, C. J., in Whitworth v. Hall, 2 Barn. & Adol. 697.

The plaintiff's exceptions are overruled, the demurrer is sustained, and the case is remitted to the superior court for further proceedings.

The Malicious Prosecution of Criminal Actions is discussed in the note to Ross v. Hixon, 26 Am. St. Rep. 127; and the malicious prosecution of civil actions is discussed in the note to McCormick Harvesting etc. Co. v. Willan, 93 Am. St. Rep. 454.

ARNOLD v. RHODE ISLAND COMPANY.

[28 R. I. 118, 66 Atl. 60.]

CARRIERS—Right of Passenger to Resist Expulsion.—If a passenger on a street-car is entitled to transportation, and presents to the conductor the evidence of his right which the company has established for that purpose, he may lawfully resist expulsion and recover in a suitable action against the company for damage caused by the violence of its servant. (p. 723.)

CARRIERS.—If a Transfer Offered by a Passenger upon a street-car was good for passage upon the car where he offered it, according to the rule and practice of the railway company, it is immaterial whether the statute had compelled it to enact such a rule and establish such a practice. Its obligation to the public had been established by its own course of dealing, and so had become binding upon it by its voluntary act, whether it exceeded the requirement of the statute or not. (p. 724.)

CARRIERS—Excessive Damages for Expelled Passenger.—A verdict of one hundred and seventy-five dollars for rejecting a valid transfer and expelling the passenger from a street-car is not excessive, where on two previous occasions, and under similar circumstances, his transfer had been refused and another fare exacted, which fare had subsequently been refunded by the carrier. (p. 727.)

William J. Brown, for the plaintiff.

Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman and Alonzo R. Williams, for the defendant.

119 DOUGLAS, C. J. This is an action of trespass on the case, brought by a passenger upon one of the street-cars which the defendant operated in the city of Providence, to recover damages for being forcibly ejected from the car by the defendant's servant. The plaintiff presented a transfer which he claimed to be good, but which the conductor refused to accept for his fare, demanding a further cash payment which the plaintiff refused to pay. The plaintiff recovered a verdict of one hundred and seventy-five dollars in the superior court, and the presiding justice refused the defendant's mo-

tion for a new trial, based on the ground that the verdict was contrary to the evidence and that the amount was excessive.

The exceptions allege error in the denial of the defendant's motion for a new trial and in certain rulings of the court at the trial, and in the charge.

The first question raised by the exceptions is whether the form of action is correctly chosen, the defendant contending that, if the transfer were valid, the plaintiff should have paid the fare demanded and resorted to an action of assumpsit to recover it back.

The cases which are cited by counsel, however, do not support this proposition to its full extent.

Thus it is held in Norton v. Consolidated Ry. Co., 79 Conn. 109, 118 Am. St. Rep. 132, 63 Atl. 1087, that a passenger who is aboard a street-car without a proper transfer ticket, due to the negligence of the conductor of the car from which he was transferred, is entitled to sue for breach of contract for failure to furnish a proper ticket and recover the loss necessarily following therefrom, but he cannot refuse to pay his fare and to forcibly resist being expelled from the car; and where he does so, and no more force is used than necessary to remove him from the car, he can only recover nominal damages. The case is supported by abundant citations from many jurisdictions, but it does not decide the issue presented to us.

[120] So in Bradshaw v. South Boston R. Co., 135 Mass. 407, 46 Am. Rep. 481; Dixon v. New England R. Co., 179 Mass. 242, 60 N. E. 581; Kiley v. Chicago City Ry. Co., 189 Ill. 384, 82 Am. St. Rep. 460, 59 N. E. 794; Brown v. Rapid Ry. Co., 134 Mich. 591, 96 N. W. 925, the passenger did not present a ticket which entitled him to passage in the car in which he was traveling, as the plaintiff in the case at bar claims that he did.

In Monnier v. New York etc. R. R. Co., 175 N. Y. 281, 96 Am. St. Rep. 619, 67 N. E. 569, 62 L. R. A. 357, and in Crowley v. Fitchburg etc. Ry. Co., 185 Mass. 279, 70 N. E. 56, the passenger had no ticket at all.

In Western Maryland R. Co. v. Schaun, 97 Md. 563, 55 Atl. 701, the passenger had an invalid ticket, and in McGhee v. Reynolds, 117 Ala. 413, 23 South. 68, the ticket offered was void on its face.

In Hufford v. Grand Rapids & Indiana Ry. Co., 53 Mich. 118, 18 N. W. 580, in the opinion by Chief Justice Cooley it is said: "If the conductor, who was manager of the train,

informed him that for any reason the ticket was one he could not receive, a contest with him over it must generally be very profitless, and therefore unadvisable. But we are all of the opinion that if the plaintiff's ticket was apparently good, he had a right to refuse to leave the car."

We have no doubt that this is generally understood to be the law. It would be as reasonable to require the company to carry a man who refuses to pay his fare and sue him for it afterward as it would be to require a man who presents the proper evidence that he has paid his fare to pay it again and resort to his action of contract to recover it. If the passenger is entitled to his transportation and presents to the conductor the evidence of his right which the company has established for that purpose, he may lawfully resist expulsion and recover in a suitable action against the company for damage caused by the violence of its servant.

In Atchison etc. R. R. Co. v. Dickerson, 4 Kan. App. 345, 45 Pac. 975, the court treat a similar argument to the one here presented as follows (page 354): "It is also contended that Dickerson could have escaped the humiliation and indignity by paying the excess, and then his measure of damages would be ten cents; that he had no right to aggravate the damages by not [121] complying with the demand of the conductor. We are not partial to a rule that would require a person to submit to an extortion for the purpose of relieving the extortioner from the natural consequences of his acts."

In Jeffersonville R. Co. v. Rogers, 28 Ind. 1, 92 Am. Dec. 276, the court say: "It is argued that the utmost damages recoverable was the difference between the two rates of fare, fifteen cents, by paying which all other inconvenience and damage would have been avoided. But no man is bound to submit to even a trifling extortion. If he had a right to be carried for the sum tendered to the conductor, then the expulsion was purely wrongful, and for the consequences thereof the defendant was liable. The plaintiff was under no obligation to purchase even for a trifle the right which was already his own. This principle is elementary."

In New York etc. R. Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. Rep. 356, 36 L. ed. 71, it is held that where a party is rightfully on a car or train as a passenger, he has a right to refuse to be ejected from it, and to make sufficient resistance to being put off to denote that he was being removed by compulsion and against his will; and the fact that un-

der such circumstances he was put off the car or train is of itself a good cause of action against the company, irrespective of any physical injury which he may have received: See, also, Murdock v. Boston & Albany R. Co., 137 Mass. 293, 50 Am. Rep. 307, and New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. Rep. 1039, 30 L. ed. 1049.

The next contention is that the statute requiring the defendant corporation to give transfers between its lines does not in terms require a transfer, such as the plaintiff had, to be accepted on the car on which he offered it, and that, therefore, a rule of the company making such a transfer valid is of no effect. The insufficiency of this argument is apparent. The statute, while requiring certain accommodations from the company, did not forbid it to grant more ample ones to the public. If the transfer offered by the plaintiff was good for passage upon the car where he offered it, according to the rule and practice of the defendant, it is immaterial, as ruled by the [122] court below, whether the statute had compelled it to enact such a rule and establish such a practice. Its obligation to the public had been established by its own course of dealing, and so had become binding upon it by its voluntary act, whether it exceeded the requirement of the statute or not.

The statute imposed upon the defendant the duty of giving transfers. The plaintiff had paid for passage along Brook street to Waterman, and thence along Waterman by either line passing that corner going east. The company had adopted a certain voucher to be presented to its conductors by a passenger, like the plaintiff, who claimed the right to ride on the Butler avenue line by transfer from another car. The company was therefore bound to see that its conductor accepted and honored the voucher which it had provided for that purpose. The language or marks on the transfer card were nothing to the plaintiff so long as it was the card which the defendant's rule made good for him to show on the car to which he transferred.

In order to understand the evidence in the case it is necessary to know that Waterman and Angell streets, between Prospect street and Wayland avenue run east and west, substantially parallel to each other, Angell street lying to the north of Waterman; and that Brook street runs north and south crossing Angell street at right angles. At the time to which the case relates the Dyer avenue line, after crossing Brook street, ran easterly on Waterman street to Wayland

avenue, thence northerly to Angell street, thence easterly to Butler avenue, thence northerly to Blackstone boulevard, and along Blackstone boulevard to the entrance of Swan Point Cemetery. The Elmgrove avenue line ran over the same route to Angell street, thence westerly on Angell street to Elmgrove avenue, and thence northerly on Elmgrove avenue to its termination.

About half-past 6 P. M., June 14, 1905, the plaintiff who wished to go from his place of business on Brook street to his home on Elmgrove avenue, boarded a Brook street car, going north on Brook street. He paid his fare and asked for and received a transfer to the Elmgrove avenue line. When [123] he reached the corner of Waterman street and Brook, the Elmgrove avenue car had passed by and he boarded the next car going east on Waterman street, which was a Dyer avenue and Swan Point car. When the plaintiff's fare was demanded by the conductor he tendered the said transfer, which the conductor refused to accept, upon the ground that it was not good upon that line. After some conversation, in which the plaintiff informed the conductor that he had been assured by Mr. Potter, the general superintendent of transportation, that such transfers were good on that line, and in which he requested the conductor to take from his pocket the printed regulations of the company, which directed him to receive such transfers upon that line, the conductor persisted in refusing the transfer, insisted that the plaintiff must pay his fare, or he would put him off the car; and thereupon, the plaintiff refusing to pay his fare, the conductor stopped the car and with the assistance of the motorman removed the plaintiff from the car, using such force as was necessary.

There was no contradiction of this evidence, the defendant calling no witnesses.

The plaintiff accepted the burden of showing that the transfer which he offered was valid. To prove this he introduced a rule of the company for the guidance of its conductors, as follows: "Dyer Avenue and Butler Avenue Line. On east bound trips conductors will honor transfers punched for Butler Ave., Elmgrove Ave., or Red Bridge, E., in accordance with the general rules and time limit, telling the passengers how far you go on Angell Street."

It appeared also in evidence that some time previous to the occurrences to which this action relates a change had been made in the direction in which these lines of cars were

run on Waterman and Angell streets. When this rule was printed, it was the custom for the Dyer avenue, Elmgrove avenue, and Red Bridge lines of cars to run easterly on Angell street and to return westerly on Waterman street, instead of running easterly on Waterman street and returning westerly on Angell street as they did at the time in question. It was seriously urged that this rule could have no application to the state of [124] affairs existing after the change of direction, although the testimony was overwhelming that the rule still continued in force and operation, simply making the transfer point from Brook street the corner of Waterman street, instead of the corner of Angell street, and reversing the change to passengers changing to Brook street. The new point of intersection became, of necessity, the point of transfer, and the rule applied as before.

In further support of the validity of his transfer the plaintiff testified that on two occasions previous to the fourteenth day of June 1905, the last time some six or eight weeks before that date, the Dyer avenue conductor had refused to accept from the plaintiff a transfer from the Brook street line to the Elmgrove avenue line; that on each occasion the plaintiff had paid his fare and reported the circumstances to Albert E. Potter, who was then the superintendent of transportation of the defendant company, and who had charge of all conductors and motormen and issued all instructions and rules of government for the lines of the company, that on these occasions his fare was refunded and he was told by Mr. Potter that under the rules of the company an Elmgrove avenue transfer from Brook street was good on a Dyer avenue car. This evidence was corroborated by Mr. Potter, who was called by the plaintiff, and also by Roscoe E. Anderson, chief clerk of the transportation department of the defendant, who also assented to the existence and application of the general rule quoted above. The objections which are made and urged to the admission of evidence during the trial, and the objection to the charge, relate to this testimony. They are not strenuously relied upon before us, and an exhaustive examination of the specific objections does not show us that any substantial error was committed in the admission of the questions to which they relate, or in the comments thereon in the charge.

The final ground of exception is that the damages assessed were excessive. Considering all the facts of the case, we do not think so. The plaintiff had submitted to the impositions

practiced upon him by the servants of the defendant until forbearance had ceased to be a virtue. In each preceding [125] case he had been assured by the managing officers of the road that he was right in his demands, and that the rule which he was informed was in operation should be observed. Nothing less than substantial damages would seem likely to compel the company to see that its regulations should be obeyed by its servants. The plaintiff's counsel has cited a number of cases in which larger verdicts have been sustained in no more aggravated cases. Among them are Finch v. Northern Pac. R. Co., 47 Minn. 36, 49 N. W. 329; Chicago etc. R. Co. v. Holdridge, 118 Ind. 281, 20 N. E. 837; Hardenbergh v. St. Paul etc. Ry. Co., 41 Minn. 200, 42 N. W. 933; Lake Shore etc. R. Co. v. Teed, 2 Ohio Dec. 662.

Our conclusion, upon the whole case, is that the exceptions must be overruled and the cause remanded to the superior court for judgment on the verdict; and it is so ordered.

CARRIERS—RIGHT OF PASSENGER TO FORCIBLY RESIST UNLAWFUL EJECTION.

I. Scope, 727.
II. Right to Forcibly Resist—In General, 728.
III. Illustration.
a. Where Right to Resist is Upheld, 729.
b. Where Right to Resist is Denied, 731.
IV. Conclusion, 735.

I. Scope.

Our discussion in this note is limited strictly to the subject indicated by the title, and no cases are reviewed except those where the exact question under consideration was before the court. There are a great many cases which sustain the doctrine that it is not the duty of the passenger to pay fare wrongfully demanded in order to avoid ejection, but that he may stand upon his rights and refuse to leave the car, and recover damages from the carrier if his refusal is followed by expulsion. The resistance in these cases, however, extended no further than a refusal to leave the car, and the real question involved was as to the right to recover damages for the breach of contract of carriage, and not for any injuries sustained by reason of forcible expulsion. A discussion of the rule announced in this class of cases will be found in the note appended to St. Louis etc. Ry. Co. v. White, 122 Am. St. Rep. 638, and as some of these cases, at least, may, by analogy, seem to justify the right of forcible resistance, the reader should consult that note in connection with this. The note appended to Thompson v. Gardner etc. St. Ry. Co., 118 Am. St. Rep. 461, will also throw some light on the topic here considered, when the carrier concerned is a street railway company. The reasonableness of rules and regulations of carriers, as justifying the expulsion of passengers who fail to comply with them, is discussed in the note

appended to Commonwealth v. Powers, 41 Am. Dec. 471, and as the right of a passenger to resist such expulsion is also there considered, that note will be found of assistance to those interested in the subject of the present note.

II. Right to Forcibly Resist—In General.

There is no conflict of authority over the rule supported in the principal case of Arnold v. Rhode Island Co., 28 R. I. 118, ante, p. 721, 66 Atl. 60, that where a passenger is lawfully on the conveyance of a common carrier, and is entitled to transportation as evidenced by the token which has been furnished him by the carrier, he is not bound to submit to wrongful expulsion, upon refusing to pay another fare, but may make such resistance as is necessary to maintain his rights, and recover for any injuries caused by the violence used in his expulsion. This rule simply applies to carriers the fundamental principle that every person has the right to forcibly resist an illegal assault. But it not infrequently happens that, through the negligence or mistake of some agent or servant of the carrier, one who has paid for his right of passage is given a ticket which is defective, and which for that reason the conductor refuses to accept. In such cases, is the face of the ticket to be treated as the sole criterion of the holder's right to transportation, or can he rely on the acts and statements of the agent or servant of the carrier who furnished him the ticket, so as to justify him in forcibly resisting any attempt to expel him for refusing to pay another fare? On this question, there is sharp conflict of judicial opinion. One line of cases holds that the face of the ticket is, as between him and the conductor, the sole criterion of the holder's right of passage, and that it is his duty, if the ticket is defective, to pay another fare when demanded, or to peaceably leave the car, and that he has no right to resist and increase the damages by causing force to be used in affecting his expulsion. The theory upon which these cases proceed is, that no one has a right to resort to force to compel the performance of a contract, and further, that though the holder of a defective ticket is not at fault, he should peaceably submit to a wrong rather than create a disturbance and possibly endanger the safety of his fellow-passengers. Another line of cases deny the ticket such conclusive force and dignity, and hold that the passenger can rely on the acts and statements of the company's agents or servants, and that when he has acted in good faith and without fault, he has the right to refuse further payment of fare, and offer sufficient resistance to prevent his expulsion, notwithstanding the fact that his ticket is defective. This latter class of cases seems to us founded upon much the better reasoning, namely, that it is the contract, and not the ticket, which gives the right of transportation—that the ticket is simply the evidence of the contract furnished by the carrier, which the holder is not allowed to alter or change, and which he has the right to presume is a faithful expression of the contract as made. The argument that a passenger should quietly submit to a wrongful expulsion rather than

create a disturbance and possibly endanger the safety of his fellow-passengers strikes us as an attempt to visit upon the offended the wrong of the offender. However potent such an argument might be ad homine, it can hardly be justified from the standpoint of law. The cases where the exact question considered in this note is directly decided are not numerous, and as the circumstances which gave rise to the decisions vary more or less in each case, the only practical method of determining the general effect of the rulings is by a review of the cases themselves.

III. Illustration.

a. **Where Right to Resist is Upheld.**—In Ellsworth v. Chicago etc. Ry. Co., 95 Iowa, 98, 63 N. W. 584, 29 L. R. A. 173, plaintiff had purchased a ticket from the agent of the defendant company, which, under the rules of the company, was good only on the date stamped on the ticket. Through a mistake of the agent, the ticket given plaintiff had been stamped three days earlier than the date of its purchase by plaintiff. The conductor refused to accept the ticket, and, upon plaintiff's refusal to pay full fare demanded, he was forcibly ejected from the train. It was contended on the part of defendant that it was the duty of the plaintiff not to enhance damages by resistance, but that he should have submitted quietly to ejectment, and then seek his damages. The court said: "To say the least, we think he may make any resistance, not amounting to a criminal disturbance of the peace, ... and that he is not called upon to submit to a wrongful ejection for the purposes of economizing the damages to be recovered."

In English v. Delaware & H. Canal Co., 66 N. Y. 454, 23 Am. Rep. 69, plaintiff was forcibly ejected from the train for refusing to pay fare demanded by the conductor, plaintiff claiming that he had already paid it. The evidence showed that plaintiff had paid his fare, and was therefore rightfully on the train, but defendant requested a charge that even if the conductor had no right to eject plaintiff, that if the latter resisted to such an extent that extraordinary force became necessary to remove him, and he was injured thereby, he could not recover for such injury. It was held that the requested charge was properly refused. Said the supreme court: "The judge was also clearly right in charging, in response to this proposition, that if the plaintiff was lawfully there, he had a right to resist the conductor in removing him. When a conductor is in the wrong, the passenger has a right to protect himself against any attempt to remove him, and resistance can lawfully be made to such an extent as may be essential to maintain such a right. Cases occur where the circumstances may imperatively require that the passenger should remain on the train on account of others who may be there in his charge, or where it is indispensable that he should hasten on his journey without delay; and if by reason of the mistaken judgment or willfulness of the conductor he could be expelled when lawfully there, serious injury might follow. The law does not, under such circumstances, place the passenger within the power of the conductor; and when lawfully in the cars he

is authorized to vindicate such right to the full extent which might be required for his protection." So, too, the right of a passenger to lawfully resist with force a wrongful ejection is recognized in Brown v. Memphis & C. R. Co., 7 Fed. 51, but the court was of opinion that no rule should be adopted which would encourage it. In this case, a woman, whom the conductor claimed to be of immoral character, was expelled from the "ladies' coach." She forcibly resisted, and sought to recover damages for the personal injuries she received as a result of the force used to remove her. There being no proof that her conduct on the car was at all objectionable, it was held that the expulsion was wrongful, and the fact that plaintiff forcibly resisted the expulsion was no defense to the action. It was said by the court, however, that "unnecessary resistance may be considered as mitigating the damages." In United States v. Kane, 9 Saw. 614, 19 Fed. 42, it was broadly announced that a person entitled to travel on a railway car may go upon the same peaceably and remain there until he arrives at his destination, and if the conductor attempts to put him off on the ground that he is not entitled to travel thereon, he may resist force with force. A case strongly sustaining the right of a passenger to forcibly resist ejection although the ticket may be defective, when the passenger himself is not in fault, is that of New York etc. R. Co. v. Winter's Admr., 143 U. S. 60, 12 Sup. Ct. Rep. 356, 36 L. ed. 71. This case is often referred to, and, coming from the highest judicial tribunal of the country, is entitled to the greatest weight. Here the plaintiff had bought an unlimited ticket, and upon expressing a wish to stop over at an intermediate point, had been told by the ticket agent that he would be allowed to do so upon making such request to the conductor. Plaintiff made the request to the conductor, who told him that he would fix him all right, punched the ticket, and returned it to plaintiff. Plaintiff made the stop and took passage in another train the next day to resume his journey. The conductor on the second train refused to accept the ticket because plaintiff had no "stop-over check" as required by the rules of the defendant company, and demanded that plaintiff pay fare or leave the train. Plaintiff refused to do either, and resisted expulsion. The force used in the expulsion resulted in injury to plaintiff's wrist and arm, for which he obtained judgment in damages for ten thousand dollars. It was held that plaintiff was not presumed to know the rules and regulations of the defendant company, and that it was entirely proper for him to rely on the statements of the ticket agent as to his being permitted to stop over on the ticket. Speaking to the question of resistance, Mr. Justice Lamar said: "If he was rightfully on the train as a passenger, he had the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he was being removed by compulsion and against his will." There was evidence in this case that more violence and force was used in making the expulsion than was necessary, and this may have influenced the court in upholding a judgment for such a large amount, but plaintiff's right to offer resistance is clearly sustained.

In Pittsburgh etc. Ry. Co. v. Russ, 57 Fed. 822, 6 C. C. A. 597, the conductor refused to accept from the passenger a mileage ticket, denying the identity and genuineness of the holder's signature thereon. Upon the passenger's refusal to pay fare, he was forcibly ejected. No greater force was used than was necessary to overcome the resistance offered by the passenger. Plaintiff obtained judgment in the district court for injuries resulting from the force used in his expulsion, but though the right of resistance was recognized, the judgment was reversed on appeal because of an erroneous charge as to the measure of damages. On the second trial, plaintiff obtained judgment for a still greater amount, and this was upheld on the second appeal by the circuit court of appeals (67 Fed. 662, 14 C. C. A. 612) on the authority of the supreme court in New York etc. R. Co. v. Winter's Admr., 143 U. S. 60, 12 Sup. Ct. Rep. 356, 36 L. ed. 71.

In Louisville etc. Ry. Co. v. Wolfe, 128 Ind. 347, 25 Am. St. Rep. 436, 27 N. E. 606, the action was to recover damages sustained by the plaintiff while forcibly resisting expulsion from defendant's train, The plaintiff had paid his fare, but the conductor believing he had not, demanded the fare, and upon plaintiff's refusal to pay, ejected him with force. A verdict in favor of plaintiff was upheld, the court saying: "The appellee being lawfully in the car, and having paid his fare, he had the right to be carried, and he had the right to make reasonable resistance, as he did, by holding onto the seats; and he was forced loose and taken from the car; and for such damages as he sustained on account of such removal from the car, the appellant is liable."

In addition to the cases above cited, there are, as heretofore stated, a large number of cases collated in the note to St. Louis etc. Ry. Co. v. White, 122 Am. St. Rep. 638, which, while not holding that a passenger has the right to forcibly resist wrongful expulsion, do, in unmeasured terms, condemn the expulsion and advocate the right of the passenger to make passive resistance and recover damages in tort. In one of these cases the right to make forcible resistance is recognized. "Of course, a party upon a train may resist when, under the circumstances, resistance is necessary for the protection of his life, or to permit probable serious injury; nor can a party be lawfully ejected from a train while in motion so that his being put off would subject him to great peril": Southern Kansas Ry. Co. v. Rice, 38 Kan. 398, 5 Am. St. Rep. 766, 16 Pac. 817. We take this to be a self-evident proposition which hardly needed judicial sanction—certainly there are no cases opposed to it.

b. **Where Right to Resist is Denied.**—The right of a carrier to eject a mere trespasser on one of its conveyances, or one who is committing a breach of the peace while thereon, is, of course, unquestioned, and whenever the right to lawfully eject exists, it necessarily follows that resistance to such expulsion would not be justified. There are many cases which hold that the face of the ticket is as between him and the conductor the sole criterion of the holder's right to transportation, and that consequently if the ticket is defective, the

conductor can lawfully eject the holder if he refuses to pay another fare. This line of cases insists that it is the duty of the passenger under such circumstances to pay the fare demanded or peaceably leave the car, and impliedly, at least, deny his right to make any resistance, In most of these cases no forcible resistance was offered, and the principal question before the court was whether the expulsion was a breach of the contract of passage. But the rules laid down in reaching this conclusion bear directly upon that branch of our topic now being considered, and the cases will be found collated and discussed in the other notes of this series, heretofore mentioned as proper to be examined in connection with this note. There is one case, however, in this class—Bradshaw v. South Boston R. R., 135 Mass. 407, 46 Am. Rep. 481—which we note, because it is a leading case, and presents fairly the line of reasoning upon which all of the decisions of this class rest; and the question of forcible resistance seems also to have been raised. The controversy in this case arose over a defective street-car transfer which had been erroneously given to the passenger by the conductor of the original line. The second conductor refused to accept it, although he was fully informed that the mistake was due to the negligence of the other conductor. Upon refusal of the passenger to pay additional fare, he was forcibly expelled. It was held that the passenger could not recover damages for the expulsion. Said the court: "It is no great hardship upon the passenger to put upon him the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise the conductor must investigate and determine the question, as best he can, while the car is on its passage. A wrongful decision in favor of the passenger would usually leave the company without remedy for the fare. A wrong decision against the passenger, on the other hand, would subject the company to liability in an action at law, and perhaps with substantial damages. It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that, in a moment of irritation or excitement, it may be unpleasant to a passenger who has once paid to submit to an additional exaction. But unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in

order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that; for the time being, the passenger must bear the burden which results from his failure to have a proper ticket." It will be seen from the above quotation that the line of cases which deny the right of a passenger to resist expulsion when his ticket is defective, place their ruling upon the ground that the passenger is not rightfully on the car, and that, therefore, his expulsion, upon refusal to pay fare, is not wrongful. But there are cases which, while not according to the ticket such conclusiveness of the holder's right to transportation, still insist that, even though the expulsion be wrongful, the passenger is not entitled to maintain his rights by force. This rule seems to prevail in Illinois and Kansas, and has been upheld by some of the federal courts. In Pennsylvania R. R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238, the passenger had a coupon ticket sold to him by one railroad and good for passage over several connecting lines. The conductor on one of the connecting lines, acting under instructions from his superior, refused to accept the coupon over his line, and upon refusal of the passenger to pay fare rejected him by force. The trial court directed the jury that the plaintiff was entitled to recover compensation for the injuries and bodily pain resulting from being forcibly ejected. This was held erroneous. Said Justice Craig, for the supreme court: "If it be true that appellee, by virtue of his ticket, was entitled to be carried over appellant's road, the question presented is, whether he can recover damages for being forcibly expelled from the train, or was it his duty, when notified by the conductor that he would not receive the ticket, to pay his fare under protest, or leave the train and hold the company responsible for the expulsion, without compelling the conductor to resort to force ; can he recover for the force used by the conductor, which he by his own act induced the conductor to resort to in order to put him off the train? We perceive no ground upon which he can recover for personal injuries received, unless the expulsion was malicious or wanton. When the conductor demanded that appellee should pay fare or leave the train, he would have been justified in refusing to pay fare, and in leaving the train on the command of the conductor, and had he done so he would have received no personal injuries, ... but when he refused to leave the train, and thus compelled the conductor to resort to force, he cannot recover for an injury which he voluntarily brought upon himself. And when appellee was notified by the conductor that his ticket was not good, and would not be received, it was his duty to leave the train in a peaceable manner and hold the company responsible for the consequences, rather than resist or undertake to retain his place on the train by force. A train crowded with passengers,—often women and children,—is no place for a quarrel or a fight between a conductor and a passenger, and it would be unwise

and dangerous to the traveling public, to adopt any rule which might encourage a resort to violence on a train of cars." We quite agree with the learned justice that "a train crowded with passengers is no place for a quarrel," but we do not perceive why the duty of avoiding it should be placed entirely upon a passenger who is entitled to be carried, rather than upon the company which invites the difficulty by denying him his lawful right unless he submits to extortion. The principle announced in the Connell case, just quoted, was later applied by the Illinois court of appeals in North Chicago St. R. R. Co. v. Olds, 40 Ill. App. 421, where a passenger in a street-car sought to recover damages for injuries received in being ejected against his resistance. The expulsion in this case was claimed to have been made because the passenger was drunk. The evidence showed that he was not "objectionably so." It was held that whether rightly or wrongly on the car plaintiff could not enforce his rights vi et armis. "A party will be entitled to quite as much damage for any wrong or injury quietly endured, as if violently resisted; indeed, the policy of the law ought to be to award him a higher measure of damages. Whatever personal injuries may result from his violence, should be attributed to his own want of subordination, for which the law will afford him no redress." So, too, in Chicago Union Traction Co. v. Brethauer, 125 Ill. App. 204 (affirmed 223 Ill. 521, 114 Am. St. Rep. 352, 79 N. E. 287), the correctness of the rule that a passenger about to be unlawfully ejected cannot resist, but must pay fare or peaceably leave the car, is conceded. In Atchison etc. R. R. Co. v. Gants, 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54, appellee had been informed by the agent who sold him a ticket that he could take a certain train for his place of destination. Appellee took the train named by the agent, but was informed by the conductor who took up his ticket that the train did not stop at that station, and that he would have to pay fare to the next station beyond where the train stopped, or the train would be stopped and he would be ejected. Appellee refused to pay additional fare, forcibly resisted expulsion, and obtained a judgment for personal injuries sustained in being ejected. The judgment was reversed on appeal, where it was held that appellee had no right to resort to force to secure his legal demands. Said Chief Justice Horton: "By resisting to the utmost of his power and ability, Gants invited force; and he ought not to complain of the force used if there was no intention on the part of the conductor or his assistants to commit unnecessary injury." In Hall v. Memphis & Charleston R. Co., 9 Fed. 585, it was held that a passenger having money with which to pay fare demanded by the conductor, it was his duty to have paid it, irrespective of his right of carriage under his ticket, and that if he refused to do so, and was forcibly ejected, he could not recover for injuries resulting from his resistance to such ejection. This case probably denies more strongly than any of the others the right of a passenger to forcibly resist wrongful ejection. Judge Hammond, in delivering his opinion on a motion for a new trial (15 Fed. 57), said: "The conductor is somewhat like

the master of a ship. He has police powers and disciplinary control over the train, and the quiet and comfort of the passengers and their safety are under his protection. He should be obeyed by the passengers, and the common notion that force must be invited to secure legal demands against his unlawful exactions is, in my judgment, erroneous and vicious. All the passenger need do is to express his dissent to the demand made upon him, and he need not require force to be exerted to secure his rights—certainly not to increase his damages— I fully recognize the feeling of 'a free American citizen' in the face of threatened wrong or insult, but the safety of the ship forbids that he should fight with the master, and imperil the ship and the lives and property she carries. The conductor of a railroad train is not altogether as supreme, perhaps, as the master of a ship; but on analogous principles, that seem to me obvious, it is, I think, the duty of a passenger to avoid resistance beyond mere dissent, and submit to his authority without more than mere protest, unless resistance is necessary to defend himself against impending personal injury."

IV. Conclusion.

The right of a passenger to resist wrongful expulsion seems to be established, provided the resistance extends no further than to show that he does not acquiesce in the unlawful demand of the conductor, and leaves the conveyance under physical compulsion. But it is difficult to deduce, from the above cases, any fixed rule as to whether he can make sufficient resistance to maintain his rights, without violating the well-settled principle of law, that a party who is subjected to an injury must use such means as he reasonably may to prevent an enhancement of the damages which will naturally flow from the injury. The arguments set forth in the conflicting opinions, both pro and con, indicate a fixedness of opinion on the part of the different judicial minds which does not conduce to the hope that the important question discussed in this note will soon be settled by any uniform line of decisions.

PRICE v. RHODE ISLAND COMPANY.

[28 R. I. 220, 66 Atl. 200.]

RAILROAD CROSSING.—The Obligation of a Traveler to Look and Listen when approaching a track upon which cars are run is so well established as the duty of a prudent person that a neglect of it is negligence in law, and not a mere circumstance for the jury to consider in passing upon the question of his care. (p. 737.)

Trespass on the case for negligence.

Robert S. Emerson and Geo. H. Huddy, Jr., for the plaintiff.

Henry W. Hayes, for the defendant.

220 PER CURIAM. The accident which occasioned the injuries complained of was caused by a trolley-car of the defendant striking and frightening a horse driven by the plaintiff across the track.

The defendant asked the court to charge the jury as follows: "If you believe the plaintiff did not look for an approaching car before entering the track she was guilty of contributory negligence and cannot recover." To which the court replied: "I suppose that that request is based upon the fact that the plaintiff stated that at some distance away from the track she did pull up her horse and did look and that after that she drove upon the track. Gentlemen, I shall decline to give you the charge in that form. I will say to you that the plaintiff was bound to exercise due care in going upon that track, and due care is dependent upon all the circumstances and all the facts of the case, as I have already explained to you. It is not necessarily negligence for the plaintiff not to look before driving upon the track. That is, it is not so as a matter of law, but it is a matter that you may take into consideration in determining whether she was guilty of negligence. If, at a point twenty or twenty-five or thirty feet, more or less, from the track she held up her horse and looked in both directions and then started on and did not look again and did not hold up her horse again, that is a circumstance which you may consider in determining whether or not she was guilty of contributory 221 negligence, but I will not say to you, gentlemen, that this is negligence as a matter of law. It is a fact which you may take into consideration and determine for yourself whether she was guilty of contributory negligence.

"Mr. Hoffman: If your honor please, I didn't mean by that request as to whether or not she looked between the distance of twenty-five feet away from the track; whether she looked at all or not."

"The Court: Very well; I will say the same thing as to whether she looked at all or not. That, if the plaintiff—although you will recall the fact she said she did hold up her horse and did look and there are two witnesses that say, as I recollect it, that she did hold up her horse and did look, but whether she did or not I will not charge you, gentlemen, that it was negligence on her part, as a matter of law, not to look. I will charge you, gentlemen, that she was bound to exercise due care as a person of reasonable—as a reasonable person she was bound to use due care in driving upon that crossing, and whether she was in the exercise of due care is entirely for you to say under all the circumstances from the evidence in the case. And if you find that she did not look, but drove upon the crossing without looking at all, then you may take that fact into consideration in determining whether she was guilty of contributory negligence in driving upon the track. I will not, however, charge you, gentlemen, that it was negligence, as a matter of law, in her not to look before driving upon the track. That depends upon all the circumstances, upon the conditions, the surroundings, the environments, in which she found herself."

In view of the opinion of this court in Beerman v. Union R. R. Co., 24 R. I. 275, 52 Atl. 1090, this ruling of the court was erroneous. The obligation to look and listen when approaching a track upon which cars are run is so well established as the duty of a prudent person, that a neglect of it must be held to be negligence in law and not a mere circumstance for the jury to consider in passing upon the question of the plaintiff's care. Although the charge of the court had very fairly instructed [222] the jury in the law applicable to the case, the refusal to charge as requested on this point and the comments of the court in answer to the request were misleading upon a vital issue in the case. We think, therefore, that this exception must be sustained and that a new trial must be granted.

We find no merit in the other exceptions, and it is not necessary to discuss the weight of the evidence or amount of the verdict, which may vary at the next trial.

Case remanded to the superior court for a new trial.

A Person About to Cross a Railroad Track is ordinarily bound to stop, look and listen for approaching trains: Scott v. St. Louis etc. Ry. Co., 79 Ark. 137, 116 Am. St. Rep. 67; Butler v. Rockland etc. St. Ry. Co., 99 Me. 149, 105 Am. St. Rep. 267; Bickel v. Pennsylvania R. R. Co., 217 Pa. 456, 118 Am. St. Rep. 926; Koch v. Southern California Ry. Co., 148 Cal. 677, 113 Am. St. Rep. 332; Queen Anne's R. R. Co. v. Reed, 5 Penne. (Del.) 226, 119 Am. St. Rep. 301. This duty is sometimes said to be absolute: Guhl v. Whitcomb, 109 Wis. 69, 83 Am. St. Rep. 889; Aiken v. Pennsylvania R. R. Co., 130 Pa. 380, 17 Am. St. Rep. 775. It would seem, however, that the failure of a person to stop, look and listen before crossing a track is not conclusive of a want of due care: Smith v. Boston etc. R. R., 70 N. H. 53, 85 Am. St. Rep. 596; Scott v. St. Louis etc. Ry. Co., 79 Ark. 137, 116 Am. St. Rep. 67.

WOOD, FOR AN OPINION.

[28 R. I. 290, 67 Atl. 8.]

WILLS—Repugnant Clauses.—Where a will provides, "All the rest, residue, and remainder of my estate, either real, personal, or mixed, I give to my dear husband, Henry P. Wood, he to have the full use and benefit thereof unconditionally. After him, should any remain, I give the same to my sister, Clara N. Crombe, one-half, and to my sisters Hannah N. Partelo and Phoebe R. Partelo, the balance, share and share alike," the first sentence gives to the husband the rest of the estate in fee simple absolute, and the second sentence is void for repugnancy. (pp. 738, 739.)

Samuel W. K. Allen, for the parties.

290 DOUGLAS, C. J. This is a petition brought under section 323 of the court and practice act, in which all the parties interested in the estate of Eunice B. Wood, late of Warwick in the county of Kent, deceased, concur in requesting the construction of the will of said Eunice B. Wood, which has been admitted to probate by the probate court of said Warwick. The clause in regard to which doubts have arisen is as follows:

"All the rest, residue, and remainder of my estate, either real, personal, or mixed, I give to my dear husband, Henry P. Wood, he to have the full use and benefit thereof unconditionally. After him, should any remain, I give the same to my sister, Clara N. Crombe, one-half, and to my sisters Hannah N. Partelo and Phoebe R. Partelo, the balance, share and share alike."

The opinion of the court is that the first sentence of this clause gave to Henry P. Wood the rest, residue, and remainder of the estate of the testatrix in fee simple absolute,

and that the second sentence of said clause is void for repugnancy.

It seems to us that the testatrix intended to give to her husband such absolute control over the estate as is inconsistent with the limitations of any less estate than a fee. The "use" of the estate might be enjoyed by a life tenant; but the full [291] "benefit" thereof could not be taken "unconditionally" without power to sell or to convey by will.

The words in the second sentence, "after him, should any remain," indicate a desire that if Mr. Wood should not dispose in his lifetime of the whole estate the residue left by him should go to the beneficiaries named; but this is not consistent with the testamentary power which is given to him, as it seems to us, by necessary implication. This particular intent of the testatrix must yield to her general intent as expressed in the first sentence: Bullock v. Waterman etc. Society, 5 R. I. 273.

In Pierce v. Simmons, 16 R. I. 689, 19 Atl. 242, where very similar provisions in a will were construed by this court, it was doubted whether the second provision, attempting to dispose of "whatever shall or may remain," following a devise which by itself conveyed an estate in fee simple, was not repugnant to the first devise. The words of the gift to Mr. Wood in the will now under consideration are much more comprehensive than those construed in Pierce v. Simmons, and the conflict between the two gifts here seems to us to be clear.

Wills—Repugnancy.—The First Taker in a Will is Presumed to be the Favorite of the Testator, and the tendency is to adopt such a construction as will give an estate of inheritance to the first donee: Platt v. Brannan, 34 Colo. 125, 114 Am. St. Rep. 147; Allen v. Hirlinger, 219 Pa. 56, 123 Am. St. Rep. 617. A will bequeathing and devising to his wife all of the testator's property "to be hers absolutely," gives her an absolute estate in fee, and a succeeding repugnant provision in the will "that if at her death any of said property is still hers, then the residue still hers shall go to my, not her, nearest heirs," must fall, and fail of effect: Moran v. Moran, 143 Mich. 322, 114 Am. St. Rep. 648.

O'NEIL v. NEW ENGLAND TRUST COMPANY.

[28 R. I. 311, 67 Atl. 63.]

BANKS—Garnished Bank—Liability for Paying Out Funds.— A bank that pays out the funds of a depositor, when it is garnished, under execution against a judgment debtor bearing the same name as the depositor, is liable to the latter for the amount of the payment. (p. 740.)

Bliss & Walsh, for the plaintiff.

Charles A. Wilson and William J. Brown, for the defendant.

311 DUBOIS, J. When a bank receives money on deposit, it is to be paid to the depositor or to his order, or to or for his use or account. The bank assumes the duty of seeing that it is so paid. If it pays out the money otherwise, it is liable to the depositor to the amount of such payment: Tolman v. American National Bank, 22 R. I. 462, 84 Am. St. Rep. 850, 48 Atl. 480. The defendant, having so received the money of the plaintiff, paid out the same as garnishee under execution against a judgment debtor other than this plaintiff, but bearing the same name. The defendant claimed that it tried to communicate with the plaintiff without success, and afterward assumed that he must be the judgment debtor. This is no excuse. The duty of the trust company was to find out whether the defendant in the suit wherein it was named as garnishee, had funds on deposit with it. This it made no attempt to do. The defendant was not paid the garnishee fee to examine into the affairs of any other person than the one named in the writ, and the plaintiff in this case was not the one named therein. In other words, the defendant attempted an investigation of the wrong person and came to an erroneous conclusion. The judge who presided at the trial did not err in his charge and refusals to charge. The plaintiff made out a prima facie case when he proved that he deposited the money in question with the defendant and demanded the same from it; the burden of proving payment to or for the use of the plaintiff was upon the defendant, and 312 it failed to sustain the same. A verdict for the plaintiff was therefore properly directed.

The defendant's exceptions are overruled, and the case is remanded to the superior court for judgment on the verdict,

On the Liability of a Bank to a depositor in paying out his funds in the case of imposition or forgery, see Murphy v. Metropolitan Nat. Bank, 191 Mass. 354, 114 Am. St. Rep. 595; Land Title etc. Co. v. Northwestern Nat. Bank, 211 Pa. 211, 107 Am. St. Rep. 565; Tolman v. American Nat. Bank, 22 R. I. 462, 84 Am. St. Rep. 850.

BOVA v. NORIGIAN.

[28 R. I. 319, 67 Atl. 327.]

"NOTICE" is Equivalent to "Information," "intelligence" or "knowledge." (p. 742.)

NOTICE.—There is No Indisputable Presumption that a Letter, which the law does not require to be sent, is read by the recipient. (p. 742.)

NOTICE.—One Who Fails to Record the Title Under Which He Claims assumes the task of actually bringing the information to the apprehension of the person affected by it. (p. 742.)

NOTICE—Letter Advising of Unrecorded Lease.—The question whether one to whom a letter was sent, not conversant with English, acquired actual knowledge of its contents, is for the jury. (pp. 742, 743.)

Thomas H. Holton and James J. McGovern, for the plaintiff.

James A. Williams, for the defendant.

319 DOUGLAS, C. J. This is an action of trespass and ejectment, in which it is admitted that the plaintiff is entitled to possession, unless at the time he purchased the land in question he had notice of a lease under which the defendant claims.

320 The lease was not recorded at the time when the plaintiff bought the land, but the defendant claimed that the plaintiff had actual legal knowledge of it. The notice relied upon was a letter, containing a copy of the lease, which the defendant claimed the plaintiff received before he purchased the property in question. The defendant's counsel testified that he dictated and signed the letter, and left it in his office, directed and stamped, expecting it to be mailed.

The plaintiff admitted that he received a letter, which he could not identify as coming from the defendant, and which he did not read, as he could not read English, and which was destroyed without being read to him.

The defendant requested the court to charge the jury as follows: "The jury is instructed that if it finds from the evidence that the letter offered in evidence was written by

Williams and McCabe to the plaintiff, was addressed to the plaintiff, and received by the plaintiff, the jury will be warranted, as a matter of law, in finding that the plaintiff received due notice of the lease in question, whether he read the letter or not, or whether he caused the same to be read to him."

The court refused the request, and charged that the lease was of no validity as against the plaintiff unless he had actual knowledge of it. The defendant, having duly excepted to this ruling, after verdict in favor of the plaintiff, which the superior court refused to set aside on motion for a new trial, brings his bill of exceptions to this court on the grounds that the ruling was erroneous and that the verdict was against the evidence.

We think the ruling of the court was correct. "Notice" is equivalent to "information," "intelligence," or "knowledge": Wile v. Southbury, 43 Conn. 53. Where the law prescribes written notice as a method of giving information, no doubt the receipt of a letter containing the information would be conclusive proof of knowledge for the purposes of the case. Whether, as a matter of fact, the recipient had read or could read the letter would make no difference, because the sender had fully complied with the direction of the law. But there is no indisputable presumption that a letter, which the law does [321] not require to be sent, is read by the receiver to whom it is delivered. The question is one of fact, to be determined on all the evidence relating to it. Brayton, J., says, in Harris v. Arnold, 1 R. I. 125: "No man would be presumed to have that knowledge which we might be able to prove that he had not, unless as a consequence of the neglect of some known duty."

The law prescribes the recording of a conveyance of title to real estate as the method of giving legal notice of the conveyance to all the world.

If the claimant under such a conveyance chooses to neglect this method and attempts to give actual knowledge of his title to another person, he assumed the task of actually bringing this information to the apprehension of the person to be affected by it. The delivery of the notice in writing to a blind man or to one unable to read is not enough. The delivery of a letter may be ground of inference that the information was communicated, but this inference may be rebutted by contrary evidence. The question was thus properly left to the jury whether, if the letter were received by

the plaintiff, he acquired actual knowledge of its contents. The weight of the evidence is not clearly against the verdict.

The defendant's exceptions are overruled, and the cause remanded to the superior court for judgment on the verdict.

Actual Notice is that which consists in express information of a fact: Prouty v. Devine, 118 Cal. 258, 50 Pac. 380; Cleveland Woolen Mills Co. v. Sibert, 81 Ala. 140, 1 South. 773. It is said to be equivalent to knowledge: Strahorn-Hutton-Evans Commission v. Flover, 7 Okl. 499, 54 Pac. 710. Some authorities declare, however, that the terms are not synonymous: Southern Ry. Co. v. Bunt, 131 Ala. 591, 32 South. 557; Clarke v. Ingram, 107 Ga. 565, 33 S. E. 802.

BENNETT v. RANDALL.

[28 R. I. 360, 67 Atl. 525.]

CERTIORARI—The Action of a Probate Court may be reviewed on certiorari. (p. 745.)

CERTIORARI—Discretion in Issuing.—The issuance of the writ of certiorari is not a matter of strict right, but is discretionary with the court. (p. 745.)

CERTIORARI—Harmless or Formal Errors.—The writ of certiorari will not be granted to correct merely harmless, technical or formal errors, which are not shown to have resulted prejudicially or to have caused substantial injustice. (pp. 745, 746.)

CERTIORARI—Examination on the Return of Citation.—It is a common practice to examine the case upon return of the citation to determine before issuing a writ of certiorari whether it is necessary to prevent substantial wrong. (p. 746.)

CERTIORARI—Irregularity in Appointing Guardian.—Certiorari will not issue to review the proceedings of a probate court appointing a general guardian for an insane person, on the ground that there was no prior appointment of a guardian ad litem, where the guardianship has been an advantage rather than a detriment to the incompetent. (p. 747.)

Elmer J. Rathbun and John P. Beagan, for the petitioner.

Gardner, Pirce & Thornley, for the respondent.

360 DOUGLAS, C. J. This is a petition for a writ of certiorari to the probate court of Foster, alleging that a decree of that court, entered on the fourth day of August, 1906, appointing Job Randall of said Foster guardian of the person and estate of the petitioner, a person of full age, residing in said Foster, was erroneous, and ought to be quashed for want of jurisdiction in said probate court to enter the decree.

The petition states that at the time of the filing in the [361] probate court of the petition upon which said decree was entered, the present petitioner, a resident of the town of Foster, was insane, and had been so adjudged by the district court of the eighth judicial district, and was an inmate of the State Hospital for the Insane at Howard, Rhode Island; that since that time, to wit, March 20, 1907, upon examination and inspection by the district court within whose jurisdiction he was committed to said State Hospital for the Insane, he has been declared to be restored to soundness of mind, and to be no longer under the necessity of restraint.

The error assigned by the petitioner as vitiating the proceedings of the probate court is that there was no compliance with the requirement of section 772 of the court and practice act that "whenever application shall be made to a probate court for the appointment of a guardian of any person confined in an asylum for the insane," certain notices shall be given, "and then the court, having first appointed a guardian ad litem for such insane person, may proceed to act upon the application."

In Wheeler v. Court of Probate of Westerly, 21 R. I. 49, 41 Atl. 574, a query was suggested whether certiorari is a proper form of proceeding to review the action of a probate court. The doubt was founded upon the opinion of Shaw, C. J., in Peters v. Peters, 8 Cush. 529, decided in 1851, where it was held that in Massachusetts the courts of probate still exercised the jurisdiction in the settlements of estates which was originally possessed by the English ecclesiastical courts, and following the analogy of the English practice, the supreme judicial court of common law could not extend its control by certiorari over them. Another consideration upon which Chief Justice Shaw relied was "that if the probate court, even where it has jurisdiction over the general subject, exceeds its powers, or acts in a manner prohibited by law, its decrees are not regarded as merely irregular, and voidable, but yet good and valid, unless reversed, like other erroneous or irregular judicial proceedings; but they are held entirely and absolutely void and of no effect, and may be set aside in any collateral proceeding by plea and proof. This would [362] not be true if they could be drawn in question and vacated by a writ of certiorari." But in Rhode Island this objection to the employment of certiorari has been removed by statute.

Section 803 of the court and practice act is as follows: "No order or decree of a probate court which may be appealed from, or in any collateral proceeding when the same shall not have been appealed from, shall be deemed to be invalid, or be quashed, for want of proper form, or for want of jurisdiction appearing upon the record, if the probate court had jurisdiction of the subject matter of such order or decree. The superior court having jurisdiction of the parties to a probate appeal may allow amendments to be made in the papers filed in the case, to supply any deficiency or correct errors therein, upon such terms as it may deem proper."

With respect to the first objection, it seems to us more conducive to simplicity and efficiency in our judicial system to recognize the status of probate courts as fixed by present statutes rather than by the limitations of their ancestry. As constituted at the present day, they form a well-defined part of our judicial machinery in due subordination to the supervising authority of the supreme court. An appeal lies from the decree of a probate court to the superior court, and thence by bill of exceptions to this court, with substantially the same effect upon the final decision of the case as a claim of jury trial from a district court to the superior court followed by a bill of exceptions to this court in an action at law.

On deliberate consideration of the question, therefore, we see no reason why the objections urged in Chief Justice Shaw's opinion should be considered valid in Rhode Island; and, indeed, the question has been settled by Pratt v. Probate Court of Pawtucket, 22 R. I. 596, 48 Atl. 943, where this court issued a writ of certiorari to a probate court and quashed its decree.

We may then consider the question whether the present is a proper case for the issuance of the writ. It is well settled, in those jurisdictions where special statutes do not regulate the matter, that the issue of the writ is not a matter of strict [363] right, but is discretionary with the court. It must appear not only that the inferior tribunal has committed some error of law, but also that the error has caused substantial harm, and that the petitioner has been guilty of no laches in seeking his remedy. This court has said, in McAloon v. License Commissioners, 22 R. I. 191, 46 Atl. 1047: "The writ will not be granted for the correction of merely harmless, technical or formal errors, which are not shown to

have resulted prejudicially, or to have caused substantial injustice to the relator: 4 Ency. of Pl. & Pr. 34, footnote 1. The matter to be determined is substance and not form. If the error is such that it does not affect the substantial justice of the case, but is in the forms of procedure only, the writ will be refused: 2 Spelling on Extraordinary Relief, sec. 1897."

To the same effect are Knapp v. Heller, 32 Wis. 467; Ex parte Buckley, 53 Ala. 42; State of Washington v. Lockhart, 18 Wash. 531, 52 Pac. 315; People v. Mayor of New York, 5 Barb. 43. Accordingly, it is a common practice to examine the case upon return of the citation to determine before issuing the writ whether it is necessary to prevent substantial wrong.

It is said in Farmington R. W. P. Co. v. County Commissioners, 112 Mass. 206: "The uniform practice of this court for many years, as shown in numerous reported cases, has been to hear the whole case upon the petition, in order to avoid unnecessary delay and expense to the parties, and to enable the court to deal with the substantial justice of the case untrammeled by merely formal and technical defects in the record": See, also, Sampson v. Commissioners of Highways, 115 Ill. App. 443; Petition of Landaff, 34 N. H. 163; Town of Royalton v. Fox, 5 Vt. 458; Haven v. County Commissioners, 155 Mass. 467, 29 N. E. 1083; Stone v. Boston, 2 Met. 220.

We think this principle may be held to have special force in reviewing the acts of a probate court in view of the statute (C. & P. Act, 728), which provides that "irregularity, defective notice, or want or improper exercise of authority" affecting the validity of such acts may be supplied or corrected on notice to the parties interested. We should be very reluctant [364] to quash a decree which the probate court is given the power to validate unless the interests of justice should absolutely require it.

It appears to a majority of the court that the case presented by the petitioner is not one which calls for the interposition of this court.

The appointment of a guardian ad litem is directed by the statute; but the petitioner who is now alleged to be sui juris states the fact that at the time the decree was entered he was insane. The court having jurisdiction of the subject matter of the appointment of guardians of insane persons residing in the town of Foster neglected the requirement of the

law, but performed the substantial duty of appointing a guardian and fixing his responsibility.

The petitioner, by his misfortune, had become unable to care for and manage his property. The court appointed and installed a custodian, under substantial bonds, to act under legal restraint and responsible to legal authority. The appointee is held to strict accountability for his management of the property intrusted to him. We are unable to consider the proceeding as otherwise than beneficial to the petitioner. That his estate should have been cared for during his disability is an advantage rather than a damage to him, and to set aside the appointment because a person had not been appointed to represent him in the proceedings would be to exalt the letter of the law at the expense of substantial right. If the facts stated in the petition are true, the guardian ad litem, if appointed, must have advised and consented to the decree.

The petition is therefore denied and dismissed.

Certiorari, Discretion to Refuse.—The Writ of Certiorari issues only when the court under review has exceeded its jurisdiction. It is not a writ of right, but may be granted or denied in the discretion of the court according to the showing made in any particular case: Tinn v. United States District Attorney, 148 Cal. 773, 113 Am. St. Rep. 354; Deslauries v. Soucie, 222 Ill. 522, 113 Am. St. Rep. 432; State v. Witcher, 117 Wis. 668, 98 Am. St. Rep. 968. As to what questions are reviewable upon certiorari, see the note to Wulzen v. Board of Supervisors, 40 Am. St. Rep. 29; and as to what persons are entitled to prosecute the writ, see the note to Elliott v. Superior Court, 103 Am. St. Rep. 110. The writ of certiorari to review the appointment of a guardian for an incompetent person will be refused where no harm has come to the incompetent from such appointment, and he has permitted the decree to stand unquestioned for over eight years and until after the death of the guardian: Brown v. Probate Court of Warwick, 28 R. I. 370, post, p. 747.

BROWN v. PROBATE COURT OF WARWICK.

[28 R. I. 370, 67 Atl. 527.]

CERTIORARI.—The Action of a Probate Court may be reviewed on certiorari. (p. 748.)

CERTIORARI—Whether a Matter of Right.—The issuance of the writ of certiorari is not a matter of strict right, but is discretionary with the court. (p. 748.)

CERTIORARI.—One Who has been Guilty of Laches will generally be refused a writ of certiorari. (p. 748.)

CERTIORARI—Review of Guardianship Proceedings.—The writ of certiorari to review the appointment of a guardian for an incompetent person will be refused where no harm has come to the incompetent from such appointment, and he has permitted the decree to stand unquestioned for over eight years and until after the death of the guardian. (p. 749.)

P. Quinn, for the petitioner.

Archibald C. Matteson, for Centreville Savings Bank.

[370] PER CURIAM. This is a petition for a writ of certiorari to the probate court of Warwick, alleging that a decree of that court, entered on the twelfth day of September, 1898, appointing Job S. Carpenter, of said Warwick, guardian of the person and estate of the petitioner, a person of full age, residing in said Warwick, was erroneous, and ought to be quashed upon the ground that, upon the facts found by said probate court, it had no jurisdiction to appoint a guardian as aforesaid. The petition for the appointment of said guardian alleged said Peleg Brown to be a person of full age who, from excessive drinking, gaming, [371] idleness and debauchery, who from want of discretion in managing his estate, is likely to bring himself or family to want and to render himself or family chargeable. The lack of jurisdiction upon which the petitioner bases his objection is that the probate court only adjudged him "to be a person lacking in discretion in managing his estate."

The court of probate had jurisdiction over the person of the petitioner, and of the subject matter of the proceeding, i. e., the appointment of a guardian. Having such jurisdiction, its decree is not void, but merely voidable. By the provisions of the statute in force at the time of the entry of the decree (caption 248, section 7, General Laws), the decree could not in any collateral proceeding be deemed invalid, or quashed for want of proper form, or for want of jurisdiction appearing upon its face. Section 803 of the court and practice act is to the same effect.

It is settled in this state that certiorari lies to review the action of a probate court: Pratt v. Court of Probate of Pawtucket, 22 R. I. 596, 48 Atl. 943; Bennett v. Randall, 28 R. I. 360. Where the matter is not regulated by special statutes it is, however, well settled that the issue of the writ is not a matter of strict right, but is discretionary with the court: Bennett v. Randall, 28 R. I. 360.

Where the petitioner has been guilty of laches, the writ is generally refused: In re Lantis, 9 Mich. 324, 80 Am. Dec. 58;

State v. Blake, 35 N. J. L. 208; People v. Fire Commrs., 77 N. Y. 605; People v. Board of Police Commissioners, 82 N. Y. 506; Long v. Ohio River R. R. Co., 35 W. Va. 333, 13 S. E. 1010.

In the case at bar it does not appear that any harm has come to the petitioner from the appointment of the guardian. Furthermore, he has permitted the decree to stand without attack for more than eight years and a half. Although excessive drinking was one of the grounds alleged in the petition for the appointment of the guardian, he has, according to his affidavit, been a total abstainer for some years, and so, presumably, under no disability on that account. He has permitted the guardian, without objection, to mortgage his property pursuant to other decrees of said probate court, and to apply the proceeds of said mortgages to his support, and has only moved in the matter [372] after the death of the guardian. Such conduct constitutes sufficient laches to justify the refusal of the writ.

The petition is denied and dismissed.

On the Proper Scope of Certiorari, see Bennett v. Randall, 28 R. I. 360, and authorities cited in the cross-reference note thereto. Certiorari will not issue to review the proceedings of a probate court appointing a general guardian for an insane person, on the ground that there was no prior appointment of a guardian ad litem, where the guardianship has been an advantage rather than a detriment to the incompetent: Bennett v. Randall, 28 R. I. 360, ante, p. 743.

H. F. WATSON COMPANY v. CITIZENS' CONCRETE COMPANY.

[28 R. I. 472, 68 Atl. 310.]

JUDGMENT — Conclusiveness of Former Adjudication. — A judgment on the merits is a bar to a subsequent action between the same parties upon an identical cause of action, and the court will not consider in the latter action an allegation that the verdict was directed in the former action on grounds not affecting the merits. (p. 751.)

JUDGMENT—Conclusiveness of Adjudication.—The judgment of a court having jurisdiction of the subject matter and of the person, though erroneous, is conclusive upon the parties until set aside in a direct proceeding instituted for that purpose. (p. 751.)

William M. P. Bowen, for the plaintiff.

Bassett & Raymond and Russell W. Richmond, for the defendant.

[472] BLODGETT, J. On August 15, 1904, the plaintiff commenced this action of assumpsit for the recovery of the value of certain goods alleged to have been sold to the defendant, "Daniel F. Grady, doing business as the Citizens' Concrete Co.," and has recovered a verdict in his favor, and the cause is now before the court on the defendant's exceptions.

The defendant's second plea in bar to this action is that in a [473] prior action between the same parties, commenced February 23, 1904, in the same court and for the same subject matter, "the jury rendered a verdict for the defendant in said cause, and thereupon the said defendant, by consideration of the same court did recover judgment against the plaintiff and its costs of suit, as by record thereof now remaining in said court more fully appears," etc. To this plea the plaintiff's replication, after setting forth the direction of a verdict for the defendant by the court upon a ground therein specified, avers "that said verdict in said former action in said plea mentioned was not directed upon the merits of said action and said judgment was not rendered upon the merits of said action"; and further avers "that the issue in said former case was and is not identical with the issue in this said present action."

An examination of the pleadings and record in the action commenced February 23, 1904, discloses that with other pleas the defendant pleaded the general issue to the declaration, and it is conceded that the parties thereto and the cause of action therein are identical. The verdict returned in this prior action on June 30, 1904, is as follows: "The jury find that the defendant Daniel F. Grady doing business as the Citizens' Concrete Co. did not promise in manner and form as the plaintiff corporation has in its declaration thereof complained against him." This verdict was duly accepted by the court and recorded by the clerk, and, in accordance with the statute, on the seventh day thereafter judgment was duly entered thereon, as appears by the clerk's minutes on the papers in the case as follows: "July 7, as of June 30. Judgment on verdict for deft. with costs taxed at $——." The more formal extension of the record, after setting forth the plea of the general issue and the other pleadings in the case, is as follows: "And issue being thereupon joined, said case, being called for trial, is argued by counsel and committed to a jury duly impaneled and sworn to try the issue joined, who by direction of the court return a verdict for the de-

fendant. It is therefore considered by the court, that said defendant recover and have of said plaintiff corporation its costs of defense taxed at $——."

474 It is too obvious to require further comment that this verdict was on the merits of the case, and that the judgment for the defendant rendered thereon is a bar to this action.

The plaintiff's contention is to the effect that the stenographic transcript of the testimony shows that the verdict was directed by the court on other grounds. The propriety of that instruction is not before the court for consideration, nor is it necessary to consider what effect should be given to such a transcript, or even to decide upon its admissibility. The fact remains that the record shows the verdict which was returned by the jury and the judgment which was entered by the court thereon, and no proceedings were ever taken to question the propriety of either of them.

In Smith v. Borden, 17 R. I. 220, 33 Am. St. Rep. 867, 21 Atl. 351, 11 L. R. A. 585, this court said: "The rule is that the judgment of a court having jurisdiction of the subject matter and of the person, though erroneous, is not void, but binding and conclusive upon the parties until it is set aside; that it cannot be impeached in any collateral suit or proceeding, but only on appeal, by writ of error, or by some appropriate proceeding operating directly upon it instituted for that purpose."

It follows that the defendant's exception to the refusal of the court "to direct a verdict for the defendant on the issue raised by the pleading of former judgment recovered by the defendant" must be sustained, and the case must be remanded to the superior court with direction to enter judgment for the defendant.

The Judgment of a Court having jurisdiction, though erroneous, is conclusive upon the parties until set aside in a direct proceeding: Robinett v. Mitchell, 101 Va. 762, 99 Am. St. Rep. 928; Teel v. Dunnihoo, 230 Ill. 476, 120 Am. St. Rep. 319; but a judgment void by reason of a lack of jurisdiction may be denied or contested at any time in any proceeding, direct or collateral: Flowers v. King, 145 N. C. 234, 122 Am. St. Rep. 444, and see cases cited in the cross-reference note thereto.

SUPREME COUNCIL CATHOLIC KNIGHTS OF AMERICA v. FITZPATRICK.

[28 R. I. 486, 68 Atl. 367.]

BENEFIT SOCIETY—Beneficiaries not Members of Family.—Where the charter and constitution of a beneficial order provide for the payment of a benefit on the death of a member to his family or "as he may direct," he may designate whom he will as his beneficiary, and is not limited in his choice to members of his family. (p. 753.)

BENEFIT SOCIETY—Ultra Vires Contract.—The fact that a benefit society transcends its powers in issuing a certificate to a beneficiary not a member of the family of the member does not render the contract ineffectual under the statutes of Rhode Island. (p. 754.)

Cooney & Cahill, for the complainant.

Hugh J. Carroll, for respondent Quinn.

Gorman, Egan & Gorman, for respondent Fitzpatrick.

[486] DOUGLAS, C. J. This is a bill of interpleader brought to determine the ownership of a fund of two thousand dollars paid into court by the supreme council of the Catholic Knights of America as the proceeds of a benefit certificate issued to William Quinn, a member of a local branch of that order, payable at his death.

The claimants are Patrick Fitzpatrick, Jr., who is named as beneficiary in the certificate, on the one part, and the children of Quinn on the other.

The evidence shows that Quinn, being embarrassed pecuniarily and being in arrears for his dues to the order, after negotiations with Fitzpatrick and others, sold his interest in the benefit certificate which he held, in which his wife, then deceased, was named as beneficiary, and, with the approval of the local branch, surrendered it, and thereupon the supreme [487] council issued the certificate now under consideration, in which, at Quinn's request, Fitzpatrick was named as beneficiary.

On receipt of the certificate Fitzpatrick paid Quinn one hundred and fifty dollars in money, paid to the local branch the dues in arrears, and agreed to pay all future dues during the lifetime of Quinn, and to pay the further sum of one hundred dollars for his funeral expenses, or, if the expenses should be less than one hundred dollars, then the balance of that sum to Quinn's heirs. These obligations have been fulfilled.

The counsel for the heirs of Quinn contends that the transaction by which Fitzpatrick was constituted the beneficiary was void, and hence that the fund belongs to the heirs. He argues that the certificate is void under the charter and constitution of the corporation and by the laws of Rhode Island.

In the first contention he is refuted by the documentary evidence in the case. The charter of the order in force at the time of this transaction specifies as one of the objects of the order, "to establish and maintain a benefit fund, from which a sum not to exceed five thousand dollars shall be paid at the death of each member to his family, or be disposed of as he may direct."

The constitution provides (Part 6): "The objects of the order shall be to establish a Benefit Fund, from which, on satisfactory evidence of the death of a beneficiary member of the order, a sum not exceeding two thousand dollars shall be paid to the beneficiaries of male members, and a sum not exceeding one thousand dollars shall be paid to the beneficiaries of female members, as he, or she, may have directed in his or her Benefit Certificate."

(Par. 165.) "Each member, at his initiation into the Order, shall have a Benefit Certificate issued to him free of charge. Each member may enter upon his application the name, or names, of the members of his family, or those to whom he desires the benefit paid, and they shall be entered in the Benefit Certificate according to said direction, and in accordance with Paragraph 6. A member may at any time, when in good standing, change his beneficiary, upon complying with the requirements hereinafter provided, and upon surrender of his Benefit Certificate and payment of a fee of fifty cents," etc.

488 This language plainly gives to the member to whom the certificate is issued the right to nominate a beneficiary either in his family or outside of it. The argument of counsel that the words should be construed to give the option of choice only among the member's family so long as he leaves blood relations is fanciful and unconvincing.

In discussing very similar provisions in Highland v. Highland, 109 Ill. 366, the court say (page 374): "No doubt it is an object to provide a widows' and orphans' benefit fund, and it will remain as such a fund, unless the member directs to the contrary. But notwithstanding the description as a 'widows' and orphans' fund,' it is equally the purpose that

the member should have the power of directing to whom payment of his benefit should be made, as that the fund should be for the benefit of his family. The language that the sum shall be paid to the member's 'family, or as he may direct,' gives to him in the most plain terms the power of absolute direction to what person or persons the payment shall be made. Evidently the language of the charter will not bear the construction which appellant's counsel would place upon it."

The same construction is adopted in Gentry v. Supreme Lodge, 23 Fed. 718; Independent Order v. Allen, 76 Miss. 326, 71 Am. St. Rep. 532, 24 South. 702; Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961; Supreme Lodge K. of H. v. Martin, 16 Phila. 97; Sabin v. Phinney, 134 N. Y. 423, 30 Am. St. Rep. 681, 31 N. E. 1087; Berkeley v. Harper, 3 App. Cas. (D. C.), 308; Lamont v. Hotel Men's Mut. Ben. Assn., 30 Fed. 817; Brown v. Brown, 6 Misc. Rep. 433, 27 N. Y. Supp. 129, and many other cases.

"In all cases the member may have as broad a range of choice in selecting his beneficiary as the organic law of his society gives him. If there is nothing in the charter or by-laws of the organization, or in the statutes of the state, restricting the appointment, the member may designate whomsoever he pleases, and no one can question the right": 1 Bacon on Benefit Societies, sec. 246.

The second branch of the argument of counsel for the Quinn heirs is, if we understand it, that the scope and intention of the establishment of the fund is the benefit of the family of the member; that the power of the organization in the management [489] and distribution of the fund is restricted to the promotion of the welfare of the member and his family, and that when the order issues such a certificate as is now before us, it transgresses the limits of its legitimate powers and becomes in effect a simple life insurance company, and hence becomes liable to the provisions of the statutes which apply to such companies. Without discussing the merits of this argument we may say that, if the position is tenable, it does not nullify the contract.

Chapter 182, General Laws, "Of Foreign Insurance Companies and of the Insurance Business Generally," provides (section 17), as follows: "If any insurance company, co-operative or otherwise, shall make insurance without complying with the provisions of this chapter the contract shall be valid," etc.

We conclude, therefore, that the certificate as issued was valid under the organic law of the order and under the statutes of this state, and that the defendant Fitzpatrick is entitled to the fund in the registry of the court.

The appeal is dismissed, the decree of the superior court is affirmed, and the cause is remanded to the superior court for further proceedings.

A Member of a Benefit Society may Designate whomsoever he pleases as his beneficiary, where there is nothing in the charter, constitution or by-laws of the organization restricting his right of designation: Independent Order etc. of Jacob v. Allen, 76 Miss. 326, 71 Am. St. Rep. 532; Sabin v. Phinney, 134 N. Y. 423, 30 Am. St. Rep. 681; note to Bankers' etc. Assn. v. Stapp, 19 Am. St. Rep. 788.

IN RE PROVIDENCE JOURNAL COMPANY.

[28 R. I. 489, 68 Atl. 428.]

FREEDOM OF PRESS.—It is the Right of a Newspaper, as of any citizen, in public or in private, to discuss the opinions of a court, to criticise their reasoning or to question by sober argument the soundness of their conclusions, but not to misstate these conclusions. (p. 758.)

NEWSPAPER CONTEMPT—Publication of Court Decisions.—When a newspaper takes up the task of informing the public of the decisions of courts, it holds itself out to be equipped with suitable instruments for that work; the task, though a very proper one, is self-assumed, and is undertaken at the peril of the publisher. (p. 758.)

NEWSPAPER CONTEMPT—Publication of Court Decisions.—A newspaper of general circulation which, through the recklessness or incompetence of persons in its service, publishes an editorial misstating an opinion that has been rendered by the supreme court, may be adjudged guilty of contempt. (p. 759.)

Edwards & Angell, for the respondent.

490 PER CURIAM. The opinion in Supreme Council Catholic Knights of America v. Fitzpatrick, 28 R. I. 486, ante, p. 752, was delivered December 17, 1907. On the morning of December 19, 1907, on the editorial page of the "Providence Daily Journal," a newspaper of general circulation in Rhode Island and elsewhere, published by the respondent corporation, appeared the following article:

"FRATERNAL ORDERS AND INSURANCE.

"That an ordinary life insurance policy is a negotiable instrument is well recognized. All that is necessary to make

it transferable is the consent of the prospective beneficiary. An opinion of the Rhode Island Supreme Court in the matter of a benefit certificate of the Catholic Knights of America sustains the right so to dispose of a fraternal insurance policy, even where such organization, through its charter and by-laws provides against transfer of the benefits to one not of blood relation to the members. The circumstances of the case as tried in an equity action are familiar in life insurance practice. A member of the order had transferred his policy, the consideration being that it be kept alive by the payment of certain defaulted and all subsequent assessments. The Court holds that the charter provision of the order, which would exclude the arrangement described, is 'fanciful and unconvincing.' It is, of course, clear that the intent of the policy, that it be devoted to the welfare of the member's family, is thus defeated. The Court, however, maintains that the higher consideration of integrity of contract should determine the issue."

As soon as this article came to the knowledge of the court it directed a citation to be issued to the "Providence Journal Company" requiring it to show cause why it should not be [491] adjudged guilty of contempt for publishing a false statement of the decision.

The respondent appeared by attorney in answer to the citation, and presented the following statement:

"The Providence Journal Company, appearing in obedience to the citation in this matter issued out of this Honorable Court on the 19th day of December, A. D. 1907, and showing cause, as commanded in said citation, why it should not be adjudged in contempt, respectfully says:

"First. It admits the publication of the Article set forth in said citation and further admits that said Article is an erroneous statement of the opinion handed down by this Court on the 17th day of December, A. D. 1907, in the cause entitled Supreme Council Catholic Knights of America v. Patrick Fitzpatrick, Jr., et al.

"Second. It avers, nevertheless, that the erroneous statements in said article contained were made entirely through misunderstanding and misapprehension of the language used by the court in said opinion and not with the purpose or intent to reflect upon the Court, or upon either of the parties to said cause, nor in any other manner to embarrass or corrupt or interfere with or obstruct the due administration of justice.

"Third. It further avers that as the publisher of a newspaper it has considered it proper in the public interest to comment upon such opinions of the Court as might be expected to be interesting or instructive to its readers. In so doing it has always endeavored to state the opinions of the Court with accuracy, and in every way to manifest and inculcate respect for such opinions; and it respectfully submits that an unintentional error, made in the course of such comment, and in the absence of any indication of a purpose to reflect upon the court, or to criticise its opinion unfavorably, does not constitute an offense against the dignity of the Court, or such an interference with or embarrassment of the administration of justice as to make the respondent liable to punishment for contempt.

"Fourth. If the Court shall determine, after consideration of the foregoing, and such further information as it may require [492] to be produced before it, that the respondent is guilty of contempt, the respondent protesting that such contempt was wholly unintentional on its part, prays that it may be permitted to purge itself thereof, and to that end submits itself to such order as to your Honors shall seem meet.

[Seal of Providence Journal Co.]

"PROVIDENCE JOURNAL COMPANY,

"By Its Attorneys,

"EDWARDS & ANGELL,

"WALTER F. ANGELL."

It appeared further from admission of counsel that the writer of the article had before him a correct copy of the opinion of the court in which the decision was stated.

The case is one of particularly flagrant carelessness in the discharge of an assumed public duty which very intimately affects the administration of justice. A newspaper has the same right to publish the truth, without malice, that is guaranteed to every citizen. It has no more warrant to publish falsehood.

The administration of justice by our courts is before the face of the people. The sessions of the courts are open to the public, and it is proper that their decisions should be known to all. To this end, in all cases of general interest, the decisions of the courts, with the reasons therefor, are delivered in writing so that they may be disseminated, and appropriations are made for printing and preserving them for future reference in similar cases.

A skilled lawyer is appointed to insure correctness in the reports.

Inasmuch as the decisions of the courts in a very large measure announce the law of the land, which all men are supposed to know, and by which their rights and property are protected and their daily actions must be guided, the whole system is obstructed by a false statement of such decisions, and the people are thereby grievously wronged.

It is the right of a newspaper, as of any citizen, in public [493] or in private, to discuss the opinions of the court, to criticise their reasoning or to question by sober argument the soundness of their conclusions, but not to misstate these conclusions.

When a newspaper takes up the task of informing the public what the decisions of courts are, it holds itself out to be equipped with suitable instruments for that work. Its agents must be intelligent and judicious, as well as honest and impartial.

The task, though a very proper one for a newspaper, is self-assumed, and is undertaken at the peril of the publisher. The responsibility for accurate statement increases as the agency for the dissemination of the statement becomes more efficient.

A peculiarly lamentable feature of the affair is the present inability of the respondent to comprehend its offense: "it respectfully submits that an unintentional error, ... does not constitute an offense such as to make it liable to punishment for contempt." It relies upon the purity of its intentions. Manifestly this is no excuse. Ignorance of the law excuses no one, not even a newspaper while using its columns for the purpose of instructing its readers in the law. The effect of such instruction, if erroneous, is more than ordinarily misleading, as the first and for most unprofessional persons the final information which the community receives of the doings of the courts is derived from the newspapers. The misstatement arose from recklessness or incompetence, and the respondent must not employ reckless or incompetent persons for such service. A blunder in this connection produces the same evil consequences as an intentional misrepresentation.

The point of law involved in the opinion referred to was of very wide application and importance. The fraternal orders of this country having benefit funds number many thousands of members, all of whom would learn with alarm that

the supreme court of one of the states had denied their right to regulate the disposition of these funds by their fundamental law. This court cannot suffer that such a misstatement should be published within its jurisdiction with impunity.

For these reasons we have thought it our duty to call the respondent to account, and now, after the respondent has been [404] heard, adjudge it to be guilty of contempt, of which it may purge itself by publishing this opinion, on or before the first day of January, 1908, on the editorial page of the "Providence Daily Journal," where the original article appeared, and by paying the costs of this proceeding.

Contempt of Court by Libelous Newspaper Publications is discussed in the note to Percival v. State, 50 Am. St. Rep. 572. The publication of articles in a newspaper may constitute a contempt of court for which the editor and manager may be punished, although he may have no actual knowledge of the contents of the articles nor any actual intent to interfere with justice or bring disrespect upon the court. Absence of wrongful intent may be considered in mitigation of the offense but not as an excuse therefor: State v. Howell, 80 Conn. 668, ante, p. 141, and see cases cited in the cross-reference note thereto.

BATES v. HACKING.

[28 R. I. 523, 68 Atl. 622.]

WILLS—Revocation by Subsequent Writing.—The statutory provisions for the revocation of a testament by will properly executed, or by some writing declaring an intention to revoke executed like a will, are neither identical nor interchangeable. The latter is evidence of a present intention, and when executed becomes of itself a complete revocation; but the former takes effect only when the will of which it forms a part becomes effective, and that can never be in the lifetime of the testator. (p. 760.)

WILLS—Destruction of Revocatory Wills.—Where a will, which contains a provision revoking prior wills, was afterward destroyed by the testator, a prior will may be admitted to probate. (p. 761.)

James L. Jenks, Gardner, Pirce & Thornley and William W. Moss, for the appellant.

John N. Butman and Bassett & Raymond, for the appellee.

[523] DUBOIS, J. This is a probate appeal brought to this court upon appellee's exceptions to certain rulings of the superior court, including the following charge to the jury directing a verdict for the appellant, viz.: "Inasmuch as it appears by undisputed testimony that, after the execution of the will in issue, Peter Warren made and executed another

will which contained a clause expressly revoking all wills theretofore made, which last-mentioned will was subsequently destroyed, and as there is no evidence that it was the intention of the said Peter Warren to revive the will in issue, the jury are instructed to find that the will in issue is not the last will and testament of the said Peter Warren, and to return a verdict for the appellant."

It appears from the transcript of the testimony that Peter Warren, the testator, made four wills, to wit, one in 1893, another in 1898, a third, which is the will in issue, May 10, 1900, and the fourth about May 20, 1900; that the first and third wills are still in existence, but that the second and fourth wills have been destroyed by the testator; that the second will was burned by him on May 10, 1900, after the third will was drawn; that at the time of the execution of the fourth will the testator gave the third will to the appellee, named therein as executor and trustee, with instructions "to take [524] care of it"; and that subsequently the testator informed the appellee that he had destroyed the fourth will by burning the same.

The first will is not offered for probate, and needs no further consideration at the present time.

The question presented is whether the third will was revoked by the execution of the fourth will, which contained a clause expressly revoking all wills theretofore made; and the answer depends entirely upon General Laws, caption 203, section 17, which reads as follows: "No will or codicil or any part thereof shall be revoked otherwise than as provided in the preceding section, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same." Section 16 concerns revocation by marriage, and has no application to this case.

The statute relating to revocation of wills is of ancient origin, and was construed by this court in Reese v. Court of Probate (1870), 9 R. I. 434, wherein Brayton, C. J., speaking for the court, said: "The statute declares that all devises shall continue in force unless burned, etc., or unless the same be altered by some other will or codicil, or other writing of the devisor, signed in the presence of three or

more witnesses declaring such alteration. As another writing signed by the devisor, it has the same defect as where offered as a will. It has but two witnesses, while it requires three to give it validity.

"But the cases go further, and hold that if the writing declaring the revocation be part of a will, and executed as such, though the instrument be defectively executed, so that it cannot operate as a will, the clause of revocation cannot be set up as another writing revoking any former devise. That being executed for a will, the clause is like every other declaration therein of the testator's will and intent, is ambulatory, and the whole instrument stands or falls together: Laughton v. Atkins, 1 Pick. 535; Eccleston v. Speke, Carth. 79."

525 Thirty-seven years have elapsed since the rendition of the foregoing decision, during which time the statutes have undergone several revisions, but the provision relating to revocation of wills has not been substantially modified. This fact may fairly be taken as an indication of legislative satisfaction with the construction placed upon it as aforesaid. Acquiescence for more than a generation is sufficient approval.

The statutory provisions for revocation by will properly executed, or by some writing declaring an intention to revoke executed like a will, are neither identical nor interchangeable. They differ materially in that the former relates to a will while the latter does not. One looks toward the future while the other regards the present. The writing declaratory of an intention to revoke is evidence of a present intention, and when executed becomes of itself a complete revocation. But the revocation by will takes effect only when the will of which it forms a part becomes effective, and that can never be in the lifetime of the testator.

For these reasons we are constrained to hold that the superior court erred in directing the jury to return a verdict for the appellant. The other exceptions need not be considered in this view of the case.

The appellee's exception is therefore sustained, and the case is remitted to the superior court for further proceedings, in accordance with this opinion.

The Operation of a Revocatory Clause in a Will is, according to some authorities, immediate and absolute, and the fact that such will is destroyed, or cannot be found after the death of the testator, does not revive the former one: In re Noon's Will, 115 Wis. 299, 95 Am. St. Rep. 944, and see authorities cited in the cross-reference note thereto.

CASES

IN THE

SUPREME COURT

OF

SOUTH CAROLINA.

CHARLES v. ATLANTIC COAST LINE RAILROAD COMPANY.

[78 S. C. 36, 58 S. E. 927.]

CARRIERS, CONNECTING—Loss of Freight—Liability for.—If the last carrier collects freight charges on the whole number of packages of an interstate shipment and marks the packages "four sacks short," he is presumed to be liable for the missing packages. (p. 763.)

CARRIERS—Connecting Lines—Loss of Freight—Burden of Proof.—Evidence showing the amount of freight charges collected, the number of packages shipped, and the initials of the consignor, and that the consignee had bought but one bill of goods of the consignor, casts the burden of proof, as between connecting carriers, on the last carrier, to show that any loss of goods did not occur on its line. (p. 764.)

CARRIERS—Connecting Lines—Evidence.—In an action against the last of connecting carriers to recover for the loss of goods shipped, the bill of lading issued by the first carrier and the bill of the goods shipped are inadmissible, without more. (p. 764.)

CARRIERS, TERMINAL—Evidence.—In an action against a terminal carrier for the loss of goods, the contract of purchase is a collateral matter, and parol evidence is admissible to prove it without producing the written order and its acceptance. (p. 764.)

CONSTITUTIONAL LAW—Interstate Commerce.—A statute providing that a penalty be paid the consignee by a carrier doing business within the state, for failure to admit and pay a claim for loss of freight while in its possession, within a certain time, is not unconstitutional as an unlawful interference with interstate commerce, even as applied to an interstate shipment. (p. 766.)

Willcox & Willcox and H. E. Davis, for the appellant.

G. Galletly and J. W. Ragsdale, for the appellee.

[37] JONES, J. This action was brought in a magistrate court to recover the value of four sacks of rice alleged to

have been shipped from New Orleans, Louisiana, by Martin J. Wynne to the plaintiff at Timmonsville, South Carolina, and to have been lost while in the possession of the defendant carrier, and also to recover fifty dollars' penalty for failure to adjust and pay the claim within ninety days as prescribed by the act of February 23, 1903. The magistrate gave judgment against defendant for the amount claimed, sixty-eight dollars and forty-eight cents, which judgment, on appeal, was affirmed by the circuit court.

We notice, first, appellant's seventh and eighth exceptions alleging error in finding that the rice sued for was lost while in the possession of the defendant, there being no testimony whatever tending to show such fact. The circuit court found that "the defendant presented to and collected from the plaintiff a freight bill for thirty sacks of rice and marked on the bill '4 sacks short,' that it was warrantable to conclude that the four sacks of rice did come into the possession of the defendant company, for it collected the freight on the four sacks, and [38] declared that the rice was missing. Enough was proven to cast on the defendant company the burden of proving that when the shipment reached its line four sacks were then missing. The defendant alone knew the fact and it did not prove it."

The plaintiff was the only witness examined in the case, and his testimony warranted the conclusion of the circuit court, if his testimony on this point was admissible.

The fifth exception charges that it was error to admit in evidence the freight bill, exhibit "F," on the ground of irrelevancy. It appears from the exhibit that defendant collected from plaintiff thirteen and fifty one-hundredths dollars freight for transporting "30 pkts. Rice," and that the consignor was M. J. W., and that four sacks were short. Plaintiff testified that in August, 1905, he ordered Martin J. Wynne, of New Orleans, to ship thirty bags of rice, and paid him for the same; that he paid the freight for thirty bags, and received only twenty-six. There was no evidence of any other order by plaintiff for rice or shipment of rice to plaintiff during the period involved in the controversy. The freight bill and its payment with this statement indorsed thereon was clearly relevant. It tended to show a single shipment of thirty bags of rice to plaintiff by one whose initials were the same as those of the alleged shipper, and that charge was made by defendant for transporting that number of bags, coupled with an admission that four were

missing. This was at least sufficient to make out a prima facie case of loss while in the possession of defendant, and to cast upon defendant the burden of showing that the loss did not occur on its line: Willett v. Southern Ry., 66 S. C. 477, 45 S. E. 93; Walker v. Southern Ry., 76 S. C. 308, 56 S. E. 952.

The foregoing conclusion renders it immaterial to consider the third and fourth exceptions to the admission of testimony by the magistrate, for it may be conceded that it was error to admit in evidence a bill of lading purporting to be issued by the Louisville and Nashville Railroad Company for thirty sacks of rice, consigned by Martin J. Wynne to [39] plaintiff, without some proof that it was in fact issued to the consignor by an authorized agent, and that it was also error to allow in evidence a bill for thirty packages of rice rendered to plaintiff by Martin J. Wynne, dated August 23, 1905, containing the words "shipped via L. & N. Rd.," being the mere statement of Martin J. Wynne not examined in this case, still the error was harmless as this testimony may be stricken from the record and leave undisputed testimony sufficient to sustain a judgment for the loss of the goods while in defendant's possession. Section 368 of the Code requires that on appeals from magistrate's court, judgment should be rendered according to the justice of the case, without regard to technical errors and defects which do not affect the merits.

The first and second exceptions allege error in permitting plaintiff to testify that he had purchased thirty bags of rice from Martin J. Wynne without producing the written order and acceptance therefor admitted to be in existence. This not being a suit between plaintiff and Martin J. Wynne touching the purchase of the rice and defendant's liability being dependent, not upon such contract of purchase, but upon its possession for transportation of goods consigned to plaintiff, the contract in question involved merely a collateral matter as to which parol testimony was admissible: Elrod v. Cochran, 59 S. C. 467, 38 S. E. 122.

The ninth exception assigns error in not reversing the judgment of the magistrate for the statutory penalty, after having held that the claim in question arose out of an interstate shipment, and that the penalty statute was invalid as to interstate shipments. What the circuit court really held was that the terms of the proviso of the act of 1903 were invalid in so far as they refer to commerce between the states,

under the authority of Central of Georgia R. R. v. Murphey, 196 U. S. 194, 25 Sup. Ct. Rep. 218, 49 L. ed. 444, but that defendant could not avail itself of the invalidity of this proviso, as the evidence showed that defendant was in possession of the goods lost. In other words, that the penalty [40] statute of 1903 does not violate the interstate commerce law in so far as it applies to the common carriers in this state, in whose possession the goods are lost or damaged.

The Georgia statute, which was condemned in the Murphey case as an unlawful interference with interstate commerce, imposed upon the initial or connecting carrier, as a condition of availing itself of a valid contract of exemption from liability beyond its own line, the duty of tracing the freight and informing the shipper in writing when, where and how and by what carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established. The distinction between the Georgia statute and our statute, section 1710, is pointed out in Skipper v. Seaboard Air Line Ry., 75 S. C. 276, 117 Am. St. Rep. 901, 55 S. E. 454, 7 L. R. A., N. S., 388, which sustained section 1710 as not violative of interstate commerce.

We are, however, not now to consider the validity of section 1710, but we are to consider the validity of the act of 1903 (24 Stat. 81), as applied to interstate shipments. The statute by its title is "An act to regulate the manner in which common carriers doing business in this state shall adjust freight charges and claims for loss of or damage to freight." Section 2 provides, "That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state, and within ninety days, in case of shipment from without this state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: provided, that no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the [41] periods respectively herein prescribed shall subject each

common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: Provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: Provided, further, that no common carrier shall be liable under this act for property which never came into his possession, if it complies with the provisions of section 1710, volume 1, of the Code of Laws of South Carolina, 1902."

The last proviso, as the circuit court correctly held, has no application to carriers into whose possession the goods have come. Construing the statute in Seegers v. Seaboard Air Line Ry., 73 S. C. 71, 121 Am. St. Rep. 921, 52 S. E. 797, the court said: "The duty to make prompt settlement for loss or damage to goods is but an incident of the duty to transport and deliver safely and with reasonable diligence, The statute in question was designed to effectuate an important public purpose, viz., to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight. The penalty is but a means to that end."

While it is not easy to define the exact limits of the operation of state laws as affecting interstate commerce, we have no hesitation in saying that the statute in question, as it affects carriers doing business in this state, who fail or refuse to adjust and pay the loss of or damage to goods while in their possession, is no unlawful interference with interstate commerce, even as applied to an interstate shipment. The penalty imposed is for a delict of duty appertaining to the business of a common carrier, and in so far as it may affect interstate commerce, it is an aid thereto by its tendency to promote safe and prompt delivery of goods, or its legal equivalent—prompt settlement of proper claim for damages. No penalty can attach except upon the establishment in a court of a default of duty imposed by statute. The statute [42] does not attempt to regulate interstate commerce and imposes no tax or burden thereon. It is supported by the general principle declared in Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819, and enforced in Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. Rep. 564, 31 L. ed. 508, and Nashville etc. R. R. v. Alabama, 128 U. S. 96, 9 Sup. Ct. Rep. 28, 32 L. ed. 352, that state legislation "relating to the rights, du-

ties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce is of obligatory force upon citizens within the territorial jurisdiction, whether on land or water, or engaged in commerce foreign or interstate, or in any other pursuit."

In the case of Western Union Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. Rep. 934, 40 L. ed. 1105, a statute of Georgia requiring telegraph companies to transmit and deliver dispatches with impartiality, good faith and diligence under penalty of one hundred dollars in each case, in the absence of legislation by Congress on the subject, was held not to be an unwarrantable interference with interstate commerce as to messages without the state.

The exceptions are overruled and the judgment of the circuit court is affirmed.

The Cases of Cooper v. Seaboard Air Line Ry., 78 S. C. 81, 58 S. E. 93, and Von Lehe v. Atlantic Coast Line Ry., 59 S. E. 135, are both ruled and decided by the principle laid down in the last paragraph of the syllabus of the principal case, ante, p. 762.

The Liability of an Initial Carrier for the torts and negligence of connecting lines is discussed in the note to Pennsylvania Co. v. Loftis, 106 Am. St. Rep. 604; and the burden of proof as between connecting carriers to show who is at fault for a loss or injury is discussed in the note to Beede v. Wisconsin Cent. Ry. Co., 101 Am. St. Rep. 392. In an action against an initial carrier of two or more connecting lines, the burden of proof is upon the plaintiff to show that the damages occurred on its line; but in a suit against the last or delivering carrier, the burden is upon it to show that the damage was not done on its line: St. Louis etc. R. R. Co. v. Pearce, 82 Ark. 353, 118 Am. St. Rep. 75. See, also, St. Louis etc. Ry. Co. v. Coolidge, 73 Ark. 112, 108 Am. St. Rep. 21; Rolfe v. Lake Shore etc. Ry. Co., 144 Mich. 169, 115 Am. St. Rep. 388.

A Statute Providing that Common Carriers shall adjust freight charges and claims for loss or damage to freight within a named time, and that if this is not done they shall be liable to a penalty, is not unconstitutional as violative of the equality clause of the fourteenth amendment to the United States constitution, or of a similar provision in a state constitution: Seegers Bros. v. Seaboard Air Line Ry., 73 S. C. 71, 121 Am. St. Rep. 921, and see note thereto.

VENNING v. ATLANTIC COAST LINE RAILROAD COMPANY.

[78 S. C. 42, 58 S. E. 983.]

CARRIERS—Interstate Commerce—Constitutional Law.—A statute which makes each carrier the agent of its connecting carrier, from whom it receives freight, and makes each such agent liable for the default of its connecting carrier, is unconstitutional, as an unlawful interference with the interstate commerce clause of the constitution of the United States. (pp. 776, 777.)

CARRIERS—Constitutional Law.—A statute making each carrier the agent of its connecting carrier, from whom it receives freight, and making such agent liable for the default of its connecting carrier, is not unconstitutional as being in contravention of the fourteenth amendment to the national constitution, as denying to common carriers the equal protection of the laws. (p. 777.)

CARRIERS—Failure to Adjust Loss—Application of Statute.—A statute providing a penalty for a failure to pay or adjust a loss or damage to freight within a certain time must be construed to apply only to a loss or damage to freight occurring on the line of the railroad sued within the state. (p. 778.)

STATUTES—Construction—Provisos.—In construing statutes, a provision therein cannot be extended by implication to cover that which is opposed to the express language of the main enactment. (p. 779.)

Following are the statutes referred to in the main opinion:

"Code of 1902, sec. 1710: When under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order,' and if such freight or express has been lost, damaged or destroyed, it shall be the duty of the initial, delivering or terminal road, upon notice of such loss, damage or destruction being given to it by the shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days after such notice, or to trace such freight and inform the said party so notifying when, where and by which carrier the said freight or express was lost, damaged or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage or destruction in the same manner and to the same extent as if such loss, damage or destruction occurred on its lines: *Provided,* That if such initial, terminal or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage or destruction occurred, it shall thereupon be excused from liability under this section."

"AN ACT TO FURTHER DEFINE CONNECTING LINES OF COMMON CARRIERS AND TO FIX THEIR LIABILITIES.

"SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That all common carriers over whose transportation lines, or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers on a contract for through carriage, recognized, acquiesced in or acted upon by such carriers, shall in this state, with respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and in any of the courts of this state, any through bill of lading, way bill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage or other property for such through shipment or transportation, shall constitute prima facie evidence of the subsistence of the relations, duties and liabilities of such carriers as herein defined and prescribed, notwithstanding any stipulations or attempted stipulations to the contrary by such carriers, or either of them.

"SEC. 2. For any damages for injury, or damage to, or loss, or delay of any freight, baggage or other property sustained anywhere in such through transportation over connecting lines, or either of them, as contemplated and defined in the next preceding section of this act, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this state therefor, shall be held liable to such person or persons, and such carrier so held liable to such person or persons shall be entitled in a proper action to recover the amount of any loss, damage or injury it may be required to pay such person or persons from the carrier through whose negligence the losses. damage or injury was sustained, together with costs of suit.

"SEC. 3. That this act shall take effect immediately upon its approval by the Governor, and all acts and parts of acts inconsistent with this act are hereby repealed.

"Approved the 13th day of May, A. D. 1903. 24 Stat. 1."

"AN ACT TO REGULATE THE MANNER IN WHICH COMMON CARRIERS DOING BUSINESS IN THIS STATE SHALL ADJUST FREIGHT CHARGES AND CLAIMS FOR LOSS OR DAMAGE TO FREIGHT.

"SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That from and after the passage of this act, all common carriers doing business in this State shall settle their freight charges according to the rate stipulated in the bill of lading: *Provided*, The rate therein stipulated be in conformity with the classification and rates made and filed with the Interstate Commerce Commission, in case of shipments from without this State, and with those of the Railroad Commissioners of this State, in case of shipments wholly within this State; by which classification and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carrier to inform any consignee or consignees of the correct amount due for freight, according to such classifications and rates; and upon payment and tender of the amount due on any shipment, or on any part of any shipment, which has arrived at its destination, according to such classifications and rates, such common carrier shall deliver the freight in question to the consignee or consignees, and any failure or refusal to comply with the provisions hereof shall subject each such carrier so failing or refusing to a penalty of fifty dollars for each such failure or refusal, to be recovered by any consignee or consignees aggrieved by suit in any court of competent jurisdiction.

SEC. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this State, and within ninety days in case of shipments from without this State, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: *Provided*, That no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of

such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any Court of competent jurisdiction: *Provided,* That unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: *Provided, further,* That no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, vol. 1, of the Code of Laws of South Carolina, 1902.

"SEC. 3. That any common carrier, upon complying with the provisions of this act, shall have all the rights and remedies herein provided for against the common carrier from which it received the freight in question.

"SEC. 4. That causes of action for the recovery of the possession of the property shipped, for loss or damage thereto and for the penalties herein provided for, may be united in the same complaint.

"SEC. 5. That all acts or parts of acts inconsistent with this act be, and the same are hereby, repealed.

"Approved the 23d day of February, A. D. 1903. 24 Stat. 81."

P. A. Willcox, H. E. Davis and Wilson & DuRant, for the appellant.

W. C. Davis, for the appellee.

[47] WOODS, J. The Belknap Hardware Company, in January, 1905, delivered to the Southern Railway Company at Louisville Kentucky, a steel range and warming closet, consigned to the plaintiff at Manning, South Carolina.

The defendant, Atlantic Coast Line Railroad Company, the terminal carrier, delivered to the plaintiff the warming closet only, and this action was brought in a magistrate's court to recover twenty-one dollars for failure to deliver the range and fifty dollars, the statutory penalty, for failing to adjust and pay the claim within ninety days.

The allegation of the complaint is that the Southern Railway Company undertook carriage and delivery of the goods

to Manning, South Carolina, for itself and the defendant, its connecting line. But the bill of lading expressly provides: "No carrier shall be liable for loss or damage not occurring on its portion of the route."

The defendants' clerk, whose duty it was to check the contents of cars turned over by the Southern Railway to the Atlantic Coast Line Railroad at Columbia, testified the range was marked short on his book and was never received by the Atlantic Coast Line Railroad. The magistrate rendered judgment in favor of the plaintiff for twenty-one dollars damages and fifty dollars for failing to adjust and pay the claim in ninety days, and on appeal the circuit court affirmed the judgment.

It was held in Willett v. Southern Ry., 66 S. C. 477, 45 S. E. 93, that when property received by the initial carrier in good condition is delivered by the terminal carrier in damaged condition, the burden is on the terminal carrier to show the damage did [48] not occur on its own line. The same principle was held to apply to the loss of a part of a carload of goods in Walker v. Southern Ry., 76 S. C. 308, 56 S. E. 952, and in Bradley v. Northwestern Ry. Co., 77 S. C. 317, 57 S. E. 1101, it was held to extend to the loss of a part of several articles shipped under one bill of lading. Applying this last case, the defendant's delivery of the warming closet cast upon it the burden of showing that it had never received the range. The credibility of the testimony that the range had not come into possession of the defendant was for the magistrate and the circuit court to pass on, and had the record disclosed that this evidence was disbelieved on any reasonable ground, the judgment would be affirmed, because this court could not disturb a finding of fact that the presumption of loss by the terminal carrier had not been refuted by credible testimony. The record makes it clear, however, the judgment was not upon this ground, but on the statute of 1903 (24 Stat. 1), under which the defendant as one of the connecting carriers would be liable without respect to whether the range was lost on its line or on that of another carrier. If the act of 1903 is a valid statute, the evidence that the range was never delivered to the defendant carrier would be immaterial, and it was no doubt so regarded by the circuit court. The vital question, therefore, is whether this act of May, 1903, must be held unconstitutional as an attempt to regulate interstate commerce. In Skipper v. Seaboard A. L. Ry. Co., 75 S. C. 276, 117 Am. St. Rep. 901, 55 S. E. 454, 7 L. R. A., N. S., 388, an exception raising the question of the

constitutionality of this act was overruled, but the main question considered in that case was the constitutionality of sections 1710 and 2176 of the Civil Code. We propose now to consider the question of constitutionality of the act of May, 1903, as if it had not been heretofore made.

The statute was intended to make radical changes in the law as to the liability of carriers for losses or damage occurring on connecting lines. The extent of the changes contemplated will be made evident by viewing the state of the law [49] as it appears from the adjudications of the supreme court of the United States and the supreme court of this state, with respect to the relations of connecting lines with each other, and to the owners of goods in course of transportation, and with respect to the right of such carriers to contract, before the enactment of the statute, in contrast with the law as it would be under the statute. The supreme court of the United States held in Michigan Central R. R. Co. v. Mineral S. M. Co., 83 U. S. 318, 21 L. ed. 297, that, in the absence of a contract to the contrary the liability of a common carrier ended with its prompt delivery of the property in good order to the next connecting carrier. This rule was recognized and followed by the same court in Ogdensburg L. C. R. R. Co. v. Pratt, 89 U. S. 129, 22 L. ed. 827, and St. Louis Ins. Co. v. St. Louis etc. R. R. Co., 104 U. S. 146, 26 L. ed. 679, and other cases. The law was held to be the same in this state in Piedmont Mfg. Co. v. Columbia etc. R. R. Co., 19 S. C. 353; Dunbar v. Port Royal & A. Ry. Co., 36 S. C. 110, 31 Am. St. Rep. 860, 15 S. E. 357; Hill v. Georgia etc. R. R. Co., 43 S. C. 461, 21 S. E. 337. Under these cases it is obvious a stipulation in the bill of lading, limiting the liability of each carrier to its own line, would be a reasonable limitation. In Lewis v. Richmond & D. R. R. Co., 25 S. C. 249, it was held the initial carrier could not, without special authority, make a contract binding upon the terminal carrier.

Terminal and intermediate carriers were held entitled to the benefit of any reasonable stipulations in the bill of lading limiting their liability, in Harby v. Southern Ry. Co., 75 S. C. 321, 55 S. E. 760.

The act of 1882 (Civ. Code, sec. 2176) provided the initial carrier should be liable for loss or damage to goods until it discharged itself by showing a written receipt from the carrier to which it was its duty to deliver it; and when the initial carrier so discharged itself, the successive connecting carriers were made liable in the like manner, with the right to discharge themselves by like written receipt from the next

carrier. The act further provided, that any carrier, by willfully failing or refusing to produce the written receipt [50] of the next carrier, on the demand of anyone interested, lost the benefit of it in any action brought against the carrier for the loss or damage of the property. This act was held constitutional in Skipper v. Seaboard Air Line Ry. Co., 75 S. C. 276, 117 Am. St. Rep. 901, 55 S. E. 454, 7 L. R. A. 388, and there is no ground to doubt the soundness of that conclusion.

The act did nothing more than relieve persons interested in property lost or damaged in transit of intolerable hardship, by fixing the kind of evidence a carrier shown to have been in actual possession of the property should take, preserve and produce that it had been properly delivered to another carrier. It merely made a rule of evidence less drastic than that which was held to be reasonable and valid in Richmond etc. Co. v. Patterson Tobacco Co., 169 U. S. 311, 18 Sup. Ct. Rep. 355, 42 L. ed. 759. The section of the Virginia Code under consideration in that case was: "When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing, ... if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge."

In holding the statute to be the legitimate exercise by the state of Virginia of the power to determine the form in which contracts may be proved, not amounting to a regulation of interstate commerce, the court says, at page 314: "The inadequacy of the bill of lading to protect the carrier from liability beyond its own line resulted, it is true, from the statute, but not because the statute forbade the carrier from contracting so as to limit his liability, but because the contract which he did make was not in the form required by law, and therefore was not evidence that there was such a contract. Indeed, the entire argument, upon which it is [51] asserted that error was committed by the court below, but manifests in varying forms of statement the fallacy already noticed, that is, it comes from obscuring the difference between substance and form, between a power to contract and the asserted right in

availing of the authority, to disregard the requisites essential to show a valid contract, and this confusion also marks the difference between the case now presented and the very many adjudged cases cited by the plaintiff in error in support of its proposition."

The act of May, 1903, now under consideration, is entirely different in scope from the Virginia statute and our statute of 1882. It goes far beyond prescribing a rule of evidence or the form of contract. By it, the General Assembly has undertaken to make a complete change in the legal relations of connecting carriers to each other and to the owners of goods in transit, and in the right of such carriers to contract. The act provides that all carriers which recognize, acquiesce in, or act upon a contract for through shipment shall be statutory connecting carriers, and, as such, agents of each other with respect to the matter of transportation, and they shall be under contract each with all the others, and with the shipper, owner and consignee for safe and speedy transportation of the property from the point of shipment to destination. Any through bill of lading, issued by any one of such carriers, showing that any one of them received the property for through transportation, is made prima facie evidence of the agency of each other and all the others, and of the contract of each and all of such carriers with each other and with the owner to transport the property with safety and speed from the point of shipment to destination; and against this prima facie evidence of agency and contract the express stipulations of the parties themselves are made unavailing.

In consonance with these provisions it is further enacted, the person sustaining damage or loss shall have the right of recovery against any one of the connecting carriers he may choose to sue; the liability being unaffected by proof that 52 the property had been lost or damaged on another line, or had never come into possession of the carrier sued. The carrier singled out by the shipper, owner or consignee is in turn allowed to recover from the carrier through whose negligence the loss, damage or injury was sustained, together with costs.

In Central of Georgia Ry. Co. v. Murphey, 196 U. S. 194, 25 Sup. Ct. Rep. 218, 49 L. ed. 444, the supreme court of the United States held a statute of Georgia unconstitutional as to interstate commerce which imposed upon the initial or any connecting carrier, as a condition of availing itself of a valid contract of exemption from liability beyond its own

line, the duty of tracing the freight and informing the shipper in writing, when, where and how, and by which carrier, the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established.

In Skipper v. Seaboard Air Line Ry. Co., 75 S. C. 276, 117 Am. St. Rep. 901, 55 S. E. 454, 7 L. R. A., N. S., 388, this court held section 1710 of Civil Code constitutional. Pointing out the particulars in which that section differed from the Georgia statute, which had been declared unconstitutional in Central of Georgia Ry. Co. v. Murphey, 196 U. S. 194, 25 Sup. Ct. Rep. 218, 49 L. ed. 444, Mr. Justice Jones uses this language: "The Georgia statute made the initial carrier absolutely liable if it failed within thirty days after application to inform the shipper in writing when, where, how and by what carrier the freight was lost or damaged, together with the names of witnesses to establish such facts; whereas, our statute, section 1710, provides that the carrier shall be excused from liability upon proof that by the exercise of due diligence, it has been unable to trace the line upon which the loss or damage occurred. The Georgia statute prevented a carrier from availing itself of a valid contract exempting from liability for loss or damage occurring beyond its own line, except upon an onerous condition, which in many cases it could not meet; whereas, the South Carolina statute excuses the carrier if the loss did not occur on its own line, and it could not, after due diligence, comply with the statute."

53 The act of 1903, now under consideration, goes as far beyond the Georgia statute as section 1710 fell behind it. The Georgia statute was held to be unconstitutional, in that it made one connecting carrier liable for the delict of another, unless it exempted itself by giving to the party interested information within thirty days as to the particulars of the loss. The requirement that the carrier should obtain and give this information was, as the court held, so onerous as to amount to an illegal attempt to regulate interstate commerce. Still, under the Georgia statute, the carrier had the chance to save himself by giving the information required. In our statute there is no means of escape for a carrier which recognizes, acquiesces in, or acts upon the contract of the initial carrier for through shipment, however innocent from liability for the breach of duty of a connecting carrier.

The far-reaching character of the attempt to regulate interstate commerce will be still more apparent on viewing an-

other feature of the statute. The provision that the carrier selected for liability by the owner of the goods should have the right of recovery from the carrier actually in default, to compensate for its own liability to the owner, would be of no avail against the real defaulting carrier operating entirely outside the state. For the state law can have no extraterritorial effect. A railroad operating in Kentucky cannot be made the agent of a railroad in South Carolina, or liable for its default, or subject to a suit by the South Carolina railroad for breach of duty to a shipper, by authority of a South Carolina statute. Therefore, if this statute is given effect, a carrier operating on an interstate line partly in this state, upon receiving freight in Georgia upon a connecting line, under a bill of lading issued by a Kentucky railroad, would have to pay for the loss or damage arising from the negligence of the Kentucky road, without any recourse against the defaulting road. Obviously, the practical result would be that the loss and damage on all through shipments from the entire country into South Carolina would fall on the interstate roads coming into this state, [54] to the exemption of all connecting roads for their own defaults. On principle, as well as under the authority of Central of Georgia R. R. Co. v. Murphey, 196 U. S. 194, 25 Sup. Ct. Rep. 218, 42 L. ed. 444, it is impossible to avoid the conclusion that the act of May, 1903, here under consideration, is unconstitutional.

The defendant submits that the act is obnoxious to the fourteenth amendment of the constitution of the United States and section 5, article 1, of the constitution of South Carolina, in that it denies to common carriers the equal protection of the law; and should be declared void even as to the transportation of goods by connecting lines entirely within the state. The argument in support of this proposition is strong, but we do not think it is conclusive. While the lawmaking branch of the state government has no power to require persons or corporations to make contracts, it has, in general, the power to regulate the business of public transportation within its borders. Considered with respect to such business, in this act, the General Assembly has in effect forbidden a common carrier to recognize, acquiesce in or act upon a through contract of shipment made by a shipper, owner or consignee with another carrier, except upon condition that it shall become liable for any default of such other carrier. But the carrier may avoid this liability for the default of another by refusing to recognize, acquiesce in or act

upon the through contract of shipment. A carrier, it is true, is required by section 2177 of the Civil Code to forward freight sent on another road "according to the directions contained thereon or accompanying the same," and we think, aside from this statute, the common law imposes the obligation upon the carrier to receive and forward goods tendered by another carrier, just as if they were tendered by the owner. But in doing so it need not recognize, acquiesce in or act upon the through bill of lading. It may receive the goods, give its own receipt, charge its own freight and in all respects repudiate or disregard the through bill of lading. By thus refusing to recognize, acquiesce in or act upon the through bill of lading it would avoid liability [55] for the default of another. It cannot, therefore, be said that the statute denies to the carrier the right to prosecute its business, except upon condition that it shall become liable for the default of others.

It remains to consider whether the judgment of the circuit court in this case can be sustained under section 1710 of the Civil Code or under the act of February, 1903 (24 Stat. 81).

As to section 1710, it is only necessary to refer to the case of Cave v. Carolina M. Ry. Co., 53 S. C. 496, 31 S. E. 359, where it was held no relief could be given under this section unless the complaint alleged shipment under a contract providing that the responsibility of each carrier should cease upon the delivery of the freight to a connecting carrier "in good order." There is no allegation of the kind in this case; on the contrary it is evident from the complaint the action was intended to rest on the invalidity under the act of May, 1903 (24 Stat. 1), of such a contract as section 1710 contemplates. Section 1710, therefore, can have no application.

We come, then, to the act of 1903 (24 Stat. 81), which it is convenient to designate as the act of February 1903, to distinguish it from the statute already considered, and held unconstitutional, passed in May, 1903 (24 Stat. 1).

We are not concerned with the first section which relates to freight charges and the duty of the carrier to deliver goods on payment of the charges after they have reached destination.

The section of main importance here is the second, which provides for the recovery for loss of or damage to freight; and penalties for failure to adjust and pay such loss or damage within a certain time. The question vital to this case is whether the statute can be construed to impose upon one con-

necting carrier liability for the default of another, unless such carrier obtains and gives the information, or uses due diligence to obtain it as provided in section 1710 of the Civil Code. We do not think it can be so construed.

[56] The main enactment as to the recovery of damages and penalties thus begins in section 2: "That every claim for loss of, or damage to, property *while in the possession of such common carrier* shall be adjusted and paid within forty days," etc. The words we have italicized clearly limit the loss and damage which a carrier is required to adjust and pay for, to that which befalls while the goods are in the possession of such carrier, and excludes the idea of liability for loss or damage to the goods while in the possession of another carrier.

It is true there is a proviso at the end of this section "that no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, volume 1, of the Code of Laws of South Carolina, 1902." But as the body of the act does not make the carrier liable at all "for goods which never came into its possession"; a proviso which exempts from liability for loss of, or damage to, such goods on certain conditions can have no effect. The act imposes no liability to which the exemption can be applied.

The rule is that all parts of a statute including provisos, are to be construed, and effect given if possible to all. But it is contrary to reason as well as authority to extend by implication a proviso to cover that which is opposed to the express language of the main enactment: Southgate v. Goldthwaite, 1 Bail. 367; United States v. Dickson, 15 Pet. 141, 10 L. ed. 689; The Irresistible, 7 Wheat. 551, 5 L. ed. 520; 26 Am. & Eng. Ency. of Law, 681; Endlich on Statutes, secs. 184, 185. The fact that the statute is penal adds force to this conclusion. We are of the opinion that the proviso of section 2 has no effect, and the act only imposes penalties upon the carrier for failing to adjust claims for loss occurring while the goods are in its own possession.

It follows, the plaintiff in this case cannot sustain his recovery on the ground that the defendant was liable under the act of February, 1903, for goods lost by a connecting carrier because it failed to obtain and give information of the kind [57] required in cases falling under that act, or to use due diligence to obtain such information.

This penalty act of February will apply to the case if the finding on the new trial should be, that the loss occurred on

the defendant's road, but not otherwise. It is attacked as unconstitutional under the interstate commerce clause of the constitution of the United States. That question is discussed and decided against the defendant's contention in Charles v. Atlantic etc. R. R. Co., 78 S. C. 36, ante, p. 762, 58 S. E. 927.

The judgment of this court is that the judgment of the circuit court be reversed and the case remanded to the magistrate's court for a new trial.

Statute Requiring Carriers by Rail to Trace Freight or Express shipped over their lines and the line of a connecting carrier, and making the initial carrier liable for shipment over its own and connecting lines, unless a receipt from the connecting carrier is produced, and making the bill of lading issued by the initial carrier prima facie evidence of liability for the loss of or damage to goods in course of transportation, do not unlawfully regulate interstate commerce: Skipper v. Seaboard Air Line Ry., 75 S. C. 276, 117 Am. St. Rep. 901. See, also, Marshall etc. Co. v. Kansas City etc. R. R., 176 Mo. 480, 98 Am. St. Rep. 508.

BROOKE v. LAURENS MILLING COMPANY.

[78 S. C. 200, 58 S. E. 806.]

SALES—Arbitration—Conclusiveness of Grading of Grain.—If a contract for the sale of grain contains a stipulation that the "West Nashville Public Elevator weights and grades be accepted as final," the honest grading of the grain by the arbitrator thus selected by the parties must be accepted as final. (p. 783.)

SALES—Acceptance of Inferior Goods.—By the acceptance of goods, the buyer waives his right to allege inferiority of their quality which was obvious to him. (p. 784.)

SALES—Delivery in Installments—Refusal to Accept—Measure of Damages.—If, under a contract for the purchase of grain to be delivered in installments with a right on the part of the seller to sell on account of the buyer, the latter refuses to accept it, the measure of damages is the difference between the market value on the day that it should have been accepted and the price which was contracted to be paid. (p. 786.)

SALES—Installments—Measure of Damages.—If, in a case of a sale in installments, the time of delivery arrives before the trial, the measure of damages is the difference between the contract price and the market price at the time the goods ought to have been accepted by the purchaser. (p. 786.)

SALES—Damages.—If a purchaser notifies the seller before the day fixed for the acceptance of the goods that he will not accept them, and the seller then sells them, as he has a right to do under the contract, such sale does not enter into a computation of the damages for the breach of the contract of sale. (p. 787.)

Dial & Todd and F. P. McGowan, for the appellant.

Simpson, Cooper & Babb, for the appellee.

201 WOODS, J. The plaintiff and defendant, in January, 1904, made a contract in writing, by which it was agreed plaintiff should sell and deliver to defendant, at specified times, "9,600 bushels, bulk, No. 2 white corn," and defendant should pay for the corn in specific installments. The contract was in these words:

"This witnesseth that George W. Brooke, of Atlanta, Ga., has this day sold to Laurens Milling Co., of Laurens, S. C., 9,600 bushels, bulk, No. 2 white corn, at ——— per bushel, delivered at Laurens, S. C.; said corn to be stored with the Steel Elevator and Storage Co., of West Nashville, Tenn., and carrying charges of one cent per bushel per month, or fraction of a month, are to be paid by said Laurens Milling Co., in addition to the above price, beginning April 1st, 1904. Delivery is to be made within fifteen days after receipt by said Brooke of order therefor by said Laurens Milling Co.: Provided, however, That if failure to deliver within the usual time is occasioned by failure of the railroads to furnish cars therefor, or transport, same shall not be chargeable to said Brooke. Title to said corn shall pass on delivery hereunder. West Nashville Public Elevator Weights and Grades to be accepted as final. Said Laurens Milling Co. has paid said Brooke a margin of 10 cents per bushel on said corn by notes of $960.00, June 1st, 1904; July 1st, 1904; payable at the ——— of ————, which amount of said notes is to be deducted from the last invoice when the grain is shipped, or to such amount as will balance the account, and it is agreed, if said Laurens Milling Co. does not order out said corn as per these terms of contract, said Brooke may, at his option, sell said grain for account of said Laurens Milling Co. Shipments to be made as per memorandum on back of this sheet."

Indorsed on it was the following memorandum:

202 "2,400 bus. No. 2 White Corn, to be shipped March 68¾
1 car March 1st, 1 car March 15th, 1 car March 20th.

"2,400 bus. No. 2 White Corn, to be shipped April.... 69¾
1 car April 1st, 1 car April 15th, 1 car April 20th.

"2,400 bus. No. 2 White Corn, to be shipped May..... 70¾
1 car May 1st, 1 car May 15th, 1 car May 20th.

"2,400 bus. No. 2 White Corn, to be shipped June..... 71¾
1 car June 1st, 1 car June 15th, 1 car June 20th."

The defendant accepted and paid for two carloads of the corn, but refused to accept two other carloads which reached Laurens, the designated place of delivery, on the ground that it was not up to grade; and notified the plaintiff not to ship the remainder. Thereupon the plaintiff sold the corn and brought this action for the difference between the contract price and the price realized on the resale.

The substance of the defense is contained in this sentence of the answer: "That, instead of shipping the corn of quality stipulated in the contract, the plaintiff fraudulently shipped corn to the defendant that was damaged, musty and mildewed, and very inferior in all respects to number two white corn, and was unfit for use, and this defendant could not use the same in its business, and upon the arrival of this corn at Laurens the defendant declined to receive the same, and immediately so notified the plaintiff on the ——— day of ———, 1904, and demanded of the plaintiff the return of the notes given by the defendant to the plaintiff under the said contract, which demand has never been complied with." Evidence was adduced tending to prove the rejected corn was heated and inferior to No. 2 grade when it reached Laurens, and there was also evidence of its liability to become heated and damaged in transportation from Nashville, the place of shipment.

The provision of the contract on which an important question made by the appeal hinges is this: "West Nashville Public Elevator Weights and Grades to be accepted as final." There is no ambiguity or obscurity in this language. [203] The grade No. 2 white corn provided for in the contract is a grade of universal trade recognition. It seems perfectly clear the West Nashville Public Elevator was not empowered to make a new standard of corn grading. The general trade grading was to be the standard, but the West Nashville Public Elevator was to inspect the corn tendered for the parties and decide whether it was up to the trade standard of No. 2 white. The plaintiff produced certificates from M. L. Coggins, grain inspector at the West Nashville Public Elevator, that he had inspected each of the carloads of corn, and that all of them contained "corn, grade No. 2 white"; and Coggins confirmed these certificates by his testimony as a witness.

The circuit judge submitted in his charge as one of the issues decisive of the case whether in the opinion of the jury, as formed from the evidence, the corn was or was not in fact of No. 2 grade when loaded at Nashville. This, we think, was

error, because the parties themselves had agreed in the contract that the grading of the elevator company should be final. In such case the true rule as fixed by authority, from which we can find no dissent, is that the decision of the arbiter on whom the parties have agreed is conclusive when reached in the exercise of his honest judgment.

This rule was applied to the decision of arbitrators appointed by the parties in Rounds v. Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714, and earlier cases in this state; to the decision of an engineer under a contract to dig a well, in Omaha v. Hammond, 94 U. S. 98, 24 L. ed. 70; to that of a meat inspector under contract to deliver meat of a certain grade, in Nofsinger v. Ring, 71 Mo. 149, 36 Am. Rep. 456; to that of architects and engineers under contracts for the construction of buildings or railroads, in Sweeney v. United States, 109 U. S. 618, 3 Sup. Ct. Rep. 344, 27 L. ed. 1053; Chicago etc. R. R. Co. v. Price, 138 U. S. 185, 11 Sup. Ct. Rep. 290, 34 L. ed. 917; Kennedy v. Poor, 157 Pa. 472, 25 Atl. 119; McAlpine v. Trustees, 101 Wis. 468, 78 N. W. 173; Kilgore v. Northwest T. Baptist Soc., 89 Tex. 465, 35 [204] S. W. 145; Seim v. Krause, 13 S. D. 218, 83 N. W. 583; East Tennessee etc. Ry. Co. v. Central Lumber Mfg. Co., 95 Tenn. 538, 32 S. W. 635; Thompson v. Bradbury, 5 Idaho, 760, 51 Pac. 758; Hot Springs Co. v. Maher, 48 Ark. 522, 3 S. W. 639.

The reason for holding the award of the arbiter selected by the parties final, when reached in the exercise of his honest judgment, seems to be at least as strong as the reason for giving such effect to the return of commissioners in partition. In stating the principle applicable to the return of commissioners, the court says in Aldrich v. Aldrich, 75 S. C. 369, 117 Am. St. Rep. 909, 55 S. E. 887; "Even if it should be conceded that a preponderance of the evidence outside the report of the commissioners on the lands given Mrs. Richardson and Mrs. Duncan was too high, it was proper to sustain the valuation made by the commissioners, unless the court was satisfied the valuation was so grossly incorrect and unequal as to warrant an inference that the commissioners acted from an unfair and improper motive. It is a matter of common knowledge that men of experience may differ as to the value of lands. So long, therefore, as the valuation by commissioners may be accounted for on this ground, it should be sustained; and it is not sufficient to overthrow a valuation by commissioners, merely to show that in the opinion of other honest and experienced men the true value

is higher or lower than that made by commissioners under oath."

There is no doubt under the authorities proof may be made of gross inferiority of the work done, or material used, or goods delivered, or of gross over or under valuation, because such proof tends to show that the arbiter agreed on did not exercise his honest judgment, or he must have come to a different conclusion. Nevertheless the issue always remains the same—did the arbiter exercise his honest judgment, not whether the jury or the witnesses would have come to a different conclusion in the exercise of their judgment. To give the finding of the arbiter selected by the parties less force would be to deny the right of the parties to contract. If, therefore, the inspector at the West Nashville 205 Public Elevator inspected the corn and in the exercise of his honest judgment graded it No. 2 white, the plaintiff was entitled to recover, and it was immaterial that the jury might have been of the opinion that the judgment of the inspector was not sound and the corn was not in fact up to the grade No. 2 white.

The plaintiff demurred to the two counterclaims set up in the answer on the ground that the allegations were not sufficient to constitute counterclaims, and the demurrer was overruled. The first counterclaim is as follows: "That the defendant received and used part of the corn shipped to it by the plaintiff, and paid the plaintiff therefor the price stipulated in the contract, but the same was found to be of a very inferior quality, and not No. 2 corn, and was worth much less than the corn which the plaintiff contracted to deliver to the defendant, to wit: The sum of two hundred and ninety-seven and 50-100 dollars." By acceptance of the goods the defendant waived the right to allege inferiority of quality which was obvious to him (Woods v. Cramer, 34 S. C. 508, 13 S. E. 660; Vanderhorst v. McTaggart, 2 Bay, 498; Mitchell v. McBee, 1 McMull. 267, 36 Am. Dec. 264), and there is no allegation that the inferiority was latent. In Ellison v. Johnson, 74 S. C. 202, 54 S. E. 202, 5 L. R. A., N. S., 1151, the question here made was not discussed nor involved. The point there was the measure of damages for breach of warranty in the sale of a quantity of flour. Nothing was decided as to the effect of the acceptance of defective goods when the defects were not latent, and the goods open to examination as the corn was in this case. The demurrer to this counterclaim should have been

sustained. On the same point there was error in the charge as set out in the twelfth exception.

In the complaint plaintiff alleges that when defendant notified him that it would not accept the remainder of the purchase, six thousand two hundred and eighty-six bushels, he resold it as authorized by the contract at a net loss of three and one-fourth cents a bushel, aggregating two hundred and four dollars and twenty-nine [206] cents. By the second counterclaim, the defendant alleges this sale was made at three cents a bushel less than the market price at Laurens on the day of the sale, and asks judgment for one hundred and eighty-eight dollars and fifty-eight cents on this ground. To determine whether this counterclaim was subject to demurrer, it is necessary to state the rights of the plaintiff under this clause of the contract: "And it is agreed if said Laurens Milling Company does not order out said corn as per these terms of contract, said Brooke may at his option resell said grain for account of said Laurens Milling Co." If defendant, without such legal excuse as would release him from the contract, notified plaintiff the remainder of the corn would not be accepted, this gave plaintiff the right to consider the contract breached and to sue for damages immediately, without waiting for the time agreed on for the delivery of all the installments to arrive: Payne v. Melton, 67 S. C. 235, 45 S. E. 154; Ellison v. Johnson, 74 S. C. 202, 54 S. E. 202, 5 L. R. A., N. S., 1151; Hochster v. De la Tour, 22 L. J. Q. B. 455, 6 Eng. Rul. Cas. 576; Roper v. Johnson, 23 Eng. Rul. Cas. 545, and note; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. Rep. 780, 44 L. ed. 953; 24 Cyc. 1124; note to 94 Am. St. Rep. 120.

The damages in such case are to be estimated as of the date when the contract was to be performed, not the date of the repudiation. The rule is thus stated in Roper v. Johnson, 23 Eng. Rul. Cas. 545: "The general rule as to damages for the breach of a contract is, that the plaintiff is to be compensated for the difference of his position from which it would have been if the contract had been performed. In the ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract price and the market price on that day. Now, although the plaintiff may treat the refusal of the defendant to accept or deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the con-

tract price and the market price on the day of the breach. It appears to me that [207] what is laid down by Cockburn, C. J., in Frost v. Knight, in the Exchequer Chamber (L. R. 7 Ex. 11), involves the very distinction which I am endeavoring to lay down, viz., that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages; and that, when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for the performance, and not at the time of the breach." After full discussion, the supreme court of the United States adopted this view in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. Rep. 780, 44 L. ed. 953, and it is now generally accepted in this country. Evidently, if the trial takes place before the time for performance has arrived, there is difficulty in estimating with precision the loss of the plaintiff on the day of performance yet in the future. The difference in the market price on the day of performance and the price fixed in the contract is not available as a measure, because it is impossible to know the future market price. In the case last cited, Chief Justice Fuller thus states the principle in which the damages in such circumstances are to be estimated: "As to the question of damages, if the question is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought to have availed himself." This difficulty, however, is not present here, because the time fixed by the contract for delivery had arrived before the trial. If the time of delivery arrives before the trial, the general rule that the measure of damages is the difference between the contract price and the market price at the time the goods ought to have been accepted by the purchaser is applicable. This is the rule here. The plaintiff, it is true, had the option to resell the corn for defendant's account, but according to the principle laid down in the numerous cases above cited, he could not charge the defendant with a loss on a resale [208] made before the time specified in the contract for delivery. The contract only gave the plaintiff the option to substitute for the market price on the day appointed for performance the price realized by a resale on that day. Therefore, while

the plaintiff under his option could hold the corn and resell it at the time fixed for acceptance or not, as he saw fit, the defendant was in nowise bound by the result of a resale made before the day fixed for performance. The resale by the plaintiff was of no effect, and his option to resell on the arrival of the day fixed for performance of the contract by defendant remains unexercised. The measure of the damages, therefore, would be the difference between the market price of the corn on the day the contract contemplated the acceptance of the corn by the defendant, and the price which the defendant contracted to pay.

The second counterclaim is for the difference between the price of six thousand two hundred and eighty-six bushels of corn realized by the resale, made before the time for delivery, and the market value on the day of the resale. If the defendant breached the contract and threw the corn on the plaintiff's hands, then, as we have seen, he is liable for the contract price less the market value of the corn on the day it was to be delivered. The plaintiff having sold the six thousand two hundred and eighty-six bushels before the time fixed for acceptance, neither the amount realized at this resale nor the market price on the day of resale enter into the case. For these reasons the demurrer to the second counter claim also should have been sustained.

The complaint alleges in effect a breach of the contract by defendant in refusing to pay for so much of the corn as was shipped and accepted, in refusing to accept and pay for so much of the corn as was shipped to defendant and refused after it reached Laurens, and in notifying plaintiff by letter it would refuse to receive or pay for the six thousand two hundred and eighty-six bushels unshipped. As to the alleged breach in refusing to take the six thousand two hundred and eighty-six bushels unshipped corn, the complaint incorrectly alleges the defendant's liability to be the difference between
209 the contract price and the amount realized on resale made before the time for delivery had arrived, instead of the true measure of liability, namely, the difference between the contract price and the market value on the day the corn was to be accepted. But as there was no objection made to the complaint by demurrer or otherwise this mistake has not been considered. It is proper to say, if defendant meant by his second counterclaim to admit that the agreement contemplated an option to the plaintiff to resell the six thousand two hundred and eighty-six bushels at once on its notice that it would refuse to accept, the counterclaim would still be

demurrable. For if the resale is to be considered to have been made according to the contract, then under the contract it was "for account of Laurens Milling Company"; and this altogether negatived the idea that the plaintiff was to guarantee the market price.

Of course, these conclusions as to the complaint and the counterclaims are announced without prejudice to the parties to move to amend the complaint or counterclaims as they may be advised in accordance with the principles we have stated.

No specific reference to the exceptions to the charge are deemed necessary, as in the discussion we have endeavored to cover them all. Under the principles we have announced, the exceptions as to the exclusion and admission of testimony are overruled.

The judgment of this court is, that the judgment of the circuit court be reversed and the cause remanded to that court for a new trial.

An Award by Arbitrators is in the Nature of a Judgment, and ordinarily conclusive upon the parties: Hynes v. Wright, 62 Conn. 323, 36 Am. St. Rep. 344. Awards are favored in law, and reluctantly set aside; every presumption is in favor of their fairness, and the burden is on the party seeking to set them aside to do so by clear and strong proof: Brush v. Fisher, 70 Mich. 469, 14 Am. St. Rep. 510; Roberts v. Consumers' Can Co., 102 Md. 362, 111 Am. St. Rep. 377. As to vacating awards for mistake, fraud or misconduct, see Jackson v. Roane, 90 Ga. 66, 35 Am. St. Rep. 238; In re Curtis, 64 Conn. 501, 42 Am. St. Rep. 200; Brush v. Fisher, 7 Mich. 469, 14 Am. St. Rep. 510; Sweet v. Morrison, 116 N. Y. 19, 15 Am. St. Rep. 376; Hewett v. Reed City, 124 Mich. 6, 83 Am. St. Rep. 309; Christianson v. Norwich Union Fire Ins. Co., 84 Minn. 526, 87 Am. St. Rep. 379. A statutory award may be impeached upon a showing of fraud and mistake, though honestly made, which would work a fraud on either party: Waisner v. Waisner, 15 Wyo. 420, 123 Am. St. Rep. 1081.

STATE v. COOK.

[78 S. C. 253, 59 S. E. 862.]

TRIAL—Legal Holiday—Objection.—An objection to the trial of a criminal case on a legal holiday, to be available on appeal, must be made when the case is called for trial on such holiday, and the statement of the trial judge, made on the day before, that he knew of no law which prevented a court from trying a case on a legal holiday, is immaterial. (p. 790.)

HOMICIDE in Defense of a Relative.—One who undertakes to assist a near relative who is in danger of death or great bodily harm at the hands of an antagonist, acts at his peril if the person assisted was actually at fault in provoking the difficulty. (p. 791.)

HOMICIDE—Self-defense.—If one person interferes in behalf of another, who is the aggressor, to prevent his being killed, and there is opportunity to retreat after the interference, and advantage is not taken of it, the person interfering can claim no greater right than the other, and neither of them can invoke the doctrine of self-defense. (pp. 791, 792.)

W. S. Tillinghast, for the appellant.

J. E. Davis, for the state.

[253] WOODS, J. The defendants, Vincent Cook, Bose Cook, Daisy Cook and Henry Cook, were tried at February, 1906, term of the court of general sessions for Hampton county, under an indictment charging them [254] with the murder of Hampton Smith. Vincent Cook, Bose Cook and Daisy Cook were convicted of manslaughter, and Vincent Cook and Bose Cook were convicted also under the second count of the indictment, charging them with carrying concealed weapons. The following statement appears in the record:

"On the trial of the cause the state offered testimony tending to show that at the time of the alleged homicide there was a carnival in the town of Hampton, and that deceased was one of a number of special policemen, duly appointed by the town council to preserve order, and that while attempting to arrest Daisy Cook for an alleged breach of the ordinances of the said town of Hampton, he was set upon by the brothers of the said Daisy Cook and shot to death with pistols. The defendants offered testimony tending to prove that the defendants Bose Cook and Vincent Cook came up suddenly, and, finding their brother assaulted, interfered in his defense, and, under an impending necessity to save their brother from death or serious bodily harm, they took the life of the deceased. They further offered testimony tending to prove that they were all without fault in bringing on the difficulty. The state replied to the defense and offered testimony tending to show that Daisy Cook was cutting up the tents belonging to the parties who owned the show or carnival, and, furthermore, that his co-defendants had, on the afternoon previous to the killing in the evening, made threats against the life of the deceased. The issue was submitted to the jury on the charge of the court."

The first exception charges the circuit judge committed error in ordering the defendant to go to trial on the twenty-second day of February, a legal holiday. The facts bear-

ing on this point are thus stated in the record: "On the twenty-first day of the said month, Mr. Tillinghast, one of the attorneys for the defendants, inquired of the judge whether he would hold court on the 22d of February, as he thought he could not do so, that being a legal holiday. The [255] judge ruled that he knew of no law to prevent the court being held on the succeeding day. The case was then called on the 22d of February, and no further objection being raised, the case proceeded to trial with the result above stated." The point is purely technical and defendants suffered no detriment. It will be observed that Mr. Tillinghast does not appear to have had reference to this or any other case, and the response of the circuit judge cannot be regarded as an adjudication made in this cause. To make the objection available on this appeal, it should have been distinctly made against proceeding with this cause when it was called for trial. Not having been made, it must be considered objection to the trial on the twenty-second day of February was waived: Mitchell v. Bates, 57 S. C. 44, 35 S. E. 420; 21 Cyc. 444.

The second ground of appeal is as follows: "That his honor, the presiding judge, erred in charging the jury, in reference to the right to kill in defense of another, as follows: 'But if your brother or one near and dear to you provokes a difficulty, or puts himself in the wrong and bring it on, the law does not allow you to go there, take his place and kill that man, and say you are guilty neither of murder nor manslaughter. The law does not give the person who is near and dear to you the right to provoke a difficulty, and then let you come in and kill some one, when he has brought it on himself, and get out of it by your saying he was near and dear to you, and you did the killing on that account. But if he was without fault in bringing on the difficulty and the law would justify him in defending himself, you have a right to go in and defend him. But if he brings on the difficulty and you take part, you do it at your own risk, and if he took life under similar circumstances, and would have been guilty of murder or manslaughter, and you go in, take his place and take life under those circumstances then you are guilty of murder or manslaughter.' The error being that the said charge held one striking in defense of a brother bound and affected by a fault on the part of the [256] brother defended, in bringing on the difficulty, although he may have acted without knowledge of such fault or may have had no opportunity to ascertain who was at fault in

bringing on the difficulty, before being compelled by the pressing necessity to act in defense of his brother; and he may be without fault himself; whereas, it is respectfully submitted, that in order for one to be affected by the fault of another he must at least have some knowledge or opportunity to know it."

This exception raises the important question whether one who undertakes to assist a near relative who is in danger of death or great bodily harm at the hands of an antagonist acts at his peril if the person assisted was actually in fault in provoking the difficulty. There is some authority for the view that the assistant is guilty who takes life in aiding a relative in apparent danger of death or great bodily harm if he knew his relative to be the aggressor, as a reasonable man should have known it, but not otherwise: Chambers v. State, 46 Tex. Cr. 61, 79 S. W. 572; State v. Harper, 149 Mo. 514, 51 S. W. 89; Little v. State, 87 Miss. 512, 40 South. 105. There are a number of other cases decided by the supreme court of Texas to the same effect, but in that state, as in Missouri, the law as to homicide has been greatly modified by statute.

Even if it be assumed, however, the criminal codes of those states have not affected the consideration to be given these decisions by courts of other states, they are opposed to the great weight of authority from the earliest times to the present.

In Hale's Pleas of the Crown, volume 1, page 484, the rule is thus stated: "The like law had been for a master killing in the necessary defense of his servant, the husband in defense of the wife, the wife of the husband, the child of the parent, or the parent of the child, for the act of the assistant shall have the same construction in such cases, as the act of the party assisted should have had, if it had been done by himself, for they are in mutual relationship the one to the other": See, also, 1 Bishop on Criminal Law, sec. 877, and [257] 21 Cyc. 826, et seq. The doctrine is thus comprehensively stated in Wharton on Homicide (3d edition), section 332: "The doctrine of freedom from fault in bringing on a difficulty as a condition precedent to a plea of self-defense applies with equal force to a case in which one person interferes in a difficulty between two others in behalf of, or to protect one of, them; and, generally speaking, a person who does this will not be allowed the benefit of the plea of self-defense, unless such plea would have been available to the

person whose part he took in case he himself had done the killing, since the person interfering is affected by the principle that the party bringing on the difficulty cannot take advantage of his own wrong. If the person sought to be protected provoked or brought on the difficulty, he must have clearly manifested a desire and intention to retire from the conflict; and even then the person interfering would not be justifiable if he struck the fatal blow in pursuance of a previous design to assist his friend in the event of a personal difficulty. And where one person interferes in behalf of another who was the aggressor, and there is opportunity to retreat after the interference, and advantage is not taken of it, the person interfering can claim no greater right than the other, and neither of them can invoke the doctrine of self-defense. Thus, if a son fight in defense of his father, his act in doing so will receive the same construction as that of the father, and if the latter was the aggressor in bringing on the difficulty, and could not plead self-defense, the same rule applies to the son. And the son cannot rely on his own freedom from fault in bringing on the difficulty, as a defense, where he knew the father had provoked the attack; both must have been without fault in bringing it on. Nor is a father justified in killing the adversary of his son, where the son had provoked and brought on the conflict in which he was placed in imminent danger. And the plea of self-defense cannot be interposed by a father who kills an officer rightfully seeking to arrest his son, to prevent such arrest. Nor can one strike to relieve a brother from peril unless the brother was free from [258] fault in bringing on the difficulty which placed him in peril. And if a person in whose defense a brother engaged was in fault, and had not retreated or attempted to retreat, the interference is not justifiable or excusable." The following cases support the same view: Wood v. State, 128 Ala. 27, 86 Am. St. Rep. 71, and note, 29 South. 557; Utterback v. Commonwealth, 105 Ky. 723, 88 Am. St. Rep. 328, and note, 49 S. W. 479; People v. Travis, 56 Cal. 251; State v. Giroux, 26 La. Ann. 582; Sharp v. State, 19 Ohio, 379; State v. Johnson, 75 N. C. 174; note to 74 Am. St. Rep. 736.

There are some expressions in Wharton on Homicide and other text-books which seem to be at variance with the text above quoted, but they will be found to be merely a statement of the rule as laid down in the Texas and Missouri cases to which we have referred.

The precise question has never been decided in this state, so far as we can discover, but the same principle was involved in State v. Anderson, 1 Hill, 327. There the right to arrest a felon was under discussion, and the court held, in order for the party who killed in the effort to arrest one charged with the felony of murder to excuse himself, he must show that a voluntary homicide, presumed by the law to be felonious, had been committed and the party charged had perpetrated it. The court uses this language: "The homicide actually committed constitutes the authority to arrest; it is a felony until matter in excuse is shown; it authorizes the grand jury to find a true bill, and thus put the prisoner on his trial for life and death. Like the finding of stolen goods in the possession of one, he is legally regarded as the thief until he accounts for his possession; so he who of his own will, and not by command of law, commits a homicide, is legally guilty of murder until he shows that it was excusable in self-defense, or manslaughter by reason of sudden heat and passion from reasonable provocation given. The party arresting is supposed to act with knowledge of the law; he is bound, therefore, to show that the prisoner has committed the fact from which the law raises the presumption of guilt. This is what I understand by being bound to show the prisoner's [259] guilt in order to justify his arrest by a private person. A mere suspicion that he has done the act will not justify the arrest; the proof must show that prima facie a legal felony was committed, and that the prisoner was the perpetrator. The prisoner's excuse, although it might shield him from condemnation, does not enter into the question." It was here distinctly held that reasonable and honest belief that a felony had been committed would be no justification.

In commenting on the case of State v. Anderson, 1 Hill, 327, this court said in State v. Griffin, 74 S. C. 412, 54 S. E. 603: "It will thus be seen that it was incumbent on the person making the arrest to show the actual fact from which the law raised the presumption that a felony had been committed. He was not permitted to act merely upon information, although it might strongly tend to establish the fact from which the law inferred a felony." The law on the subject of arrest has been changed in this respect by section 1 of the Criminal Code, as will be seen by reference to the case last cited, but the statute has no application to one who kills in assisting another.

The case of State v. Myers, 13 S. C., MSS., which is supposed to support the appellant's view, seems to be not at all clear, and we discern in it no adjudication of the point here under discussion.

We have endeavored to show the law as laid down by the circuit judge is firmly established. It is true, the rule may, in exceptional cases, work hardship; but the opposite rule would allow the innocent man who had been forced to strike in self-defense to be killed with impunity merely because appearances happened to be against him at the moment a partisan of his antagonist reached the scene of conflict. The duty seems urgent to enforce rather than relax the rule which admits of no excuse for taking human life except necessity.

It is the judgment of this court that the judgment of the circuit court be affirmed.

Mr. Justice Gary Dissented, solely upon the ground that "the distinction is overlooked in the leading opinion, between the case where there is merely an intention to prevent a felony, and that in which a third party espouses the cause of one of the participants. In the latter case they are held equally guilty, for the reason that they have, by their acts, become confederates; while in the former, a third party is justified or excused, even in taking human life, if the sole motive by which he was actuated, was to prevent the perpetration of a felony, and the jury thinks the acts as they appeared to him were such as might reasonably have been expected to induce such belief in a man of ordinary firmness and intelligence."

The Law of Self-defense is discussed in the notes to State v. Sumner, 74 Am. St. Rep. 735; State v. Gordon, 109 Am. St. Rep. 804. If one fires a fatal shot in defense of his son, he is excusable or not according as the son would be innocent or guilty had he fired the shot in his own defense: Utterback v. Commonwealth, 105 Ky. 723, 88 Am. St. Rep. 328; and one who intervenes in a difficulty in behalf of his brother and takes the life of the other combatant stands in the shoes of his brother in respect of the fault in bringing on the difficulty, and cannot defend on the ground of his brother's peril, unless the latter could so defend: Wood v. State, 128 Ala. 27, 86 Am. St. Rep. 71.

EHRLICH v. JENNINGS.

[78 S. C. 269, 58 S. E. 922.]

BILLS AND NOTES—Title to Stolen Negotiable Instruments.—The title of a bona fide holder of a stolen negotiable instrument acquired before maturity is good against the world. (p. 796.)

BILLS AND NOTES—State Coupon Bonds.—A coupon bond of the state, valid in its inception, is a negotiable security, and the state issuing it incurs the same responsibility which attaches to an individual or a corporation in a like case. (p. 796.)

BILLS AND NOTES—Stolen Coupon Bonds—Liability for.—The state is liable for a coupon bond issued by it in the hands of an innocent holder before maturity, though it had been surrendered for cancellation and stock issued therefor, even if stolen before cancellation, and put in circulation by the person by whom it was stolen. (p. 796.)

CONSTITUTIONAL LAW—Stolen Bonds—Increase of State Debt.—The recognition by the state of a stolen coupon bond as a valid obligation in the hands of an innocent holder does not increase the state debt under a provision of a state constitution prohibiting the legislature from increasing the state debt without a vote of the people. (p. 800.)

MANDAMUS Lies to Compel a Public Officer to Perform a Plain, Ministerial Duty, imposed by law, involving no discretionary power, to the performance of which the relator has a right, and to enforce which he has no other adequate and specific legal remedy. (p. 800.)

MANDAMUS to Compel Exchange of a Certificate of Stock for a State Bond.—Mandamus will lie to compel a state officer to exchange a certificate of stock, for a state bond when such action is expressly authorized by the legislature and the relator's title to the bond is impregnable. (p. 800.)

MANDAMUS to Compel a State Officer to exchange a certificate of stock for a bond is in no sense a suit against the state. (p. 801.)

W. T. Aycock, for the relator.

J. F. Lyon, attorney general, and J. W. Thurmond, for the respondent.

271 JONES, J. The relator, as holder of a coupon bond, No. 2525, for one thousand dollars, payable to bearer, issued by the state in June, 1893, presented the same to the state treasurer and demanded a certificate of stock in exchange therefor under the act of 1892, entitled, "An act to provide for the redemption of that part of the state debt known as the Brown Consul bonds and stocks by issuing other bonds and stocks." The state treasurer refused to make the exchange on the ground that said bond had been previously redeemed, having been surrendered to the state treasurer by a holder in exchange for stock, and thereafter

had been stolen from the treasury vault by a clerk in the office. Mandamus is now sought to compel the state treasurer to issue stock in exchange for said bond.

No marks to indicate the cancellation were ever placed upon the said bond, although the statute expressly declared that such surrendered bond "shall immediately upon such [272] surrender be canceled and filed by the state treasurer with the permanent records of his office." It is admitted that relator is a bona fide holder for value before maturity and without notice. The general rule of law is that a thief of personal property cannot convey to purchaser, however innocent, any title to the stolen property as against the real owner. But from the highest considerations of public policy the law excepts from the rule negotiable instruments acquired in good faith before maturity and without notice, and makes the title of such holder good against the world: Bond Debt Cases, 12 S. C. 200; Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491; Evertson v. National Bk. of Newport, 66 N. Y. 14, 23 Am. Rep. 9; Murray v. Lardner, 2 Wall. 110, 17 L. ed. 857; Cooke v. United States, 91 U. S. 389, 23 L. ed. 237.

The Bond Debt Cases, 12 S. C. 200, show that a coupon bond of the state, valid in its inception, is a negotiable security, and the state issuing such negotiable paper incurs the same responsibilities which attach to individuals or corporations in like cases. There is no suggestion that the bond in question was not valid when originally put in circulation, and it being admitted that relator is a bona fide holder thereof at this time, his title can in nowise be affected by the surrender of the bond to the treasurer by some antecedent holder and the subsequent theft by means of which it was again put in circulation. The method which the state had adopted to take such bond out of circulation, cancellation, was not complied with by those intrusted by the state with that duty. The direction to cancel surrendered bonds was designed to prevent the very possibility which has happened, and the failure of the state officers to comply cannot be treated as a circumstance of no consequence, for the absence of marks of cancellation made it possible for the thief to put the bond in circulation.

The respondent relies upon the case of Branch v. Commissioners of the Sinking Fund, 80 Va. 427, 56 Am. Rep. [273] 596. The syllabus of that case is as follows: "Coupon bonds issued by the state of Virginia had been redeemed and others had been issued in their stead. The bonds so

redeemed were stolen from the state and came into possession of a bona fide holder for value, who presented them to be refunded in other state bonds. Held, that mandamus would not lie to compel the funding." This result is based upon three reasons: 1. The bonds could not be funded because they were not legal outstanding obligations of the state, having been redeemed and extinguished; 2. That if the bonds were legal obligations of the state to be paid at maturity, the contract of the state was to pay money, not give other bonds for them; 3. That the bondholders were, under the circumstances, guilty of negligence in failing to inform themselves, as they could and ought to have done by a breath, as to the genuineness of the bonds. It will be observed that the third reason given is contradictory of the view that the holder was a bona fide holder for value before maturity without notice, as that language is understood in this state and now generally in this country and England.

At one time in England, under the case of Gill v. Cubitt, 3 Barn. & C. 466, it was held that the holder, to have good title, must not have taken the negotiable paper under circumstances which ought to have excited the suspicion of a prudent man, and this view has received some support in this country, but in Goodman v. Harvey, 4 Ad. & E. 870, the doctrine of Gill v. Cubitt, 3 Barn. & C. 466, was completely discarded, and the rule declared that negligence, which is not so great as to warrant an inference of fraud or bad faith, will not affect the title of the holder. Such is now generally the rule in this country: Goodman v. Simonds, 20 How. 343, 15 L. ed. 934; Murray v. Lardner, 2 Wall. 110, 17 L. ed. 857; Witte v. Williams, 8 S. C. 200, 28 Am. Rep. 294. We refer to this to show that in so far as the Virginia case rests upon the negligence of the holder as affecting his title, it cannot receive any sanction in this state, for if the holder was merely negligent, his title should have been held [274] unaffected, whereas, if his negligence was so gross as to warrant an imputation of bad faith, that made a case wholly different from the case at bar, where there is not a suspicion of bad faith. With respect to the second reason given in the Virginia case, if it be conceded that the bond in question is a valid obligation of the state in the hands of a bona fide holder, it would seem clear that such bona fide holder is clothed by law with every right given to holders of the bonds by the statutes which authorized their issuance, exchange or redemption. The main reason upon which the

doctrine of the Virginia case rests is that which treats the bonds when once surrendered to the treasurer in exchange for other bonds as dead matter, whose vitality could never be restored without voluntary redelivery by the state, and there being no such redelivery, the bonds should be held to be in the category of commercial paper stolen from the maker before it had legal inception. Although there is conflict, much authority exists for the view that an innocent holder for value of paper commercial and negotiable in form, but which had never been completed by delivery, cannot acquire rights thereto against the alleged maker: Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Cline v. Gutherie, 42 Ind. 227, 13 Am. Rep. 357; Salley v. Terrill, 95 Me. 553, 85 Am. St. Rep. 433, 50 Atl. 896, 55 L. R. A. 730.

This rule, however, cannot properly apply in a case where the negotiable paper has once become operative by a valid delivery. The real point of inquiry is, admitting a valid and strictly negotiable paper in the hands of a bona fide holder before maturity, how far can intervening circumstances affect the title of the holder? The general rule is that payment before maturity is no defense against a subsequent bona fide holder for value before maturity: 3 Randolph on Commercial Paper, sec. 1470; 2 Daniel on Negotiable Instruments, sec. 1233; Haug v. Riley, 101 Ga. 372, 29 S. E. 44, 40 L. R. A. 249; Rockville Nat. Bank v. Citizens' Gas Light Co., 72 Conn. 576, 45 Atl. 361. It is the duty of the maker paying commercial paper before maturity to take reasonable precaution to prevent its restoration to [275] circulation by accident or fraud. In Ingham v. Primrose, 7 Com. B., N. S., 82, the acceptor of a bill after paying it, and intending to cancel it, tore it in halves and threw it into the street, but the drawer having picked up the pieces and pasted them together put the bill again into circulation. The acceptor was compelled to pay a second time.

In California v. Wells, Fargo & Co., 15 Cal. 336, certain warrants issued by the state of California were paid and deposited in the office of the treasurer, and were afterward stolen from the office and passed into the hands of a bona fide holder, who presented them to the treasurer to be exexchanged for bonds under a statute of that state. The treasurer, not aware of the theft, exchanged bonds for warrants. On discovering the theft afterward, he brought suit to recover the bonds, but the court held that the bonds were valid debts of the state in hands of the innocent holder.

In Rockville Nat. Bank v. Citizens' Gas Light Co., 72 Conn. 576, 45 Atl. 361, coupon bonds of the defendant had been paid before maturity and surrendered, but not marked canceled, and left in the hands of the defendant's treasurer, who, with no power to reissue, fraudulently pledged same with plaintiff bank, which took them before maturity, bona fide and without notice. The court held that plaintiff was entitled to recover upon the bonds.

The case of District of Columbia v. Cornell, 130 U. S. 655, 9 Sup. Ct. Rep. 694, 32 L. ed. 1041, is distinguishable from this case in at least two important particulars: 1. The certificates involved in that case were held not to be strictly commercial paper; 2. When paid they were in fact marked canceled, although the marks of cancellation were removed by the thief, a clerk in the office.

The principle that a bona fide holder cannot acquire title where there is absolute want of power in the state or its officers to issue negotiable paper has no application in this case, the bond in question having been originally issued by due authority. The holder is not claiming by virtue of any reissue of the bond after its redemption, but by virtue of the [276] original issue and relation to it as a bona fide holder unaffected by intervening facts. The claim is not that the treasurer, or anyone in his office, had power to reissue the bond, but that he was charged by the state with the duty to keep it out of circulation by cancellation and that his failure to do so was the state's failure. It is true the doctrine of estoppel in pais does not apply to a sovereign state, and that the state can only act under its constitution and through its legislative enactments, and that therefore contracts cannot be created against the state except under such sanctions: Carolina Nat. Bank v. State, 60 S. C. 465, 85 Am. St. Rep. 865, 38 S. E. 629. But here we have a bond of the state issued by due authority of the legislature, which the representative of the state failed to cancel as directed by statute, and which is now under the law-merchant the property of the relator. As stated by Chief Justice Waite in Cooke v. United States, 91 U. S. 389, 23 L. ed. 237: "A government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required by individuals; and if it fails in this,

its claim upon the parties is lost: United States v. Barker, 12 Wheat. 559, 6 L. ed. 728. Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty authorized to represent the government in that behalf neglects that duty and loss ensues, the government must bear the consequences of his neglect." It may be further said that the right of a bona fide holder of commercial paper under circumstances like these does not wholly rest upon the law of estoppel, but is grounded upon high public policy which is subserved by making him secure in his title.

It is urged in behalf of the respondent that the recognition of the bond, in question as a valid debt of the state [277] when it has already been redeemed by the issue of stock in exchange would result in increasing the debt of the state in violation of the constitution, section 11, article 10, which forbids the General Assembly from creating any further debt or obligation without first submitting the question to the qualified electors, etc. As declared in Whaley v. Galliard, 21 S. C. 560, with reference to a similar provision in the constitution of 1868, the object of the provision was to place restrictions upon the power of the legislature to contract debts. It has no application to a case like this. We are not concerned now with the validity of the stock issued in exchange for the bond, but the principle announced touching the rights of a bona fide holder would surely protect the holder of such stock in his title. The bond in question in the hands of the relator is no new debt attempted to be created by the unauthorized act of some officer, or even by the judgment of a court, but represents the old debt provided for in the statute authorizing the issue of that series of bonds.

Having thus established the status of relator's title to the bond in question, we proceed to consider whether mandamus should issue to compel the exchange demanded.

Mandamus lies to compel a public officer to perform a plain ministerial duty imposed by law, involving no discretionary power to the performance of which the relator has a right, and to enforce which he has no other adequate and specific legal remedy. Every condition of this law governing mandamus is met in this case. There is no other adequate legal remedy. We have shown the relator's title to the bond in question to be impregnable. As owner of the bond he is unquestionably entitled to every right conferred

upon the holder by the statute authorizing its issuance, exchange or redemption. He has presented to the proper public officer the actual bond for exchange and his demand has been refused. The officer has no discretion to refuse such demand by a bona fide holder, and the statute [278] imposes upon him the plain ministerial duty to make the exchange upon demand and surrender of the bond.

In Lord v. Bates, 48 S. C. 95, 26 S. E. 213, the court refused mandamus because the statute required the funding of certain bonds upon their actual surrender, a condition which the holder had not met. In this case the bond is actually tendered; hence there is nothing in the case of Lord v. Bates antagonistic to the issuance of the writ in this case.

The attorney general, however, waives all questions as to the remedy.

The right of a bona fide holder of negotiable paper is not merely equitable. It is a legal right under the law-merchant, and mandamus should not be denied upon the ground that relator's right is a mere equity.

This is in no sense a suit against the state without its consent, for whenever mandamus lies, it compels performance of official duty imposed by the state.

The writ should be issued as prayed.

Mr. Justice Wood and Circuit Judges Watts, Gage, Dantzler, Memminger and Wilson concur in this opinion.

Mr. Justice Gary Dissented upon the ground that mandamus would not lie to compel a state officer to exchange a certificate of stock for a state bond under the circumstances of this particular case, where there is not even the slightest suspicion of wrong on the part of the petitioner attaching to his possession of the bond. At the same time, Judge Gary contended that mandamus will only lie to enforce a ministerial duty, as contradistinguished from a discretionary duty, and that for the writ to issue, the obligation must be both peremptory and plainly defined. The law must not only authorize the act, but it must also require the act to be done. He also contended that the court will not interfere by mandamus with the executive officers of the government, in the exercise of their ordinary official duties, even where those duties may require an interpretation of the law, as the court has no appellate power for that purpose, but when they refuse to act in a case at all, or when by special statute a mere ministerial duty is imposed upon them, then, if they refuse, a mandamus may be issued to compel them, and there are even cases where the writ will not be issued to compel the performance of even a purely ministerial act. When the bond in the present case was surrendered, and a certificate of stock issued in exchange therefor, it lost

its legal effect as a subsisting obligation of the state. Cancellation was not a condition precedent upon which the validity of the certificate of stock which was issued in exchange therefor depended, and such requirement was intended simply to prevent fraud after the transaction between the holder of the bond and the state had terminated by the exchange. The rights of the petitioner are purely equitable, and mandamus is not the proper remedy for the assertion of a mere equity. In the present case, "the question whether the petitioner is an innocent holder of the bond in dispute is not ministerial, but strictly judicial, and the action of the treasurer in refusing to exchange the bond for a certificate of stock is not subject to control or review by the appellate court."

Mandamus as to the Duties, the performance of which may be enforced by: See note to Ward v. Commissioners of Beaufort County, ante, p. 489.

STOLEN BONDS, COUPONS AND OTHER NEGOTIABLE INSTRUMENTS.

I. Scope of Discussion and Reference to Other Notes, 802.
II. History and Development of Law.
a. In England, 803.
b. In America, 804.
c. Present State of Law, 804.
d. Execution, Validity, Interpretation and Remedy, 805.
III. Instruments Lost or Stolen Before Delivery.
a. Rule that They are Valid in Hands of Bona Fide Holder, 805.
b. Rule that They are Void, Though in Hands of Bona Fide Holder, 808.
IV. Commercial Paper Negotiable by Delivery, 813.
V. Commercial Paper Negotiable by Indorsement, 813.
VI. Commercial Paper Issued Without Authority, 815.
VII. Particular Kinds of Lost or Stolen Instruments.
a. Stolen Bonds, 815.
b. Stolen Coupons, 816.
c. Stolen Check, 816.
d. Stolen Certificates of Deposit, 817.
e. Bills of Lading, 817.
VIII. Burden of Proof, 817.

I. Scope of Discussion and Reference to Other Notes.

This note traces the course of adjudications on the rights of a bona fide holder of stolen negotiable instruments. It shows the conflicting decisions in the English and in the American courts, and the doctrine that is now generally accepted in each country with the authorities sustaining it to date. Who are bona fide holders of negotiable paper, and their rights in general, will be found considered in the notes to Ayer v. Hutchins, 3 Am. Dec. 235; Bay v. Coddington, 9 Am. Dec. 272; Sims v. Lyles, 26 Am. Dec. 156; Bailey v. Smith, 84 Am. Dec. 401. The question as to how far fraud, if at all, is available as a defense to a negotiable instrument in the hands of a bona fide holder, including fraud in the inception of negotiable instruments;

instruments never delivered but obtained by fraud or crime; instruments put in circulation in violation of instructions or conditions; instruments executed in blank and wrongfully filled up; instruments so executed that a portion thereof may be detached or altered; instruments mistakingly executed under false representations; amount of recovery by a bona fide holder against defrauded maker or indorser, and the burden of proof as to a bona fide ownership, will be found considered in the note to Bedell v. Herring, 11 Am. St. Rep. 309-326. For fraud in procuring the delivery of negotiable instruments, see note to Willard v. Nelson, 37 Am. St. Rep. 458. For title acquired by bona fide purchaser of stolen non-negotiable instruments, as well as of stolen negotiable instruments generally, including bonds, bank checks, bills and notes, see note to Cochran v. Fox Chase Bank, 103 Am. St. Rep. 979-988. And for nature and incidents of coupons, and rights of bona fide holder thereof, see note to Evertson v. The National Bank of Newport, 23 Am. Rep. 15.

II. History and Development of Law.

a. In England.—As early as 1804, the English nisi prius court, in the case of Lawson v. Weston, 4 Esp. 56, adopted the principle now generally in force in this country in relation to stolen or lost negotiable instruments. The plaintiffs in this case, who were bankers, had discounted the bill in the usual course of their business for a person who brought it to their shop, but who was unknown to them. It was contended by the defendant that although a person might pay a bill, to which he was a party, to one who had come dishonestly by it, by reason of the personal liability attached to his name on the bill, a banker or any other should not discount a bill for a person unknown without using due diligence to inquire into the circumstances, as well respecting the bill as of the person who offered to discount it. But Lord Kenyon said that, to adopt the principle of the defense to the full extent stated, would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost might have been material if they could bring knowledge of that fact home to the plaintiffs. They might or might not have seen the advertisement, and it would be going great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply to a bill for ten pounds, as for ten thousand pounds. The principle acted upon in that case had been previously adopted in Miller v. Race, 1 Burr. 452; Grant v. Vaughan, 5 Burr. 1516, and Peacock v. Rhodes, 2 Doug. 611.

The first conflict of authorities on this subject in the English courts did not occur until nearly a quarter of a century after Lord Kenyon rendered the well-known decision in the case of Lawson v. Weston, 4 Esp. 56. This was in 1824, in the case of Gill v. Cubitt, 3 Barn. & C 446, 5 Dowl. & R. 324. Although this case changed the law of England on this subject only for a short time, about twelve years—

1824-36,—it had great weight with the American courts for years, Chancellor Kent going so far as to adopt the law as decided in this case, and embody it in his commentaries. The English and American courts, however, have returned to the principle first announced by Lord Kenyon—at least the greater number of the states have, and it is the law of the federal courts to-day: Goodman v. Simonds, 20 How. (U. S.) 343, 15 L. ed. 934.

The bill of exchange in suit in Gill v. Cubitt, 3 Barn. & C. 446, 5 Dowl. & R. 324, was stolen during the night, and taken to the office of a discount broker early on the following morning by a person whose features were known, but whose name was unknown to the broker, and the latter being satisfied with the name of the acceptor, discounted the bill, according to his usual practice, without making any inquiry of the person who brought it; the court said: "That, in an action on the bill by the broker against the acceptor, the jury were properly directed to find a verdict for the defendant if they thought that the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man"; and they having found for the defendant, the court refused to disturb the verdict.

The leading case of the modern English decisions on this subject is that of Goodman v. Harvey, 4 Ad. & E. 870, 6 L. J. K. B. 260, 6 Nev. & M. 372. That was a case in bank, on a rule nisi, which was made absolute. Lord Denman, in delivering judgment, said: "We are all of the opinion that gross negligence only would not be a sufficient answer, where a party has given consideration for the bill; gross negligence may be evidence of mala fides, but it is not the same thing. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title." That case was followed by Uther v. Rich, 10 Ad. & E. 784, 2 P. & D. 579, which was also argued before a full court, and the same learned judge held that the only proper mode of implicating the plaintiff in the alleged fraud by pleading was to aver that he had notice of it, leaving the circumstances by which that notice was to be proved, directly or indirectly, to be established in evidence; and he further held that an averment that the plaintiff was not a bona fide holder was not equivalent.

According to the rule laid down in Goodman v. Harvey, 4 Ad. & E. 870, 6 L. J. K. B. 260, 6 Nev. & M. 372, which indubitably is the settled law in all English courts to-day, proof that a bona fide holder of a negotiable instrument is guilty of gross negligence in acquiring it, does not defeat his right to recover.

b. **In America.**—The various state courts have generally followed the English decisions on this subject. The federal courts adhere strictly to the common law and the law-merchant in upholding the inviolability of bills of exchange and promissory notes.

c. **Present State of Law.**—In these courts the present state of the law is the same as that in England: Goodman v. Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Shaw v. Merchants' National Bank of St.

Louis, 101 U. S. 557, 25 L. ed. 892. In this case, the supreme court, by Mr. Justice Strong, quoting in substance from Story, J., said: "It has become a general rule of the commercial world to hold bills of exchange, as in some sort, sacred instruments in favor of bona fide holders for a valuable consideration without notice. Without such a holding they could not perform their peculiar functions. It is for this reason held that if a bill or note indorsed in blank or payable to bearer be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the bona fide purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it,—that is, nothing short of mala fides,—will defeat his right."

d. **Execution, Validity, Interpretation and Remedy.**—The protection which the law gives to a bona fide holder of stolen, negotiable instruments depends entirely, as far as the validity of the instrument is concerned, its execution and interpretation, upon the law of the state where it was made—the lex loci contractus; matters connected with its performance are regulated by the law prevailing at the place of performance, such as the time, manner, and circumstances of presentation for acceptance or protest, the rate of interest, etc., and his remedy, depends entirely upon the laws of the state where the suit on the instrument is brought, the lex fori, such as admissibility of evidence, and the statute of limitations: Scudder v. Union National Bank of Chicago, 91 U. S. 406, 23 L. ed. 245.

The laws on the subject of stolen negotiable instruments are conflicting. It will be seen by an examination of the numerous decisions of the various states set forth in detail in the pages to follow, that this conflict is due to the different rules of law applied by the different states as principles that should govern in determining the conflicting rights of the maker, indorser, indorsee, or bona fide purchaser of negotiable instruments.

III. Instruments Lost or Stolen Before Delivery.

a. **Rule that They are Valid in Hands of Bona Fide Holder.**—There is a conflict of authorities on this question. In the case of Kinyon v. Wohlford, 17 Minn. 139, 10 Am. St. Rep. 165, the supreme court of Minnesota held that the fact that there was no delivery of a promissory note to any person by or on behalf of the maker is no defense to an action on the note by a bona fide holder for value, who received it before maturity.

The only defense urged in this case was that there was no delivery of the note to any person by or on behalf of the defendant, that for want of delivery it was not the note of defendant, and he was not liable thereon even to a bona fide holder. In overruling this defense, the court quoted the following rule: "A bona fide holder for value, without notice, is entitled to recover upon any negotiable instrument

which he received before it has become due, notwithstanding any defect or infirmity in the title of the person from whom he derived it; as, for example, even though such person may have acquired it by fraud, or even by theft, or by robbery: Story on Promissory Notes, sec. 191; 2 Greenleaf's Evidence, sec. 171; Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Goodman v. Simonds, 20 How. 343, 15 L. ed. 934; Raphael v. Bank of England, 17 Com. B. 162; Wheeler v. Guild, 20 Pick. 545, 32 Am. Dec. 231; Magee v. Badger, 34 N. Y. 247, 90 Am. Dec. 691; Powers v. Ball, 27 Vt. 662; Catlin v. Hansen, 1 Duer, 309; Gould v. Segree, 5 Duer, 260; Marston v. Allen, 8 M. & W. 494, 11 L. J., Ex. 122; Smith's Lead. Cas. 597; 1 Ross' Lead. Cas. 205." The fact that there has been no delivery of the instrument by or for the maker, or by or for an indorser, through whom the holder must claim, is a defect or infirmity of title within the meaning of the rule above cited, a rule "which is said to be laid up among the fundamentals of the law: Shipley v. Carroll, 45 Ill. 285; Clarke v. Johnson, 54 Ill. 296; Ingram v. Primrose, 7 Com. B., N. S., 82; Worcester County Bank v. Dorcester County & M. Bank, 10 Cush. 488, 57 Am. Dec. 120; Edwards on Bills and Notes, 188; Gould v. Segree, 5 Duer, 260."

In the case of Shipley v. Carroll, 45 Ill. 285, a promissory note was written and signed by a defendant solely as a matter of amusement, without any design of delivering the same to the payee named therein, and he afterward stole the same and put it in circulation. The note came into the hands of the plaintiff as a bona fide purchaser for value by indorsement before maturity. The court, in finding for the plaintiff, held as follows: "The doctrine is firmly and, we believe, uniformly settled that the innocent holder for value of negotiable paper, indorsed before its maturity, is protected under the rules of the common law, although the instrument may have been stolen or otherwise wrongfully put into circulation.

"To favor commerce, the law makes an exception as to negotiable paper, and permits the bona fide indorsee to acquire title even from a person who had none in himself."

In the case of Gould v. Segree, 5 Duer (N. Y.), 260, it was held that a person whose name, written by himself, is on the back of a negotiable bill or note, is liable as an indorser to a bona fide holder, although he may not have delivered the paper to anyone for the purpose of transferring title. The court in this case said: "We apprehend that no rule of the law-merchant is more fully settled than that which affirms the title of a bona fide holder, for value, of negotiable paper, notwithstanding the person by whom it was transferred to him, had acquired its possession by felony or fraud; nor do we at all doubt that the salutary rule is just as applicable to paper transferable only by indorsement as to that transferable by delivery alone. It is just as applicable to bills of exchange and promissory notes payable to order as to bank bills payable to bearer. That such is the law is declared, or necessarily implied, in nearly every case having any bearing on the action that is to be found in the books. And using the very words of the supreme court of the United

States, we hold ourselves justified in saying, that, 'The doctrine is so well and so long established, that it is laid up among the fundamentals of the law, and neither reasons nor authorities are now necessary to be brought forward in its support': Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865."

The law in the state of Massachusetts is also well settled that the maker or owner of a negotiable instrument stolen before delivery is liable to a bona fide purchaser for value. This doctrine is laid down in the case of Worcester County Bank v. Dorchester & M. Bank, 10 Cush. 488, 57 Am. Dec. 120. In this case, a bank bill of defendant bank had never been issued by the defendant, but had been forcibly stolen from its vault, in a complete state of preparation for issue. Notices of the robbery were published by the defendants in several papers, one of which, the "Boston Journal," was regularly taken by one of the directors of the plaintiff bank. The court in passing upon this case, said: "It was once held that in the case of a bill of exchange or promissory note fraudulently put into circulation, the holder must show that he had used due and reasonable caution in taking it. But it has since been definitely adjudged that if he took it in good faith, he is entitled to recover on it; and that even gross negligence in him is not tantamount to fraud, although it may be given in evidence to a jury, as tending to prove fraud. The burden of proving good faith is all the burden which the law imposes on him: Goodman v. Harvey, 4 Ad. & E. 870, 6 Nev. & M. 372; Uther v. Rich, 10 Ad. & E. 79, 2 P. & D. 579; 2 Greenleaf's Evidence, sec. 639; 3 Kent's Commentaries, 7th ed., 98, note; Chitty on Bills, 10th Am. ed., 257; Byles on Bills, 2d Am. ed., 143, 148. In Arbonin v. Anderson, 1 Ad. & E. 504, Lord Denman said: 'Acting upon the case of Goodman v. Harvey, 4 Ad. & E. 870, 6 Nev. & M. 372, which gives the law now prevailing on this subject, we must hold that the owner of a bill [of exchange] is entitled to recover upon it if he has come by it honestly; and that that fact is implied prima facie by possession; and that, to meet the inference so raised, fraud, felony, or some other such matter must be proved.'"

In Illinois, the law is also well settled that a promissory note in the hands of a bona fide purchaser for value, and before maturity, is good against the maker, although the same may have been forcibly snatched from the maker and put in circulation: Clarke v. Johnson, 54 Ill. 296. In this case the maker was about to insert in the note a condition which would insure the delivery of a machine, for which the note was given, or render the note void, when the payee snatched it from him, and ran away. The court held that there was not such fraud and circumvention in procuring the execution of the instrument as would defeat the rights of a bona fide purchaser.

The federal law on this subject is laid down in the case of Cooke v. United States, 91 U. S. 389, 23 L. ed. 237. In this case the United States sued Jay Cooke & Co. to recover money paid them by the assistant treasurer in New York for the purchase or redemption before maturity of what purported to be certain treasury notes, but

which it was alleged were counterfeit. Cooke & Company insisted that they honestly believed that the notes in question were genuine, and, so believing, in good faith passed them to the assistant treasurer, and he, under a like belief, and with like good faith, received and paid for them, there must be no recovery, even though they may have been counterfeit.

It was conceded in this argument that when the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances. This is in accordance with the decisions of this court: The Floyd Acceptances, 7 Wall. 666, 19 L. ed. 169; United States v. Bank of Metropolis, 15 Pet. 377, 10 L. ed. 774.

As was well said in the last case: "From the daily and unavoidable uses of commercial paper by the United States, they are as much interested as the community at large can be in maintaining these principles." It is undoubtedly also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment.

In State v. Wells, Fargo & Co., 15 Cal. 336, certain warrants issued by the state of California were paid and deposited in the office of the treasurer, and were afterward stolen from the office and passed into the hands of a bona fide holder, who presented them to the treasurer to be exchanged for bonds under a statute of that state. The treasurer, not aware of the theft, exchanged bonds for warrants. On discovering the theft afterward, he brought suit to recover the bonds, but the court held that the bonds were valid debts of the state in the hands of this innocent holder.

In Rockville Nat. Bank v. Citizens' Gas Light Co., 72 Conn. 576, 45 Atl. 361, coupon bonds of the defendant had been paid before maturity and surrendered, but not marked canceled, and left in the hands of the defendant's treasurer, who, with no power to reissue, fraudulently pledged same with plaintiff bank, which took them before maturity, bona fide and without notice. The court held that the plaintiff was entitled to recover upon the bonds.

b. Rule that They are Void, Though in the Hands of a Bona Fide Holder.—In opposition to the doctrine that a negotiable instrument which is stolen before it leaves the possession of the maker, or before its delivery to this payee—in a word, before its legal inception, in the hands of a bona fide purchaser for value, before maturity, and without notice—is good as against the maker, is the doctrine that such an instrument taken before delivery or before its legal inception, is not good in the hands of such a bona fide purchaser as against the maker.

In the thoroughly and carefully considered case of Cline v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357, the maker of the note in suit was induced, by the fraud and circumvention of the payees of the note, to sign his name to such note, when he honestly supposed and believed that he was writing his name on a blank piece of paper, to

enable the payee to see how his name was spelled or written, and that the maker did not, after he discovered that he had signed his name to the note, voluntarily deliver the note to the payees, but that the same was wrongfully and forcibly taken possession of by the payees, and by them carried away against the consent and over the objection of the maker. The court said: "It is well settled by authority and on principle, that the party whose signature to a paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included: Walker v. Ebert, 29 Wis. 194, 9 Am. Rep. 548; Foster v. Mackinnon, L. R. 4 C. P. 704, given in note, 4 Am. Rep. 238; Whitney v. Snyder, 2 Lans. 477; Nance v. Lary, 5 Ala. 370; Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206; Taylor v. Atchison, 54 Ill. 196, 5 Am. Rep. 118; Wait v. Pomeroy, 20 Mich. 425, 4 Am. Rep. 395; Caulkins v. Whisler, 29 Iowa, 495, 4 Am. Rep. 236."

The court then goes on to inquire whether, conceding that the maker signed his name to the note with full knowledge of its character, it is invalid and void for want of delivery. To facilitate this inquiry the court quotes largely from the decision in the case of Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497, which is in all of its respects very similar to the case under consideration.

In this Michigan case, the court said, and its language is quoted and approved by the Indiana court: "As a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties"; citing, among other authorities, Thomas v. Watkins, 16 Wis. 549; Mahon's Admr. v. Sawyer, 18 Ind. 73; Carter v. McClintock, 29 Mo. 464. The wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value. "But a note in the hands of the maker, before delivery, is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Can the theft or wrongful seizure of this paper create a valid contract on the part of the maker against his will, where none existed before? There is no principle of the law of contracts upon which this can be done, unless the facts of the case are such that, in justice and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note. But it is urged that this case falls within the general principle which has become a maxim of law, that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This is a principle of manifest justice, when confined within its proper limits. But the principle, as a rule, has many ex-

ceptions; and the point of difficulty in its application consists in determining what acts or conduct of the party sought to be charged can properly be said to have 'enabled the third person to occasion the loss,' within the meaning of the rules. Upon examination, it will be found that this rule or maxim is mainly confined to cases where the party who is made to suffer the loss has reposed a confidence in the third person whose acts have occasioned the loss, or in some other intermediate person, whose acts or negligence have enabled such third person to occasion the loss; and that the party has been held responsible for the acts of those in whom he had trusted, upon grounds analogous to those which govern the relation of principal and agent; that the party thus reposing confidence in another with respect to transactions by which the rights of others may be affected, has, as to the person to be thus affected, constituted the third person his agent in some sense, and having held him out as such, or trusted him with papers or indicia of ownership which have enabled him to appear to others as principal, as owner, or as possessed of certain powers, the person reposing this confidence is, as to those who have been deceived into parting with property or incurring obligations on the faith of such appearances, to be held to the same extent as if the fact had accorded with such appearance. We do not assert that the general rule we are discussing, that 'where one of two innocent parties must suffer,' etc., must be confined exclusively to the cases where a confidence has been placed in some person (in reference to delivery) and abused. There may be cases where the culpable negligence or recklessness of the maker in allowing an undelivered note to get into circulation might justly estop him from setting up nondelivery; as if he were knowingly to throw it into the street, or otherwise leave it accessible to the public, with no person present to guard against its abduction under circumstances when he might reasonably apprehend that it would be likely to be taken. To confine ourselves to the question of delivery, the authorities in reference to lost or stolen notes which have become operative by delivery, have no bearing upon the question. If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, or voluntarily delivers it to the payee, or (if payable to bearer) to any other person for a special purpose only, as to be taken to, or discounted by, a particular bank, or to be carried to any particular place or person, or to be used only in a certain way, or upon certain conditions not apparent upon the face of the paper, and the person to whom it is thus intrusted violates the confidence reposed in him, and put the note into circulation; this, though not a valid delivery as to the original parties, must, as between a bona fide holder for value and the maker or indorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such bona fide holder; or if the note be sent by mail, and get into the wrong hands, as the party intended to deliver to some one, and selects his own mode of delivery, he must be re-

sponsible for the result. These principles are too well settled to call for the citation of authorities, and manifestly it will make no difference in this respect, if the note or indorsement were signed in blank, if the maker or indorser part with the possession, or authorize a clerk or agent to do so, and it is done. Much confusion, however, has arisen from the general language used in the books and sometimes by judges, in reference to cases where the maker has voluntarily parted with the possession, though induced to do so by fraud; when it is laid down as a general rule that it is no defense for a maker, as against a bona fide holder, to show that the note was wrongfully or fraudulently obtained, without attempting to distinguish between cases where the maker has actually and voluntarily parted with the possession of the note, and those where he has not": Cline v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357. In this case it was held that the maker was not liable on the note to an innocent purchaser for value and before maturity: first, because of the fraud and second, because of the want of delivery. (This case, with that of Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497, from which it largely quotes, may be considered the leading American cases supporting the doctrine that a negotiable instrument in the hands of a bona fide purchaser for value, before maturity and without notice, is not good as against the maker or an indorser, where there has been no delivery by the maker, or no legal inception of the same.)

In Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469, the maker of the promissory note in suit, an old, infirm and ignorant man, was approached by the payee and indorsees, who, fraudulently conspiring to cheat and defraud him, represented to him that "they were introducing paints for the New York Roofing Company, that they could send to him ten gallons of the paint free of charge. They asked him to furnish his address. He complied, and wrote it on a postal card. Afterward two persons in the service of the conspirators came to him, and one of them represented that he was an attorney at law. They presented the postal card, upon which was written an order for one hundred gallons of paint, ten gallons to be free of charge, and ninety gallons to be paid for at two dollars and twenty-five cents per gallon. This order was written above the defendant's signature, and was there written without his knowledge. The agents presented the card, stated to the defendant that unless he signed a note they would do violence to him, and would at once sue him in the United States court, compel him to pay a large amount of costs, and sell his farm. Clark, one of the agents who represented the confederates, pretended to draw a weapon from his pocket, while the man with him stood guard at the front door of the defendant's house, and demanded that the defendant should sign the note. The defendant was then at his house, on his farm, no one with him but his wife, and she, as was the maker himself, was old, feeble and ill. The defendant, through fear of violence, signed his name to the note as he was ordered to do. As soon as it was signed Clark snatched it up, and, against the will of the defendant,

carried it away, though the maker demanded its return. No paint was ever delivered to the defendant, and he never received anything of value from the payee of the note or his confederates." The court, speaking of an answer showing these facts, said: "The answer shows a fraudulent conspiracy, and shows, also, that by a cunningly devised scheme the confederates secured the defendant's signature to the note, and it is therefore unquestionably sufficient, irrespective of the allegations of force and violence. It would be good even if it did not show that the appellant was a conspirator, participating in the fraud; for it is well settled by our decisions that, where a note is obtained by fraud, the holder cannot recover upon it, unless he shows that he bought before maturity without notice, and that he paid value for it: Giberson v. Jolley, 120 Ind. 301, 22 N. E. 306; New v. Walker, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386; Enchellerger v. Old Nat. Bank, 103 Ind. 401, 3 N. E. 127; Scotten v. Randolph, 96 Ind. 581; Mitchell v. Tomlinson, 91 Ind. 167; Coffing v. Hardy, 86 Ind. 369; Baldwin v. Barrows, 86 Ind. 351; Baldwin v. Fagan, 83 Ind. 447; Zook v. Simonson, 72 Ind. 83; Harrison v. Bank, 28 Ind. 133; Smith v. Popular L. & B. Assn., 93 Pa. 19; Munroe v. Cooper, 5 Pick. 412." The maker, under the plea of non est factum, in this case of Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469, introduced evidence to prove that the note was altered after it had been signed, as well as that it was not delivered. The court said: "Waiving a decision of the question as to whether the appellee was entitled to succeed upon the ground that the note was materially altered (although our inclination is with him on that question, we put our decision upon the ground that the evidence satisfactorily shows that the note was not delivered, and for that reason we sustain the judgment. Delivery is part of the execution of a promissory note, and until delivered it is destitute of force. It cannot be justly said that the appellee was guilty of negligence in suffering the payee to get possession of the note, for the evidence makes quite a strong case in the appellee's favor—much stronger than the case of Cline v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357."

In the case of Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497, quoted so freely in the case of Cline v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357, the doctrine is clearly stated that the maker of a negotiable instrument, if stolen before delivery, is not liable even to a bona fide holder. At the time the supreme court of Michigan heard the case Thomas M. Cooley, the distinguished jurist and author, was an associate justice of that court. Other authorities sustaining this view of the law on this subject are: Salley v. Terrill, 95 Me. 553, 85 Am. St. Rep. 433, 50 Atl. 896, 55 L. R. A. 730; Hall v. Wilson, 16 Barb. 548; Ledwich v. McKim, 53 N. Y. 307; Davis Sewing Machine Co. v. Best, 105 N. Y. 59, 11 N. E. 146; Branch v. Commissioners of Sinking Fund, 80 Va. 427, 56 Am. Rep. 596; Dodd v. Dunne, 71 Wis. 578, 37 N. W. 430. It was recently decided by the Missouri appellate court, in sustaining this view of the law,

that a payee of a promissory note did not hold a good title as against the bona fide holder, under the following state of facts: A real estate agent abstracted from an envelope negotiable unmatured notes, indorsed in blank by the payee. After the payee discovered the loss she went to the agent, who admitted having taken them, but induced her to permit him to keep them for a few days to make a trade on the land by which the notes were secured. He subsequently sold the notes to a bona fide purchaser for value, and absconded. The payee was estopped from denying the purchaser's title, by reason of the fact of leaving the notes with the agent after discovering the theft: Walters v. Tielkemeyer, 72 Mo. App. 371.

IV. Commercial Paper Negotiable by Delivery.

It is a well-settled rule of law that stolen commercial paper, negotiable by delivery, in the hands of a bona fide purchaser, for value, without notice and before maturity, vests him with a good title against all the world: Jones v. Nellis, 41 Ill. 482, 89 Am. Dec. 389; Wheeler v. Guild, 37 Mass. (20 Pick.) 545, 32 Am. Dec. 231.

V. Commercial Paper Negotiable by Indorsement.

The holder of a genuine bill or note, or negotiable paper, regular on the face of it, although he has stolen it after its delivery or legal inception, or holds it wrongfully, or in parting with it is guilty of a fraud, can negotiate it and communicate a good title to a party who takes it in due course of business, indorsed before its maturity, as a bona fide holder without notice. This protection of a bona fide purchaser is given by the common law, as well as by the law-merchant. The authorities in support of this rule of law are simply overwhelming, and, indeed, we know of no modern authority to the contrary: Woodall v. People's Nat. Bank (Ala.), 45 South. 194; Shipley v. Carroll, 45 Ill. 285; Clarke v. Johnson, 54 Ill. 296; First National Bank v. Gates, 66 Kan. 505, 97 Am. St. Rep. 383, 72 Pac. 207; Thurston v. M'Kown, 6 Mass. 428; Worcester County Bank v. Dorchester & M. Bank, 64 Mass. 488, 57 Am. Dec. 120; Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959; Gould v. Segree, 5 Duer (N. Y.), 260; Hall v. Wilson, 16 Barb. (N. Y.) 548; Seybel v. National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583; Manhattan Savings Inst. v. New York National Exchange Bank, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079; Kuhns v. Gettysburg Nat. Bank, 68 Pa. 445; Cochran v. Fox Chase Bank, 209 Pa. 34, 103 Am. St. Rep. 976, 58 Atl. 117, and cases cited in note thereto; Whiteside v. First National Bank of Chattanooga (Tenn.), 47 S. W. 1108; Ehrlich v. Jennings, 78 S. C. 269, 58 S. E. 922.

In a recent case decided in Massachusetts the court said: "Under Revised Laws, chapter 73, section 33, providing that, where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed, a note which is complete and payable to bearer, taken from thief, is valid in the hands of a holder

in due course": Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959.

In Tennessee the same doctrine was advanced as a step further by holding that stolen negotiable paper transferred to an innocent holder as collateral security gives him title good even against the owner: Whiteside v. First Nat. Bank of Chattanooga (Tenn.), 47 S. W. 1108. A promissory note payable to the order of the maker has no validity until it is indorsed and transferred by him: Kayser v. Hall, 85 Ill. 511, 28 Am. Rep. 624. If the indorsement is a forgery, or was obtained by fraud and circumvention, and the signature to the note was obtained by fraud and circumvention, without negligence on the part of the maker, then there is a perfect defense to the note in an innocent purchaser's hands: Murphy v. Schoch, 135 Ill. App. 550. The better rule is that laid down by the same court in this case of Howell v. Merchants' Trust etc. Co., 134 Ill. App. 467. It was here held that an indorsee or assignee of commercial paper who takes it before maturity, for a valuable consideration, without knowledge of any defect, and in good faith, will be protected against the defenses of the maker, and mere suspicion of defect of title, or the knowledge of circumstances calculated to excite suspicion in the mind of a prudent man, or even gross negligence on his part, at the time of this transfer, will not defeat his title. In other words, the only thing which will defeat his title is bad faith on his part, and the burden of proof is upon the party assailing his right to establish that fact by a preponderance of evidence: Howell v. Merchants' Trust etc. Co., 134 Ill. App. 467.

The protection thrown around a bona fide purchaser of commercial paper by the federal courts is practically the same as that given to him by the English courts. In fact, the leading federal case—Goodman v. Simonds, 20 How. (U. S.) 343, 15 L. ed. 934—quotes largely and approvingly from the leading English case—Goodman v. Harvey, 4 Ad. & E. 870, 6 Nev. & M. 372.

The doctrine and principle laid down in the above cases will be found also in the following federal cases: Murray v. Lardner, 2 Wall. 110, 17 L. ed. 857; Cromwell v. Sac County, 96 U. S. 51, 24 L. ed. 681; Swift v. Smith, 102 U. S. 442, 26 L. ed. 193; Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865.

The title of a bona fide purchaser for value of stolen five twenty bonds of the United States, which had been purchased by him after the call for their redemption had matured, is better than that of the owner from whom they were stolen: Morgan v. United States, 113 U. S. 476, 5 Sup. Ct. Rep. 588, 28 L. ed. 1044; Cooke v. United States, 91 U. S. 389, 23 L. ed. 237. A case that has been often cited and as often distinguished from the leading cases establishing the above doctrine of the rights of a bona fide holder of commercial paper, is that of the District of Columbia v. Cornell, 130 U. S. 655, 9 Sup. Ct. Rep. 694, 32 L. ed. 1041, in which the supreme court in substance finds that, (1) when the maker of a negotiable instrument lawfully cancels it before maturity, his liability upon it is extinguished, and

cannot be revived without his consent; (2) it is immaterial whether the cancellation is by destroying the instrument, or by writing or stamping words or lines in ink upon its face, provided the instrument, in the condition in which he puts it, unequivocally shows that it has been canceled; (3) where certificates of indebtedness of the District of Columbia, called sewer certificates, were redeemed and canceled by the proper officers by stamping across their face marks of cancellation as clear and permanent as the original signatures, the liability of the district upon them cannot be revived by its omission to take additional precaution against their being stolen and fraudulently restored to their original condition by effacing the marks of cancellation; (4) such certificates were in no sense money or the equivalent of money, and had no validity unless issued for a purpose authorized by law, and had not the character of commercial paper so as to render them, when fraudulently issued, valid in the hands of bona fide holders: See Ehrlich v. Jennings, 78 S. C. 269, 58 S. E. 922, in which Branch v. Commissioners of Sinking Fund, 80 Va. 427, 66 Am. Rep. 596, and District of Columbia v. Cornell, 130 U. S. 655, 9 Sup. Ct. Rep. 694, 32 L. ed. 1041, is distinguished from the said case of Ehrlich v. Jennings, 78 S. C. 269, 58 S. E. 922.

VI. Commercial Paper Issued Without Authority.

In the United States courts there is an exception to the rule establishing the validity of negotiatble paper in the hands of a bona fide purchaser. The maker of the commercial paper, before he can be held liable, must first have authority to issue the paper; in other words, the authority to contract, must exist before any protection as an innocent purchaser can be claimed by the holder: Marsh v. Fulton Co., 10 Wall. 676, 19 L. ed. 1040; Northern Nat. Bank v. Trustees of Porter Township, 110 U. S. 608, 4 Sup. Ct. Rep. 454, 28 L. ed. 258; Merchants' Exchange Nat. Bank v. Bergen County, 115 U. S. 384, 6 Sup. Ct. Rep. 381, 29 L. ed. 430; Pierce v. United States, 7 Wall. 666, 19 L. ed. 169.

VII. Particular Kinds of Lost or Stolen Instruments.

a. Stolen Bonds.—The same principles of law laid down in the above rules or doctrines as applicable to commercial paper apply to bonds issued by authority, but stolen, and in the hands of an innocent purchaser before maturity or due date. The following cases illustrate the application of these principles: Herron v. State, 12 S. C. 200; Whaley v. Gaillard, 21 S. C. 560; Greenwell v. Haydon, 78 Ky. 332, 39 Am. Rep. 234; Blum v. Sallis, 24 La. Ann. 118; City of Elizabeth v. Force, 29 N. J. Eq. 587; Boyd v. Kennedy, 38 N. J. L. 146, 20 Am. Rep. 376; Manhattan Sav. Inst. v. New York Nat. Exchange Bank, 42 App. Div. 147, 59 N. Y. Supp. 51, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079; Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152; Mason v. Frick, 105 Pa. 162, 51 Am. Rep. 191; Branch v. Commissioners of Sinking Fund, 80 Va. 427, 66 Am. Rep. 596; Dodd v. Dunne, 71 Wis. 578, 37 N. W. 430; Ehrlich v. Jennings, 78 S. C. 269,

58 S. E. 922; Wylie v. Missouri Pac. R. R. Co., 41 Fed. 623; United States v. Vermilye, 10 Blatchf. 280, Fed. Cas. No. 16,618; Von Hoffman v. United States, 18 Ct. of Cl. 386; Murray v. Lardner, 2 Wall. (U. S.) 110, 17 L. ed. 857; Baxendale v. Bennett, L. R. 3 Q. B. D. 525.

b. **Stolen Coupons.**—A coupon bond issued by the state is a negotiable instrument, and the state incurs the same liabilities in issuing it as an individual. The state is liable for such bond in the hands of a bona fide holder, before maturity, without notice, surrendered for cancellation, and issue therefor under the provision of the statute, but stolen before cancellation and put in circulation by the thief: Cochran v. Fox Chase Bank, 209 Pa. 34, 103 Am. St. Rep. 976, 58 Atl. 117; Ehrlich v. Jennings, 78 S. C. 269, 58 S. E. 922. In the case of Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491, an action of tort, in the nature of trover, for certain coupons of United States bonds, bearing interest and payable to bearer in gold, was brought to recover the value of said coupons. It was alleged that the coupons belonging to plaintiff had been stolen from him and delivered by one who had received them from the thief to defendant, and by him, acting as agent and in good faith, without gross negligence, sold and turned into money, which he paid to the person from whom he received them. Mr. Justice Gray, in delivering the decision in this case, said: "But in the opinion of the majority of the court, the coupons in question do not stand upon the same ground as chattels. They were negotiable promises for the payment of money issued by the government, payable to bearer and transferable by mere delivery, without assignment or indorsement. They are, therefore, not to be considered as goods, but as representatives of money, and subject to the same rules as bank bills or other negotiable instruments payable in money to bearer." The defendant acquired lawful possession of them as agent of his employer, and was not liable for their conversion. In New York a bona fide holder of a coupon acquires a good title to it, though it has been stolen and he acquired it within the days of grace to which it was entitled: Evertson v. National Bank of Newport, 66 N. Y. 14, 23 Am. Rep. 9.

c. **Stolen Checks.**—The rights of a bona fide holder of a lost or stolen certified check are thoroughly considered and set forth by the judgment of the supreme court of the state of New York, appellate term, as delivered by Mr. Justice Gildersleeve, in the case of Poess v. Twelfth Ward Bank of the City of New York, 86 N. Y. Supp. 857. In substance, it is as follows: 1. By the certification of a check the amount thereof is charged against the depositor, and passes to the credit of the check; it renders the bank primarily liable as acceptor for its payment to any bona fide holder thereof; 2. The possession of a duly indorsed, negotiable, certified check is prima facie evidence of title; 3. One who, in due course of business and without notice of any infirmity, comes into possession of a duly indorsed, certified check, is entitled to payment of the same by the bank on which it is drawn, irrespective of the fact that it had been stolen and never had a valid delivery; 4. Notice to a bank that a certified check had

been lost, and direction by the maker not to pay the same, could not operate to the prejudice of a bona fide holder.

d. **Stolen Certificate of Deposit.**—"T. D.," an illiterate man, unable to write his name, secured from bank A a certificate of deposit payable to his order on the return of the certificate. Bank A recorded "his mark" and his description in its signature-book. Thereafter the certificate was stolen from T. D., and another bank B paid the same to a stranger who presented it, representing that he was T. D., and that he could not write his name. Upon these representations, the cashier of bank B indorsed the certificate to his own order, with the name of T. D., to which was made the mark of T. D. by the stranger, with the signature of an employé of the bank B as "witness to mark." Thereupon the cashier indorsed this certificate and sent it for collection from bank A, through a correspondent, which bank paid it, and the money was paid to the stranger. The real T. D. thereafter appeared at bank A, and, upon establishing the forgery, bank A paid him the amount of his certificate, and brought suit against bank B to recover the payment on the forged indorsement. That bank A had a right to rely upon the identification of T. B. by bank B, and could recover, was the substance of the decision of the court: State Nat. Bank v. Freedmen's Savings and Trust Co., 2 Dill. 11; Fed. Cas. No. 13,324.

e. **Bills of Lading.**—A bill of lading in the hands of the holder is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Nothwithstanding it is designed to pass from hand to hand, with or without indorsement, and is efficacious for its ordinary purposes in the hands of this holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of bona fide purchaser only applies to it in a limited sense: Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998. In this view of the law, a bona fide purchaser of a stolen bill of lading would not hold a good title as against the true owner of it. This though the statutes of the states make bills of lading negotiable by indorsement and delivery, where the statutes fail to define the effect of such a transfer. But obiter dictum: "It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness": Shaw v. Merchants' Nat. Bank of St. Louis, 111 U. S. 557, 25 L. ed. 892.

VIII. Burden of Proof.

The modern rule is that the bona fide purchaser of negotiable paper is not bound to look beyond the instrument. The burden of proof is on the person who questions the title of the bona fide purchaser, and

nothing short of evidence establishing mala fides, or actual or constructive notice that the instrument is not the property of the person who offers to sell it, will defeat his right: Goodman v. Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Murray v. Lardner, 2 Wall. 110, 17 L. ed. 857; Matthews v. Poythress, 4 Ga. 287; Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Johnson County Savings Bank v. Roberts, 125 Ga. 41, 53 S. E. 808; Evans v. Freeman, 142 N. C. 61, 54 S. E. 847; Adams v. Connelly, 118 Ill. App. 441; Hutchins v. Langley, 27 App. Cas. (D. C.) 234; Brewer v. Slater, 18 App. Cas. (D. C.) 48; Hotchkiss v. National Shoe and Leather Bank, 21 Wall. 354, 22 L. ed. 645; Goodman v. Harvey, 4 Ad. & E. 870, 6 Nev. & M. 372.

Notwithstanding these decisions, we do not understand them to conflict with the general rule supported by the authorities cited in the note to Bedell v. Herring, 11 Am. St. Rep. 324, to the effect that, "if the maker, acceptor, or other party bound by the original consideration of negotiable paper proves that there was fraud in the inception of the instrument or circumstances raising a strong suspicion of fraud, the general presumption in favor of the holder is then overcome, and he is bound to show that he acquired the paper bona fide, for value, before maturity, in the usual course of business, and under circumstances creating no presumption that he knew of the fraud."

AETNA FIRE INSURANCE COMPANY v. JONES.

[78 S. C. 445, 59 S. E. 148.]

CONSTITUTIONAL LAW—Taxation of Insurance Companies

A statute providing for collecting from fire insurance companies doing business in the cities and towns of the state a certain tax on every premium collected by them yearly in such city or town, and paying the fund to certain fireman's associations for the benefit of disabled firemen, gratuities to the widow or dependent of any fireman killed, his necessary funeral expenses, the purchase of accident insurance upon a member of such department, or for pensions to disabled firemen, is unconstitutional as not being a uniform tax levied for a public purpose, nor a legitimate exercise of the police power of the state, and as a violation of a constitutional provision prohibiting the granting of pensions except for military or naval service. (p. 824.)

J. E. Lyon, Von Kolnitz & Waring and Mitchell & Smith, for the respondents.

King, Spalding, Little, Smith, Lee & Frost and A. C. King, for the petitioners.

447 POPE, C. J. This is a petition to this court in its original jurisdiction whereby the plaintiff insurance com-

panies, for themselves and others in like situation, seek to have the comptroller general enjoined from proceeding to collect certain taxes provided for by an act of the General Assembly approved May 9, 1906 (25 Stat. 620), on the ground that the said act is unconstitutional, null and void. Counsel for petitioners discuss at length the preliminary question as to the jurisdiction of this court to hear the cause, but an identical question having been passed upon in the recent case of Ware Shoals Mfg. Co. v. Jones, 78 S. C. 211, 58 S. E. 811, we proceed at once to the merits of the case.

The title of the act is: "An act requiring the payment of certain premiums to the fire departments of incorporated cities and towns by the fire insurance companies doing business in the state, for the purpose of creating a fund for the benefit of the members of the fire departments of such cities and towns, and providing for the collection and distribution of the same."

448 The act is as follows: Section 1: "Be it enacted by the General Assembly of the State of South Carolina: Every fire insurance company, corporation or association doing business in any incorporated city or town of this State, having or that hereafter may have a regularly organized fire department under the control of the mayor and council, or intendant and council of said city or town, and having in serviceable condition for fire duty fire apparatus and necessary equipments belonging thereto to the value of ($1,000) one thousand dollars, and upwards, shall return to the Comptroller General a just and true account verified by oath that the same is a true account of all premiums received from fire insurance business done in such incorporated cities or towns during the year ending December the 31st, or such portion thereof as they may have transacted such business in such cities and towns. Such returns must be made by said companies, corporations or associations within sixty days after the 31st day of December of each year."

Section 2 requires such companies to pay within the said sixty days to the state treasurer the sum of two dollars on every one hundred dollars premiums collected on fire or lightning insurance business done in said cities and towns.

Sections 3 and 4 require said insurance companies to keep accurate books of account of all business done in said cities and towns and provide a penalty for failure so to do.

Section 5 enacts that in case of failure to pay said tax or any penalty imposed, the comptroller general shall have

power to revoke any license previously issued to said companies.

Section 6: "The State Treasurer shall pay over the money collected from the insurance companies, associations or corporations doing business within the cities or towns having or that may hereafter have a regularly organized fire department as aforesaid in section 1 of this act, to the treasurer of the firemen's Relief Association to be composed of the members of the fire departments of such cities or towns, and to be incorporated under the laws of this State; [449] Provided that all money so collected from the insurance companies, corporations or associations doing business within the cities or towns having or that may hereafter have a paid department, being such department in which the members are paid for full time or part of their time employed as firemen, and on duty at all times to respond to all duties required of them, and otherwise in accordance with the provisions of section 1 of this act, shall be paid by the State Treasurer to the treasurer of such city, and all the money so received shall be set apart and used by such cities or towns solely and entirely for the objects and purposes of this act by the Firemen's Relief Association or Board of Trustees of Firemen's Pension funds of such cities or towns under such provisions as shall be made by the mayor and council or board of trustees thereof.

Section 7: "All money collected and received under the provisions of this act shall be held in trust and used as a fund for the relief of any member of the fire department of such city or town who may be injured or disabled, and for the relief of, or the payment of gratuities to the widow or those dependent upon any member of such fire department who may be killed; for the payment of necessary funeral expenses of any member of such fire department, and for the purchase of accident insurance upon the members of such fire department; Provided, further, that the boards of trustees of such cities having pension funds may also use said money for pensions to superannuated and disabled firemen: Provided, that the fire department of such city or town should also be a member of the State Firemen's Association of this State."

The act is attacked on numerous grounds, but we think the pivotal question is, has the General Assembly power to enact such legislation. In other words, is the constitution violated in that the tax here under consideration is not uniform and for no public purpose. That the imposition is an

attempted exercise of the taxing power conferred by the constitution, the respondent practically admits in that it is [450] sought to sustain the exaction on the ground that it is for a public purpose. "A tax," according to Webster's Dictionary, "is a rate or a sum of money assessed on the person or property of a citizen by the government for the use of the nation or state." Cooley, in his Constitutional Limitations, section 479, says: "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Applying either of these rules to the legislation here in question, if it be conceded that the aid of firemen is a public purpose, it clearly falls under the head of taxation, for all of the requirements are fulfilled, namely, that it is an imposition on persons or property by the government for a public purpose. In the case of Henderson v. London & Lancashire Ins. Co., 135 Ind. 23, 41 Am. St. Rep. 410, 34 N. E. 565, 20 L. R. A. 827, where a question almost identical was under consideration, it is said that the decided weight of authority holds that such imposition are attempts at taxation, and the cases of San Francisco v. London etc. Ins. Co., 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380; State v. Wheeler, 33 Neb. 563, 50 N. W. 770; Philadelphia Assn. for Relief of Disabled Firemen v. Wood, 39 Pa. 73; State v. Merchants' Ins. Co., 12 La. Ann. 802, are quoted as sustaining that view.

The respondent here contends, however, that the imposition is not a tax, but is one of the conditions upon which foreign insurance companies are permitted to do business in this state. Such a contention, we think, cannot be sustained. In the first place, the act is general, applying both to domestic and foreign corporations. In the second place, the act itself does not purport to be conditional. It applies to "every fire insurance company, corporation or association doing business in incorporated cities or towns in this state." The participle "doing" is important here as throwing light on the intention of the legislature. The word implies that the corporations are already in existence and are carrying on business. The license has already issued. True, the act does provide that, under certain circumstances, the certificate shall be revoked, but we regard this as merely a means for securing the collection of the imposition and not as a condition [451] subsequent. That the legislature might have imposed such a condition upon foreign corporations, as well as domestic corporations, it is not our duty here to decide; suffice it to say that no such condition was imposed.

Again, the respondent contends that the present enactment is a lawful exercise of the police power inherent in the state as a sovereignty, the exercise looking to the protection of the property of all the citizens of the state. Perhaps no subject is more fraught with difficulty than is the proper limiting and defining of the police power of a sovereign state. Generally, courts refuse to attempt such definition, leaving each case to be decided as it arises. In our state, however, in the comparatively recent case of Stehmeyer v. City Council, 53 S. C. 259, 31 S. E. 322, where this power is discussed at length and numerous authorities are reviewed, the court with deference lays down the following: "The police power is that attribute of sovereignty in a state by which it clothes the legislature with power to regulate persons—natural and artificial—and property, in accordance with the provisions of the state constitution, in all matters relating to the public health, the public morals, and the public safety." Again, in the case of Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989, it is said: "Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection, health and property of the citizens, and to the preservation of good order and the public morals."

In volume 22, page 938, of the American and English Encyclopedia of Law, the following proposition sustained by much authority is laid down: "In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see (1) that the enactment has for its object the prevention of some offense or manifest evil, or the preservation of the public health, safety, morals or general welfare; and (2) that there is some clear, real, substantial connection [452] between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend toward the accomplishment of the object for which the power is exercised. The police power cannot be used as a cloak for the invasion of personal rights or private property, neither can it be exercised for private purposes, or for the exclusive benefit of particular individuals or classes." In other words, the exercise must have in view the good of the citizens of the sovereignty as a whole.

This brings us, then, to the question as to whether or not the legislation here under consideration has in view a public

purpose. The money secured from the imposition on the insurance companies is to "be held in trust, and used as a fund for the relief of any member of the fire department of such city or town who may be injured or disabled, and for the relief of, or the payment of gratuities to, the widow or those dependent upon any member of such fire department who may be killed, for the payment of necessary funeral expenses of any member of such fire department, and for the purchase of accident insurance upon the members of such fire departments," and in certain cases to be used for the payment of pensions. New York and Alabama and perhaps one or two other states, proceeding upon the theory that the prevention of conflagrations is a public duty which prior to the establishment of fire departments devolved upon the community, that in discharging these duties the firemen sustain such relation to the public as to become, in the true sense, public servants, have sustained the position that such enactments are for public purposes: Trustees of Exempt Firemen's Benevolent Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217; Phoenix Assur. Co. of London v. Fire Department of Montgomery, 117 Ala. 631, 23 South. 843, 42 L. R. A. 468. In each of these cases, however, the legislation was sustained on the ground that it provided conditions upon which foreign insurance companies would be permitted to carry on business in the state. The above reasoning as to the publicity of the purpose of [453] such enactments was considered and expressly repudiated by the Indiana court in the case of Henderson v. London & Lancashire Ins. Co., 135 Ind. 23, 41 Am. St. Rep. 410, 34 N. E. 565, 20 L. R. A. 827. A like view is maintained in Philadelphia Assn. v. Wood, 39 Pa. 73, where the court uses this language, at page 81: "Of course there was a good motive for this. The relief of the disabled firemen is a purpose worthy of society. And firemen contribute much to save insurance companies from losses. And hence, it is inferred that insurance companies ought to contribute to the support of those who have been disabled in working for their benefit. But the same argument might be quite as effectually used as a reason for imposing a burden in favor of this society, upon those who obtain insurance, and much more upon those who do not insure at all. Therefore, since the chief characteristic of justice is its equality, the justice of this provision is very far from being apparent. An untrained and unthoughtful benevolence is very apt to be unjust to those interests which do not attract its special atten-

tion." Likewise, in Louisiana v. Merchants' Ins. Co., 12 La. Ann. 802, the court says, at page 808: "But in the case before us there is no property improved or assessed; all is conjectural and arbitrary; one class of corporations is taxed an invariable sum for the benefit of another class; there is no possibility of ascertaining whether the tax is a quid pro quo; the fire companies are not compelled by the law to do anything for the insurance companies; a bounty is secured to the fire department by confiscating the money of the defendants, without providing that any service shall be rendered to the defendants by the fire departments; and even if this could, for a moment, be regarded as an assessment for benefits conferred, its inequality is glaring; every owner of buildings and other combustible property in New Orleans, who is either wholly or in part his own underwriter, is presumed to be benefited by the fire department in the same way as the insurance companies are. Why should the companies alone pay for this common benefit?"

454 The question is exceedingly close and difficult, and the authorities, as we have seen, are conflicting, but we are inclined to give adherence to the latter view. Especially where the benefits go to a Firemen's Benefit Association the public purpose seems to be lacking. Therefore, we hold that the act cannot be sustained on the ground that it is a police regulation, the important characteristic—publicity of purpose—being wanting.

It cannot be doubted that incidentally the public derives much benefit from fire departments of municipal corporations. Any organization that tends to enhance the value of property or the security of its possession, that gives work to unemployed persons in a given locality, or bridles powers hitherto unused, is certainly after a manner beneficial to the public at large. The wealth and welfare of a state lies in the well-being of its individual citizens. Thus, if a factory employing hundreds of hands and annually turning out thousands of dollars' worth of products is built, or a mine which yearly puts on the market hundreds of tons of mineral is opened up, the incidental benefit to the public is great, yet the highest legal tribunal of the country has held that public funds cannot be appropriated for such a purpose: Citizens S. & Loan Assn. v. Topeka, 20 Wall. 655, 22 L. ed. 455. A fire department is a municipal institution. Its organization and control is purely a matter of municipal concern. True, interest in the establishment of such agencies

would extend further than the municipal boundaries, but whether that interest could be manifested in action on the part of the General Assembly, otherwise than to encourage, seems a matter of doubt, the spirit of our law being that the legislature may invest municipal governments with power, leaving the exercise of it to their discretion and corporate needs.

In the present case the legislature has gone further than attempting to raise money for fire departments, municipal organizations, in that it seeks to raise a fund by taxation for what seems to us merely a benevolent purpose. The
455 money collected under the act of 1906 is not for the use of the fire department, but is to be paid to certain firemen's associations for benefits, gratuities and pensions. These associations are incorporated under the law, and their sole purpose is to take charge of the funds collected and disburse them in the manner provided for by the act. As was said in the cases above quoted from, such a purpose is certainly a worthy one. And it no doubt would be a source of much comfort to the members of the various departments and would have tendency to allure men to the vocation, but can this effect justify the seemingly arbitrary appropriation of the income of the insurance companies?

It is argued that the fire company by its work saves the insurance company from loss, and therefore the insurance company should compensate them. Let us see what this argument would lead to. It is well known that all insurance companies regulate their rate by the risk and expense relative to the insurance of a certain piece of property. Therefore, the only reasonable view is that the insurance companies would, in the end, make the insured pay the gratuities to the associations. It is likewise well known that in all cities and towns there are numerous persons who do not carry insurance. Now, it cannot be denied that such persons are even more benefited by the fire departments than those who carry insurance, for their entire risk is intrusted to the efficiency of such departments. Under the enactment being considered the class of citizens who carry insurance must pay the whole of the imposition, while the latter get the benefits and have no burden to bear. On this reasoning the tax is not uniform.

That the fireman's work is a meritorious one, and that he deserves the highest regard of the community for the faithful performance of his duties, are facts that cannot be con-

troverted. Yet his work is not altogether gratuitous. More and more is it the present day tendency to establish paid departments. In these the members are paid for their services. In the volunteer departments, too, the members [456] are usually compensated in one way or another. There is also the fact that where it is made a permanent vocation, as is usually the case in the paid departments, the individual assumes the responsibility of his own free will. That it is fraught with danger no one will deny, but it is not necessarily more dangerous than other callings in which numbers of men are employed daily. Can the engineer of a locomotive dashing across the country at the rate of from fifty to ninety miles an hour, or the miner working hundreds of feet below the surface of the earth, be said to be more secure than the fireman who answers the alarm bell? Can one be said to render a greater service to humanity than the other? We think not. Nor can it be said that the fireman's duty is more public than that of the engineer. There are numerous callings in a sense quasi public, but not of such nature as to justify the state in granting gratuities or pensions on the ground that the services are public.

Any speculation as to this subject, however, is estopped by the constitutional inhibition, article 3, section 32, which provides: "The General Assembly shall not grant pensions except for military and naval services." A pension has been defined to be an annuity from the government for services rendered in the past. That the pensions provided for by the act of 1906 fall within this rule is evident. The money is to be obtained by a governmental enactment, and is to be paid to superannuated or disabled firemen who in time past had been in active service.

We do not deem it necessary to continue the discussion further. In our opinion the act is clearly unconstitutional.

Therefore, it is the judgment of this court that the petition be granted and the prohibition issue as prayed for.

Messrs. Justice Jones and Woods concur on the ground that the statute violates article 3, section 32, of the constitution.

A Statute Requiring the Agents of Insurers, doing business in the city of New York, but not incorporated under the laws of New York, to pay a percentage upon the gross premiums received by them for insurance upon property in that city, to the "exempt firemen's benevolent fund," is not unconstitutional as granting an exclusive privilege, or as giving money of the state to a private undertaking, or as a tax: Trustees of Exempt Firemen's Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217. And in Firemen's Benevolent Assn. v. Lounsbury, 21

Ill. 511, 74 Am. Dec. 115, it is held that the legislature has power to impose a burden on foreign insurance companies doing business in the city of Chicago for the benefit and support of the Chicago Benevolent Association, and it is not necessary that the revenue derived from such burden should be paid into the treasury of the state. But in Henderson v. London etc. Ins. Co., 135 Ind. 23, 41 Am. St. Rep. 410, it is held that firemen are not servants of the state, nor of a county, but of the municipality in which they serve, and the taxing power of the state cannot be exerted for their benefit upon only a portion of a class of the citizens of the state. And in San Francisco v. Liverpool etc. Ins. Co., 74 Cal. 113, 5 Am. St. Rep. 425, it is decided if a statute requires every agent of a foreign insurance company doing business in the state to pay into the treasury of the county a sum equal to one per cent of the amount of all premiums paid him for insurance effected by him within such county, the money when paid to constitute a fund to be known as the firemen's relief fund of such county, such exaction is a tax, and forbidden by the constitution of California.

CASES

IN THE

SUPREME COURT

OF

UTAH.

VOLKER-SCOWCROFT LUMBER COMPANY v. VANCE.

[32 Utah, 74, 88 Pac. 896.]

HOMESTEAD—Head of a Family, Who is Within the Meaning of the Laws Exempting.—Under the statutes of Washington, a wife, as well as her husband, must be regarded as the head of a family, for the purpose of asserting their rights to the exemption of the homestead, though he has not deserted her, and is not absent nor infirm. (p. 830.)

HOMESTEAD, Plea of, When Sufficient—Failure to Select or File Declaration of.—An answer averring that the defendant who makes it was the head of a family, to wit, the wife of the person designated, and that the real property described in the complaint was at all times specified their homestead, and, with the improvements, does not exceed the homestead exemption, is sufficient, though it does not state any declaration or other formal selection of the property as a homestead. (p. 831.)

HOMESTEAD—Unconstitutionality of Statute Attempting to Make Subject to Mechanics' Liens.—Under a constitution declaring that the legislature shall provide by law for the selection by each head of a family an exemption of a homestead, together with the appurtenances and improvements, a statute purporting to make the homestead subject to mechanics' liens is unconstitutional and void. (pp. 833, 834.)

HOMESTEAD—Mechanics' Liens, When not Consented to by a Contract for the Construction of a Dwelling.—A contract for the construction of a dwelling or other improvements on property constituting a homestead is not a waiver of the exemption of such property from mechanics' liens for improvements, unless the contract, in express terms, stipulates to such exemption. (p. 833.)

J. D. Skeen and Geo. Halverson, for the appellant.

C. C. Richards and A. E. Prath, for the respondent.

[78] STRAUP, J. 1. This action is brought to foreclose a materialman's lien. It is alleged in the complaint that the

defendant Mary Flinders Vance was the owner of certain lots in Ogden City, Utah; that she let a contract to defendant Peterson to construct a dwelling on the premises; that the plaintiff, at the request of both defendants, furnished building material which was used in the construction of the house, and which remained unpaid; and that a notice of intention to claim a lien was filed for record. The defendant Vance answered, admitting her ownership of the lots, the letting of the contract to Peterson for the construction of the house, but denied that the material furnished by plaintiff was furnished at her request. It was further alleged by her that at the time of the filing of her answer, and at all times mentioned in [79] the complaint, she was the head of a family, consisting of herself, two children, and her husband; that prior to and at the time of the letting of the contract the lots were, and still are, her homestead; that she let a contract to Peterson to erect a dwelling on the lots for the use of herself and family, and to hold them as a permanent homestead; that she paid the contractor the full contract price; that the value of the lots, with the improvements, does not exceed the homestead exemption, and thereupon she prayed that the real estate with the improvements be declared her homestead and exempt from plaintiff's lien and from sale on execution. The court sustained plaintiff's general demurrer interposed to that portion of defendant's answer which alleged that the homestead was exempt, "upon the ground that the allegations of said answer respecting such claim of exemption do not constitute a defense to plaintiff's action." The defendant refused to further plead. A judgment was rendered in favor of plaintiff awarding it a lien on the real estate, and ordering a sale of the premises in satisfaction of plaintiff's claim, from which judgment the defendant Vance has prosecuted this appeal.

2. The homestead statute (Rev. Stats. 1898, sec. 1156) provides: "A homestead is subject to execution in satisfaction of judgments obtained (1) on debts secured by mechanics' or laborers' liens for work or labor done or material furnished exclusively for the improvement of the same." The appellant contends that this statute is in violation of section 1, article 22, of the constitution, which provides that "the legislature shall provide by law, for the selection by each head of a family, and exemption of a homestead, which may consist of one or more parcels of lands, together with the appurtenances and improvements thereon of the value of at least fifteen hundred dollars from sale on execution."

Nearly all of appellant's brief is addressed to this question. While the respondent does not concede appellant's proposition, nevertheless it has not offered anything in support of the validity of the statute. It seeks to uphold the ruling of the court upon the ground that the answer does not contain sufficient allegations that the defendant was the [80] head of a family, that the lots were her homestead at the time the contract was let to Peterson, and that a selection of a homestead had been made by her before plaintiff's lien attached. It is argued that, if the wife be the head of a family consisting of children and her husband, the facts and circumstances which make her such must be alleged; otherwise it will be presumed that the husband is the head. This may be true under a statute designating the husband the head, or in the absence of a statute defining who is the head of a family. Subdivision 1, section 1154, Revised Statutes of 1898, provides that the phrase "head of a family," as used in the homestead statute, includes within its meaning "the husband or wife, when the claimant is a married person; but in no case are both husband and wife entitled each to a homestead under the provisions of this title, except to the extent hereinbefore provided." Subdivision 2 prescribes the conditions and circumstances under which other persons are deemed heads of families. In subdivision 1 the wife, equally with the husband, without conditions or circumstances, is included within the phrase "head of a family." If the statute had intended to make her the head so as to entitle her to lay claim to the homestead only in the event of the desertion, or absence of the husband, or upon his infirmity or inability to render support, or upon other conditions, or under other circumstances, it seems to us the legislature would have said so. So far as the homestead statute is concerned, and so far as giving the one or the other a right to lay claim to a homestead, the husband is no more designated the head of a family than is the wife. This also is manifest from other sections of the same statute, which expressly provide that, "if the homestead claimant is married, the homestead may be selected from the separate property of the husband, or, with the consent of the wife, from her separate property," and "it shall be the privilege of either the husband or the wife to claim and select a homestead to the full extent prescribed in this title, on the failure of the other, being the judgment debtor, to make such claim and selection." Nor do we think, in view of what has been [81] said by this court in prior decisions (Kimball v. Lewis, 17 Utah, 381, 53 Pac. 1037; Kim-

ball v. Salisbury, 19 Utah, 161, 56 Pac. 973), that the answer is wanting in facts because not containing specific averments of a declaration and selection of the real estate as a homestead. This view, too, finds support from the homestead statute itself (section 1149), where it is provided that a failure to make the declaration shall not impair the homestead right. We are of the opinion that the facts alleged, showing the defendant to be the head of the family and that the real estate is and was her homestead, are sufficient to withstand a general demurrer, especially since the demurrer does not challenge the answer for want of facts upon which the claim of exemption is made, but proceeds specifically upon the assumption that no exemption of a homestead can be asserted against plaintiff's demand.

3. This, then, brings us to the question as to whether the homestead was subject to plaintiff's lien. This depends upon the validity of the statute, which, in terms, makes the homestead subject to execution in satisfaction of judgments obtained on debts secured by mechanics' and materialmen's liens. Mr. Boisot, in his work on Mechanics' Liens (section 30) says: "Under a constitutional direction to exempt from seizure for debt a reasonable amount of property, the legislature, after exempting homesteads from execution and sale, cannot make them subject to mechanics' liens; and where the constitution creates a homestead right, exempt from execution for debt except for payment of obligations contracted for its purchase, for taxes, for agricultural laborers' liens, and for mechanics' liens for work done on the premises, an act attempting to give materialmen a lien on homesteads is unconstitutional."

To the same effect is Thompson on Homesteads and Exemptions, where, at section 16, the author, in substance, says that a constitutional provision which provides that the homestead shall be exempt from forced sale prohibits the legislature from subjecting it to sales for labor done or material furnished for its improvement. Where the constitution of a state provided that a reasonable amount of property shall [82] be exempt from seizure and sale for the payment of any debt or liability, it was held that an exemption law excepting from its operation debts or liabilities for laborers or mechanics was void: Tuttle v. Strout, 7 Minn. (Gil. 374) 465, 82 Am. Dec. 108; Cogel v. Mickow, 11 Minn. (Gil. 354) 475; Coleman v. Ballandi, 22 Minn. 144; Cumming v. Bloodworth, 87 N. C. 83. Involving the same principles of law, and to the same effect, are the following cases: Jossman v. Rice,

121 Mich. 270, 80 Am. St. Rep. 493, 80 N. W. 25; Donaldson v. Voltz, 19 W. Va. 156; Fallihee v. Wittmayer, 9 S. D. 479, 70 N. W. 642; Sampson v. Williamson, 6 Tex. 102, 55 Am. Dec. 762. The mandatory provisions of the constitution are that the legislature shall provide by law for the selection and exemption of a homestead from sale on execution. In the discharge of the duty imposed, the legislature may provide remedies for the protection of the homestead rights created and secured by the constitution, and may regulate the claim of the right so that its exact limits may be known and understood, and may make supplemental legislation in particulars wherein they are not as complete as may be desirable, but all such legislation must be subordinate to the constitutional provision and in furtherance of its purpose, and must not in any particular attempt to narrow, defeat or limit the homestead right as defined and secured by the constitution: Cooley's Constitutional Limitations, p. 122. The following things may be said to have been defined and secured by our constitution: (1) The right to select by each head of a family (2) a homestead of one or more parcels of land (3) of the value of at least fifteen hundred dollars (4) exempt from sale on execution. In the exercise of the power conferred upon it, the legislature may, by supplemental legislation, prescribe convenient remedies for the protection of these rights, and to adopt the necessary regulations in regard to time and mode of exercising them, which are reasonable and uniform and designed to secure and facilitate the exercise of such rights, but the legislature, among other things, may not confine the homestead to one parcel of land, nor fix the value of the homestead at less than fifteen hundred dollars, nor [83] subject the homestead to any kind of sale on execution. While the constitution has placed no inhibition to a voluntary alienation of a homestead, it has specifically exempted it, without exception, from all involuntary or execution sales. The statute providing that the homestead is subject to execution in satisfaction of judgments obtained on debts secured by mechanics' or laborers' liens for work and labor done or materials furnished for its improvement seeks to make the homestead subject to a particular kind of sale on execution, and this the legislature may not do. As before observed, the constitution has not prohibited a homestead claimant from selling or voluntarily encumbering the homestead, and he may make any kind of voluntary alienation of it, or encumber it, except as restricted by section 1155 of the homestead statute, which

we need not here consider. Now, it may be said that the defendant, the homestead claimant, having herself voluntarily made and entered into the contract for the construction of the building on the homestead, and the material having been furnished by plaintiff in pursuance of it, therefore she voluntarily encumbered the homestead the same as though she had given a mortgage upon it. That would be true if by the terms of her contract she had pledged the homestead, or had given a lien on it as by law provided. But it is not made to appear that the contract contains any stipulation giving contractors, materialmen, laborers, mechanics or anyone a lien upon the homestead, and nothing appears from which the contract can be construed into a contract for a lien. In the absence of an express contract creating it, the lien which a materialman or mechanic may become entitled to depends solely upon the statute for its existence. It is a preference which he may secure if he proceeds in a particular way and fully complies with the statutory requirements upon the subject, and not otherwise. Plaintiff's lien, so far as made to appear, has its origin alone in the statute and proceedings taken under it, and does not arise out of or upon any contract. The decree ordering the property sold in satisfaction of the judgment obtained rests alone for its authority upon the statute, and not upon any contract [84] made by the defendant, and hence the order of sale is clearly an execution sale within the meaning of the constitution. This principle of law is well illustrated in, and our views fully sustained by the following authorities: Coleman v. Ballandi, 22 Minn. 144; Moran v. Clark, 30 W. Va. 358, 8 Am. St. Rep. 66, 4 S. E. 303; Lanahan v. Sears, 102 U. S. 318, 26 L. ed. 180; Sampson v. Williamson, 6 Tex. 102, 55 Am. Dec. 762. If it is within the power of the legislature to subject the homestead to execution in satisfaction of judgments obtained on debts for work and labor done or materials furnished for improvements of the same when the constitution has not made any such exception, then, why cannot the legislature subject it to execution in satisfaction of judgments obtained on other debts? To say that the legislature may do so when the debt grows out of something done or furnished for the improvement of the homestead, but may not do so if the debt arose in some other way, is making a distinction not made by the constitution itself. It may be, upon equitable principles, that the homestead ought to be made subject to such improvements. On an examination of constitutions of different states where home-

stead exemptions are provided for, we find in nearly all of them that the homestead, by the terms of the constitution, is made subject to improvements. In looking at the proceedings of our constitutional convention, we find the provisions of such constitutions referred to and discussed, and several amendments and substitutes proposed, subjecting the homestead to improvements made thereon, but all of them were voted down and rejected: Pro. Const. Conv., pp. 1772, 1774, 1768, 1771. Other exceptions were also proposed, but they also were rejected.

Without resorting to these proceedings, it is obvious that the constitutional provision exempts a homestead from execution sale without restriction, limitation or exception of any kind. The people in their constitution had the right to provide for any sort of a homestead, and to guard it as they pleased, to subject it to restrictions or without restrictions, as in their wisdom they saw fit. When the people, through their [85] constitution, have spoken and have thus exempted the homestead from execution sales without exceptions of any kind, neither the legislature nor the courts have power to subject it to any such sale. With the wisdom or equity of such a provision neither we nor the legislature have anything to do. Homestead rights are not founded upon equity. They are founded upon public policy for the protection of the home and the prosperity of the state, carrying out the policy of republics to encourage and multiply freeholders, the natural supporters and defenders of a free government.

We are of the opinion that the statute in question is in conflict with the constitution, and is void. It therefore follows that the court erred in sustaining the demurrer. The judgment of the court below is reversed, and the court directed to overrule the demurrer and to proceed with the case in accordance with the views herein expressed, costs to appellant.

McCarty, C. J., and Frick, J., concur.

A Homestead is Ordinarily not Subject to a Mechanic's Lien; Morgan v. Beuthein, 10 S. D. 650, 66 Am. St. Rep. 733. This rule, however, has been changed in some states so that real property, impressed with a homestead claim is not exempt from a lien in favor of the mechanic, laborer or materialman who has furnished labor or material in the improvement of the premises: See the note to Mertz v. Berry, 45 Am. St. Rep. 383; Nickerson v. Crawford, 74 Minn. 366, 73 Am. St. Rep. 354. Under a constitutional provision making a wife's signature necessary to a valid alienation of a homestead, her homestead interest in land owned by herself and husband jointly cannot

be devested by a mechanic's lien acquired under a contract signed by the husband alone, although it was entered into with her knowledge and consent, and a statute provides that if improvements are made under such circumstances, the lien shall attach as though the contract were signed by the wife: Jossman v. Rice, 121 Mich. 270, 80 Am. St. Rep. 483.

EUREKA HILL MINING COMPANY v. BULLION BECK AND CHAMPION MINING COMPANY.

[32 Utah, 236, 90 Pac. 157.]

APPEAL AND ERROR.—Where there is substantial evidence to support the finding of the trial court, it will not be set aside on appeal. (p. 838.)

APPEAL AND ERROR—Evidence, When will not be Considered.—In an action at law, the appellate court will not consider inconsistencies in the testimony of the witnesses for the respondent, because they go on to the weight of the evidence and the credibility of the witnesses. (p. 839.)

EVIDENCE, Time-book as.—Time-books containing the names of the men, usually written in by the timekeeper, showing the number of days each employé worked in a given month, are admissible, in connection with the testimony of the employés, as bearing on the question of the accuracy of the recollection of the several witnesses, but are not evidence as to the number of days they were at work. (p. 840.)

EVIDENCE.—Memoranda in the Time-books to indicate the capacity and place in which employés work are not admissible, where the attention of the witnesses has not been directed to the memoranda and opportunity afforded them to explain or deny the same. (p. 840.)

EVIDENCE, Books Kept by a Private Corporation.—Where books are kept by a private corporation solely for its own purposes and in the administration of its internal affairs, they are not admissible against third persons as evidence of isolated collateral facts in an action between the corporation and a stranger. (p. 841.)

Dickson, Ellis, Ellis & Schoulder, for the appellant.

Sutherland, Van Cott, Allison, Riter & Harkness, for the respondent.

239 McCARTY, C. J. This is an action of trespass brought by plaintiff against defendant to recover the value of certain ores claimed to have been unlawfully extracted by the defendant from the property of the plaintiff, situate in Tintic mining district, Juab county, this state. The case was referred to C. S. Varian, a member of the bar of this court, as referee to take testimony and to make and file findings of fact and conclusions of law. As stated by the referee in his review of the case in a written opinion which he filed

in connection with the findings of fact and conclusions of law: "It appears from the evidence that in the year 1888 there were suits pending between plaintiff and defendant and another company, the Bullion Beck and California Company, to whose right the defendant company has now succeeded, respecting the boundaries of the respective claims and the lode or lodes therein, and during the pendency of such suits a provisional line of separation was established by the court or agreed upon by the parties. In February, 1888, it appears that the defendant had worked across the line some eight or ten feet at the west end of the stope now designated in the evidence as the 'Trespass stope,' and extracted some ore; that a survey was [240] made on February 24, 1888, by Mr. Brooks, defendant's engineer, for the purpose of establishing the line at that point and the location of the 'Day stope,' with relation thereto, this being a large stope in defendant's ground immediately adjoining the line on the west, and thereupon the place was bulkheaded. On July 2, 1888, an agreement in writing was made by and between all of the parties, whereby the provisional or court boundary line was affirmed and established By this agreement the parties reciprocally released to each other all claims for damages on account of trespass theretofore committed. Plaintiff contends that in the year 1896 the defendant returned to this trespass stope (which, as stated. is in plaintiff's ground) and entered it about the same place as in 1888, stoped out substantially all the ore, and converted the same to its own use. That plaintiff had no knowledge of the trespass until January, 1903, when its servants, in following ore in plaintiff's ground, broke into the stope at its easterly end and made the discovery." The referee, among other things, found: "(7) That in the year 1896 the defendant wrongfully and unlawfully, by means of underground openings, winzes, levels, and raises, at great depth beneath the surface, entered into and upon that part of the lode or lodes lying across easterly and southerly of the vertical plane of said boundary line aforesaid, and owned by and in possession of the plaintiff, and secretly, intentionally and fraudulently, by underground excavations and openings, mined, extracted, removed and converted to its own use large quantities of mineral bearing ores from the property of the plaintiff, to wit, one hundred and forty-eight tons of the value of one hundred and fourteen dollars per ton, and of the aggregate value of sixteen thousand eight hundred and seventy-two dollars. That said ore was mined and

extracted from a certain stope called the 'Trespass stope.' (10) That said trespass being intentional, willful and fraudulent, the plaintiff is entitled to have the value of the ores so taken and converted trebled, and the aggregate damages amount to fifty thousand six hundred and ten dollars." Judgment was rendered in favor of plaintiff and against defendant in accordance with the foregoing findings [241] for the sum of fifty thousand six hundred and ten dollars. To reverse this judgment defendant has appealed to this court.

Appellant insists that the findings are not only unsupported by, but are contrary to, the evidence. The record contains about one thousand pages of testimony, besides numerous time-books and payrolls of appellant, and also several maps showing the agreed boundary line hereinbefore referred to between the respective companies (plaintiff and defendant), as well as extensive underground workings at and in the vicinity of the stope wherein it is claimed the alleged trespass was committed. We deem it unnecessary to here review in detail this voluminous record, as a brief reference to the testimony of some of the principal witnesses is all that is necessary to support the findings assigned as error.

John Group, one of plaintiff's witnesses, testified, in substance, that in the year 1888, he worked for defendant company; that he worked across the boundary line mentioned and into the Trespass stope, taking out ore for a distance of seven or eight feet; that, when it was discovered, he was working in and extracting ore from plaintiff's ground, he was ordered by defendant's foreman to stop working at that place and to bulkhead the entrance to the stope, which he did; that in 1889 he left defendant's employment and returned to work again in 1893; that in the year 1896 he and one Nelson, another employé of defendant company, removed, by order of defendant's foreman, the bulkhead from the Trespass stope, which he (Group) had placed there in 1888; that when this bulkhead was removed Jared Roundy was foreman and John A. Kirby was superintendent of defendant company. Nelson was called as a witness by plaintiff and corroborated the testimony of Group in relation to the removal of the bulkhead from the entrance of the Trespass stope, and further testified, in part, as follows: "While I was working there [referring to the Trespass stope] the men were breaking ore in the stope, Hanson and Thompson. While that six weeks' work was going on in this stope, I saw Roundy up there. He used to come every [242] day. I saw Kirby in that stope. He was up the first day when we struck the ore.

That afternoon he came up with Roundy. The same day we took the bulkhead down. I saw him there two or three times after that in the stope. During that six weeks I was timbering most of the time. Sometimes I would go up in the stope." George Hanson, another of plaintiff's witnesses, testified that: "I worked for the Bullion Beck Mining Company in 1896. Kirby was then superintendent and Jared Roundy foreman. I first saw Trespass stope in 1896. I and Joe Thompson were taken up there by Roundy, the foreman. When we got into the Trespass stope, we found ore there—lead and galena and silver ore. We started to break ore and continued to work there six or seven weeks, breaking ore through the whole of that six or seven weeks. There was no waste. It was all ore. Kirby was up there while we were at work in this stope several times. Roundy was up there nearly every day while we were at work." Plaintiff called other witnesses, who testified to substantially the same facts as those mentioned. In fact, much evidence not herein referred to was introduced by plaintiff company which tended to show that defendant committed the trespass alleged in the complaint. To meet and overcome the evidence produced by the plaintiff the defendant called Mr. Kirby, its superintendent, and Mr. Roundy, its foreman, as witnesses, and each of them denied that he had anything to do with the working of the Trespass stope, or had any knowledge of when, or by whom, the stope in question had been worked and the ores extracted therefrom. In fact, their testimony is, in effect, a flat contradiction of that given by the witnesses for the plaintiff company on this point. It will thus be seen that there is a substantial conflict in the evidence on the issues involving the merits of the case. This court, in a long line of decisions, has uniformly held that, when there is any substantial evidence to support the findings of the trial court, such findings will not be disturbed.

Counsel for appellant have devoted much space in their briefs in pointing out, and in the discussion of, what they [243] claim to be inconsistencies in the testimony of the plaintiff's witnesses; but, as this is an action at law, this court is precluded from examining into or in any way considering those matters, as they only go to the weight of the evidence and credibility of the witnesses. The referee, whose province it was to pass upon the credibility of the witnesses in weighing the evidence, evidently gave these questions due consideration, for, in the course of his written opinion filed in the

case, he says: "It is argued by defendant's counsel that the disagreements and inconsistencies appearing here and there in the testimony of plaintiff's witnesses indicate a lack of candor and truthfulness which render them unworthy of belief. As to the testimony given by the witnesses in the case, it is my duty, if I can do so, to reconcile all of it along the lines of truthfulness and honesty, and I must also do this with the evidence given by the plaintiff's witnesses, if I can. All of them but Kell were produced at the trial, and I had an opportunity of judging, from their manner on the stand and appearances generally while giving evidence, of their character. My impression was, and is, that each of them was endeavoring to state the truth as he remembered it; and it is not surprising that, after such a lapse of time, the memories of the witnesses should be at fault as to times and nonessential circumstances. They differ among themselves as to some matters; but I think the testimony, as a whole, can be easily reconciled as consistent and harmonious on all substantial matters." After a careful and thorough examination of the record, we are of the opinion, and so hold, that there is ample evidence to support the finding that the defendant company committed the trespass charged in the complaint, and that trespass was intentional and fraudulent. In fact, the physical conditions in and about the Trespass stope, as shown by the several maps in evidence, and by the testimony of the witnesses, including that given by several competent and experienced civil engineers who surveyed the underground workings and prepared the maps referred to, demonstrate beyond the possibility of a doubt that, if the defendant committed the trespass at all, it did so intentionally. [244] While there is some conflict in the evidence regarding the value and quantity of the ore extracted by defendant from the Trespass stope, we think it is sufficient to uphold the finding of the referee on this point.

The next assignment of error refers to the exclusion of evidence, by the referee, relating to certain "field-books" and certain memoranda appearing on the payrolls and time-books of appellant. The referee has so completely and logically covered and discussed the questions arising under this assignment of error in his written opinion filed in the case, we hereby adopt that part of his opinion wherein he says: "These books contain the names of the men which were usually written in by the timekeeper, and the books ruled in lines, vertical and horizontal, which, crossing each other, form spaces in columns under the several days of the month printed

at the top, in which spaces the shift bosses checked each man's time for each day by writing therein in pencil the figure '1' or a fraction as the case might be. They also contain frequent memoranda, such as initial capital letters, also in pencil, said to indicate the capacity in which the men worked, 'M' meaning miner, 'T' timberman, 'B' Burleigh, for Burleigh drill, etc. These letters are supposed to be written by the shift bosses, and I believe in some instances Franke and Temby identified some of these letters as being in their handwriting (I think also, some evidence was given of Brand's handwriting) in identification of some of these letters appearing in his books. It is apparent, however, on the face of these books, that some of the letters are not in the handwriting of the shift bosses. It was shown that it was the duty of the shift bosses to keep the time correctly, and Franke and Temby testified that they tried to do so, and believed they had kept their books correctly. All of these time-books together furnished the data, the original data, for the making up of the payrolls for the men underground. The witnesses for the plaintiff who testified to the work in the Trespass stope identified their signatures to the payrolls, which showed the number of, but not the particular, days each worked in a given month. I think these payrolls are admissible as bearing upon the question [245] of the accuracy of the recollection and statements by the several witnesses who signed them as to the number of days and months they were at work. The memoranda upon the payrolls as to the capacity in which the several men worked is not original evidence, and I exclude all such except in the individual instances where the attention of the witnesses was directed to such memoranda and opportunity afforded them to explain or deny the same: Healey v. Wellesley etc. Ry. Co., 176 Mass. 440, 57 N. E. 703. As to the time-books themselves, there is apparently a conflict of authority as to their admissibility, and I have serious doubts upon the question. I have concluded, however, to overrule the objection to these books, and also that to the timekeeper's books, letting the two sets of time-books go in evidence, together with the payrolls; but I exclude from the evidence all letters or memoranda appearing in these books by way of indication of the capacity in which or the places where the men worked. The field-books are in a different situation, however. They came to the shift bosses from the timekeeper, who prepared them for use by writing in the left-hand column of each page the

figures and words indicating the levels, stopes, drifts, and other places in which work was done each day and night by the two shifts and by writing at the top of the page, at the head of column prepared, certain words, such as 'Miners on Ore,' 'Miners on Dead Work,' 'Laborers,' 'Cars of Ore,' 'Powder,' 'Fuse,' 'Caps,' etc., indicating the places where men worked, the number working, the character of the work, and the consumption of supplies, etc. The shift bosses were supposed to fill in these columns with figures indicating the progress of the work in the mine and the consumption of material each day. These books were not correctly kept, and, as said by Mr. Hume, were not supposed to be accurate, and otherwise did not appear to be competent as evidence against the plaintiff. They were kept by a private corporation solely for its own purposes and in the administration of its internal affairs, and I do not think, under any rule of evidence, they can be competent as witnesses to isolated and collateral facts in a suit between the corporation and a stranger."

[246] The judgment of the court below is affirmed, with costs.

Straup and Frick, JJ., concur.

ADMISSIBILITY IN EVIDENCE AGAINST THIRD PERSONS OF BOOKS, REPORTS AND THE LIKE, OTHER THAN BOOKS OF ACCOUNT.

I. Scope of Note, 842.

II. General Rule as to the Admissibility of Entries Made in the Regular Course of Business, 842.

III. Admissibility of Books and Data of the General Nature of Books of Account.
- **a. In General, 848.**
- **b. Time-books and Payrolls, 849.**
- **c. Books and Reports Showing Quantities and Qualities of Material Used, Manufactured, or Produced, 851.**
- **d. Note Registers, Check-books, Inventories and the Like, 852.**

IV. Admissibility of Books Containing Memoranda of Daily Transactions and Doings, 853.

V. Admissibility of Books and Reports Used as Part of System of Conducting Business.
- **a. In general, 854.**
- **b. Books of Rules and Instructions Furnished to Employés, 855.**
- **c. Reports of Agents, Employés and Subordinate Officials.**
 - **1. In General, 855.**
 - **2. Train-sheets and Railway Inspection Reports, 856.**
 - **3. Livestock Registers and Herd-books, 857.**

VI. Admissibility of Books and Records of Corporations, Lodges, and Similar Organizations.
- **a. By-laws, 857.**
- **b. Minute-books and Other Books of Record, 858.**

I. Scope of Note.

This note is confined to a consideration of the admissibility of books, reports and memoranda made or authorized by the party seeking to introduce the same during the regular course of business. In other words, it deals more particularly with regular entries made in the course of business other than books of account. Questions relating to the admissibility of letters, telegrams, photographs, mortality tables, historical and scientific books, as evidence, will not be considered.

II. General Rule as to the Admissibility of Entries Made in the Regular Course of Business.

The admissibility of books, reports and the like in evidence on behalf of the person on whose behalf they were made is very largely governed by the rules in regard to the admissibility of books of account and the use of memoranda made at the time of the transaction.

The admission of books of accounts of a party to prove items of work done or goods delivered, when supported by the oath of the party, has been sanctioned, at least originally; as an exception to the general rule, that formerly existed, prohibiting a party from being a witness in his own case, and from the supposed necessity, in order to prevent a failure of justice, of allowing the only available proof of daily transactions of such a small importance that it could not be expected that there would be witnesses to their occurrence: Pratt v. White, 132 Mass. 477.

The rule in regard to the admissibility of memorandums as evidence was stated by the court in Manchester Assur. Co. v. Oregon R. Co., 46 Or. 162, 114 Am. St. Rep. 863, 79 Pac. 60, 69 L. R. A. 475, as follows: "The theory of the law deducible from the books seems to be that a memorandum is but secondary evidence of the facts of which it speaks, the primary evidence being the knowledge of the witness, if he is able to testify truly as to the facts mentioned, or if he is unable to testify from present recollection after having had his mind quickened by the memorandum—that is to say, of his own knowledge, independent of the memorandum; and it is only when this primary proof is not available that resort may be had to the secondary, so that it becomes necessary to show that the witness cannot speak from knowledge of the facts, or from present recollection thereof, after having consulted the memorandum, before it can become of evidentiary value, either as auxiliary, or an aid to the mind in speaking from it: Bradner on Evidence, 2d ed., 472; Abbott on Trial Evidence, 2d ed., 395, 396; Friendly v. Lee, 20 Or. 202, 25 Pac. 396; Howard v. McDonough, 77 N. Y. 592; Peck v. Valentine, 94 N. Y. 569; National Ulster Co. Bank v. Madden, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408; Krom v. Levy, 1 Hun (N. Y), 171; People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017; Acklen's Exr. v. Hickman, 63 Ala. 494, 35 Am. St. Rep. 54; Hayden v. Haxie, 27 Ill. App. 533. But to enable a witness to testify from the memorandum, under the conditions stated, it must be the original, unless it be lost,

or its absence excused: Davis v. Field, 56 Vt. 426; Caldwell v. Bowen, 80 Mich. 382, 45 N. W. 185; Harrison v. Middleton, 11 Gratt. 527.

"If the original be produced, and it appears that it was made in the usual course of business, it may be introduced and received in evidence, along with the testimony of the witness who made it, and is enabled to say that the facts stated in it were correctly minuted at the time; but this is because he has forgotten, so that he is unable to speak concerning such facts without the aid of the memorandum: Abbott on Trial Evidence, 2d ed., 395; National Ulster Co. Bank v. Madden, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408; Peck v. Valentine, 94 N. Y. 569; Krom v. Levy, 1 Hun (N. Y.), 171; Merrill v. Ithaca & O. R. Co., 16 Wend. 586, 30 Am. Dec. 130; Moots v. State, 21 Ohio St. 653; Burton v. Plummer, 2 Ad. & E. 341; Doe v. Perkins, 3 Durn. & E. 749: Tanner v. Taylor, referred to by Mr. Justice Buller in the latter case.

"Memoranda made in the usual course of business, when made up from reports of subordinates, are admissible, under the rule, when accompanied by the testimony of such subordinates that they represent truly what had transpired, combined with that of the person minuting the transactions that they were also truly noted; but not so with merely private memoranda, not made in pursuance of any duty owed by the person making them: Mayor v. Second Ave. R. Co., 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905. To the same purpose, see Harwood v. Mulry, 8 Gray, 250; Miller v. Shay, 145 Mass. 162, 1 Am. St. Rep. 449, 16 N. E. 468."

One of the requirements for entries made in a book to be admissible in evidence is that they were made in the regular course of business: Dow v. Sawyer, 29 Me. 117; Watts v. Howard, 7 Met. 478; State v. Phair, 48 Vt. 366; Nicholls v. Webb, 8 Wheat. 326, 5 L. ed. 628. The entry of a single sale or transaction in a book does not constitute it a book of original entries: Ryan v. Dunphy, 4 Mont. 356, 47 Am. Rep. 355, 6 Pac. 324. Hence, where a book contains but one entry made by the party producing it, and that entry was made solely as a memorandum of the transaction, the book is not admissible in evidence: Metzger v. Burnett, 5 Kan. App. 374, 48 Pac. 599. Entries contained in a book but are not generally admissible in evidence where they were not made by a person having personal knowledge of the transaction entered therein: Carlton v. Carey, 83 Minn. 232, 86 N. W. 85. A memorandum is not admissible as independent evidence to prove any fact to which the party making it could testify from his recollection. It can, however, be used to refresh the memory of the witness, and if, upon examining it, he is unable to remember what it contains, but knows that the facts contained in the memoranda are true, he may so testify, and then read the memoranda to the jury: Phoenix Ins. Co. v. Public Parks Amusement Co., 63 Ark. 187, 37 S. W. 959.

"How far papers, not evidence per se, but proved to have been true statements of fact at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry, and it has many times been decided

that they are to be received. And why should they not be? Quantities and values are retained in the memory with great difficulty. If, at a time when an entry of aggregate quantities or values was made, the witness knew it was correct, it is hard to see why it is not at least as reliable as the memory of the witness": Republic Fire Ins. Co. v. Weide, 14 Wall. 375, 20 L. ed. 894.

The court in Curtis v. Bradley, 65 Conn. 99, 48 Am. St. Rep. 177, 31 Atl. 591, 28 L. R. A. 143, spoke very strongly in favor of the admissibility of memoranda which could, under the well-established rules of evidence, be read to the jury by a witness whose memory was not refreshed by it. The court said: "All courts concur in holding that the witness may read the statement of such paper to the jury, and that the jury may draw the conclusion that the statement so read to them is a true statement of the facts; but some courts hold that the paper is not evidence. It seems to be pressing the use of a legal fiction too far for a court to permit the statement made by such paper to be read as evidence, while holding that the law forbids the admission as evidence of the paper which is the original and only proof of the statement admitted. In other words, it would seem as if in admitting the paper to be so read the court of necessity admitted the paper as evidence, and therefore, by the concurrent authority of all courts, the paper is itself admissible. But waiving the question whether, in admitting such paper to be read, the courts have gone so far as to make the denial of its admissibility no longer tenable, we will deal with the matter as if wholly undecided. Is the paper itself admissible as evidence? Its admissibility, in the first instance, depends on its relevancy. The competency of this paper is clearly established by the testimony, and it would seem to follow of necessity that it should be admitted on the same ground that any relevant and material documentary evidence, proved to be competent, is admitted. The doubt has arisen from the complication of the admissibility of such paper with the right of a witness to refresh his memory. The right of a witness to refresh his memory is a settled and necessary rule of evidence. The application of that rule is often difficult, involving delicate distinctions. We are not called upon now to draw the line which limits the right of a witness to the use of such aids as, under the subtle laws of association, serve to refresh his memory. All courts recognize that right, and rightly hold that the thing used to refresh the memory is not by reason of such use itself admissible as evidence. When in the application of the rule a document like the one in question was presented to the witness and absolutely failed to refresh his memory, its exclusion as a means of refreshing his memory became imperative; but the evidence of the document was so clearly essential to a fair and just trial, that its use in some form seemed also imperative. Instead of treating the paper as itself competent documentary evidence, resort was had to a palpable fiction; the paper is read by the witness, and the knowledge the witness once had of the facts stated by the paper is imputed to him as still existing, and the statement of the paper is received as the testimony of the

witness, and the paper itself, the only witness capable of making the statement, is excluded. The use of such a fiction in the administration of justice can rarely, if ever, be justified. It is certainly uncalled for in this instance. The principles of law invoked to justify the fiction are amply sufficient to support, indeed to demand, the admission of the document as evidence. There is no occasion to sacrifice truth in order to secure justice. As regards its admissibility as evidence, there is no substantial difference between this paper and any other tangible object capable of making a truthful and relevant statement."

The book, when competent, stands in the place of the witness who made the entry. Hence the book must contain the registration of some fact made in the course of business or duty by one who would at the time have been a competent witness to the fact registered therein. And the fact must, of course, be relevant to the issues on trial: Avery's Exr. v. Avery, 49 Ala. 193.

In Chicago Lumbering Co. v. Hewitt, 64 Fed. 314, 12 C. C. A. 129, the court refused to admit a book showing the tally of logs scaled during a certain season on the ground that it was not a book of accounts. The data upon which the entries were made was obtained from tally reports made by a log scaler, and the person who made the entries had no knowledge of their correctness. The book entries showed only the aggregate lumber contents of the logs which were ascertained from the tally boards showing the contents of each log. The court said: "The mere fact that a temporary entry is made on a slate, or by chalk scores, or as in this case, by pencil memoranda on tally boards, for the purpose of convenience and aiding the memory until a book of entry could be made at the close of the day, would not operate to deprive such subsequent entry of the character of an original entry, nor the book in which it was made of its character as an original book of accounts: Whitney v. Sawyer, 11 Gray, 242; Faxon v. Hollis, 13 Mass. 427; Smith v. Sanford, 12 Pick. 139, 22 Am. Dec. 415. The original rough memoranda are not books of original entry, and need not be produced; and the fact that such memoranda had been made to aid the memory until a formal entry could be made will not make the book into which they were at once transcribed secondary evidence: Wharton on Evidence, sec. 682. The difficulty in this case lies in the fact that the book entries were made from the tally boards memoranda by a person other than the one who made the tally-board entries, and who knew nothing of the correctness of the data transcribed. That McFadden was able to testify that his additions were correct, and that he had correctly entered the sums thus ascertained, is not enough. The fact which it was important to the plaintiffs to prove was the lumber contents of the logs placed in the river above the defendant company's boom from the camp of which McFadden was foreman. What McFadden knew was that Foley, whose duty it was to scale the logs put in the river each day from that camp, had by his tally-board memoranda reported a given number of logs containing, when aggregated, a given number of feet, as having been

set afloat on a particular day. If McFadden had made his entries from oral statements made by persons having knowledge of the number and contents of logs floated each day, such entries would not have been competent without calling the persons who knew the facts, and on whose authority the entries had been made. Is there any distinction in the evidential value of entries made on the oral statement of clerks or servants who knew the facts and memoranda made for convenience in aiding the memory of such clerks or servants? We can see none. Mr. McFadden's book could not refresh his memory as to the facts sought to be established by his entries, for the obvious reason that he had no personal knowledge of the truth of the facts recorded by him. But it is argued that Foley could not be found, and that, therefore, the memoranda made upon his knowledge were admissible. This contention is sought to be supported by the rule stated by Mr. Justice Field and heretofore quoted. The observation of Mr. Justice Story in Nicholls v. Webb, 8 Wheat. 326, 5 L. ed. 628, is also thought to justify such an extension of the rule of evidence. That observation quite meets our approval. It was this: 'The rules of evidence are of great importance, and cannot be departed from, without endangering private as well as public rights. Courts of law are, therefore, extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles. Still, however, it is obvious that, as the rules of evidence are founded upon general interest and convenience, they must, from time to time, admit of modifications, to adapt them to the actual condition and business of men, or they would work manifest injustice.' When the principle so well stated by Judge Story is invoked to induce an extension of the rules of evidence relating to books of accounts, it should be borne in mind that, since the parties to a suit are no longer incompetent as witnesses, books of account are deprived of much of the peculiar significance which formerly attached to them. It was always competent for a litigant to call his clerk or other stranger, who had personal knowledge of the correctness of the book entry, to testify, using the book, if the witness had kept it, as a means of refreshing his memory. So in this case Foley was a competent witness to the correctness of the memoranda shown by the tally boards. Did the books kept by McFadden become competent independent evidence because Foley could not be found and produced as a witness? There is nothing, when rightly understood, in either Chaffee v. United States, 18 Wall, 516, 21 L. ed. 908, or Nicholls v. Webb, 8 Wheat. 326, 15 L. ed. 628, which will justify such a conclusion."

It is obvious that where a witness never had any actual personal knowledge of a transaction, he has no memory to be refreshed, and hence that entries made by some one other than himself are not admissible to refresh his memory: Alabama etc. Ry. Co. v. Coleman, 78 Miss. 182, 28 South. 828.

In Imhoff v. Richards, 48 Neb. 590, 67 N. W. 483, the court said: "A memorandum may be received as independent evidence of the

matters stated in it, although it may be said there is no uniform rule governing the reception of such an instrument; and whether memoranda made by a witness contemporaneously with the event they purport to record, when supplemented by the statements of the witness under oath, may be admitted, is open to considerable doubt, elementary writers and courts being about equally divided upon the subject: Bates v. Preble, 151 U. S. 149, 14 Sup. Ct. Rep. 277, 38 L. ed. 106. For instances of admission of evidence of this nature, and that it may be done in this state, see Labaree v. Klosterman, 33 Neb. 150, 49 N. W. 1102; Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757. But it is the invariable rule that the memorandum must be identified. A proper foundation must be laid for its introduction."

In Wisconsin entries made in a book in the usual course of business, contemporaneous with the transactions to which they relate, are made admissible by statute: Kelly v. Crawford, 112 Wis. 368, 88 N. W. 296. In Virginia the court refused to extend the rule of admissibility of books of this class beyond the admission of books of accounts: Barley v. Byrd, 95 Va. 316, 28 S. E. 329.

But where entries in books are not shown to be correct, or to have been made at or near the occurrence of the facts entered, the books are not admissible: Wagar Lumber Co. v. Sullivan Logging Co., 120 Ala. 558, 24 South. 449. In other words, only business entries made contemporaneously with the facts and under a sense of business responsibility are admissible: Ray v. Castle, 79 N. C. 580.

In a few instances the admissibility of written statements have been sought upon the ground that they formed part of the res gestae. The principle has been recognized as sound, although the application is difficult because of the rare circumstances when applicable: National Ulster Co. Bank v. Madden, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408; Place v. Baugher, 159 Ind. 232, 64 N. E. 852. In this connection the court, in Batchelder v. Sanborn, 22 N. H. 325, observed: "If evidence of an act done by a party be admissible, his declarations made at the time, and tending to elucidate or give character to the act itself, and which may derive credit from the act itself, will be admissible as part of the res gestae: Sessions v. Little, 9 N. H. 271. Entries in books are regarded as the statements of the person making them; and if the act done by the party is competent, then entries in his books, made by him at the time of the act, and tending to elucidate and give a character to it, and which may derive credit from the act itself, may be admitted. To come within the principle, as it is ordinarily presented, the act performed and the declaration of entry made should be done by the same person. The declaration should be made by the party performing the act, and so made as to elucidate it. The declaration and the act should not only be concomitant, but should spring from the same source."

And in the absence of memory, a person who knows that if an act had been done by him it would have been recorded in a certain book, which he identifies, may testify that he knows that the act

was not done from the absence of the record to make mention of it, although his memory is not refreshed, and the record is competent evidence of the fact that the act was not performed: Woodward v. Chicago etc. Ry. Co., 145 Fed. 577. And where a witness cannot from recollection testify to a certain fact, but on looking at an original entry made by him knows that he could not have made the entry unless the fact had been true, the entry itself is admissible: Costello v. Crowell, 133 Mass. 352.

III. Admissibility of Books and Data of the General Nature of Books of Account.

a. In General.—The courts are very reluctant to admit books of a party other than books of account in evidence. And in most cases where such books are admitted in evidence, it will be found that the books are in fact books of account, though not generally called so, or that the books are allowed as a memoranda, in connection with other evidence, under the rules of evidence applicable to the introduction of memoranda.

The reluctance of the courts to extend the rule of admissibility beyond books of account is illustrated by the observations of the court in Smith v. Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138, wherein the court said: "The rule admitting account-books of a party in his own favor, in any case, was a departure from the ordinary rules of evidence. It was founded upon a supposed necessity, and was intended for cases of small traders who kept no clerks, and was confined to transactions in the ordinary course of buying and selling or the rendition of services. In these cases some protection against fraudulent entries is afforded in the publicity which to a greater or less extent attends the manual transfer of tangible articles of property or the rendition of services, and the knowledge which third persons may have of the transactions to which the entries relate. But the same necessity does not exist in respect to cash transactions. They are usually evidenced by notes or writing or vouchers in the hands of the party paying or advancing the money. Moreover, entries of cash transactions could be fabricated with much greater safety, and with less chance of the fraud being discovered, than entries of goods sold and delivered, or of services rendered. It would be unwise to extend the operation of the rule admitting a party's books in evidence beyond its present limits, as would be the case, we think, if books containing cash dealings were held to be competent. Parties are now competent witnesses in their own behalf. A resort to books of account is thereby rendered unnecessary in the majority of cases."

A book containing only private memoranda is not admissible under the rule admitting a tradesman's books or other entries made in the regular course of business: Thompson v. Orena, 134 Cal. 26, 66 Pac. 24. Loose sheets of paper without label, designation or date, containing items of articles sold, names of purchases and amount for which they were sold, do not constitute books of account, nor are they admissible under a statute allowing entries in a book or other

permanent form made in the usual course of business and contemporaneous with the transactions to which they relate: Kelly v. Crawford, 112 Wis. 368, 88 N. W. 296. But receipts are admissible to show the intention of the parties so far as expressed, or to characterize acts done where they are part of the res gestae: Brooks v. Duggan, 149 Mass. 304, 21 N. E. 381.

b. **Time-books and Payrolls.**—Time-books containing data showing the time and character of the work of miners made by shift bosses, and from which the payrolls were made up, are admissible to show the accuracy of the recollections and statements of the persons who signed them as to the number of days and months they were at work: Eureka Hill Min. Co. v. Bullion etc. Min. Co., 32 Utah, 236, ante, p. 835, 90 Pac. 157. Where the time of the arrival and departure of a certain person was kept on slips and afterward transcribed to a sheet of paper, the slips being then destroyed, the court, in allowing the sheet of paper in evidence, said: "The rule is that a witness may refresh his recollection from a memorandum made by himself or by others, if he saw the memorandum while the facts were still fresh in his memory, and if he then knew it to be correct. In such case if the witness cannot state the facts readily from personal recollection after using the memorandum, but can state that he knows the paper was correct when made, the paper itself may be put in evidence, and the statement of the witness and the contents of the paper together are equivalent to the present positive statement of the witness affirming the truth of the facts stated in the memorandum: Bourda v. Jones, 110 Wis. 52, 85 N. W. 671; 3 Jones on Evidence, sec. 886. It is necessary, in order to justify the reception of the paper itself in evidence, that it appear that the memorandum was one which was seen by the witness while the facts were still fresh in his memory; also that he cannot state the facts from recollection, and that he state positively that he knew that the paper was correct at that time": Nehrling v. Herold Co., 112 Wis. 558, 88 N. W. 614. The use of one's own book, verified by his oath, is not secondary evidence, nor is it necessary to its admission first to show the loss of other evidence. A time-book of the plaintiff kept in tabular form, in which the days of the month are placed at the head of the column, and the name of the workman at the side, and at the end of each day a figure is placed, indicating that the person has worked the whole or a part of such day, verified by plaintiff's oath, is admissible as an account-book to prove the amount of his own labor, as well as that of his apprentice: Mathes v. Robinson, 8 Met. 269, 41 Am. Dec. 505. Time slips made by workmen and approved by the foreman, showing the amount of labor performed by them upon a certain piece of work, are original memoranda, and are admissible to show the number of hours of work performed on the job: Jonesboro etc. R. Co. v. United Iron Works Co., 117 Mo. App. 153, 94 S. W. 726. In an action for work and labor, daily tickets made by the foreman of the work stating the time of the men employed are admissible together with his testimony: Jones v. Smith, 37 Ill. App. 169. So, also, where at the end

of each day's work workmen made out a time slip showing the amount of labor performed on a certain job, which slips were approved by the foreman unless anything seemed wrong, in which event he saw the workman about the matter, after which the slips were turned over to the bookkeeper, who transcribed the slips into a time-book within several days after the performance of the work, the time-books were held admissible after the foreman had testified that the slips were correct and the work represented by them was actually performed, and the bookkeepers testified that they had correctly transcribed the slips, of which there were over five thousand. The court required both the slips and time-book to have been made so near the time of the actual performance of the work as to constitute a part of the res gestae: Chisholm v. Beaman Machine Co., 160 Ill. 101, 43 N. E. 796. A time-book kept by the purchaser of a team of horses, showing day by day, with dates and days of the week, the amount of hauling done by him for the seller of the horses, is admissible as a book of original entries in support of evidence that the horses were to be paid for by hauling for the seller, the party making the entries being dead and his handwriting being proved: Dickens v. Winters, 169 Pa. 126, 32 Atl. 289. A time-book kept by a contractor is admissible in a suit for damages caused by delay in performing the contract, to show the date of the final completion of the work to be performed under the contract: Cornell v. Standard Oil Co., 91 App. Div. 345, 86 N. Y. Supp. 633. In a suit for personal injuries, a time-book showing the time worked by the plaintiff after the accident, is admissible to contradict the testimony of the foreman of the gang in which plaintiff worked on the question whether plaintiff was absent for several days after the accident, even though the foreman did not actually make the entries but did turn in the book as the record of the time worked by the members of his gang: Healey v. Wellesley etc. Ry. Co., 176 Mass. 440, 57 N. E. 703. Likewise, where at the end of each week a person in charge of building operations gave to the person who was advancing the money to meet the payrolls slips containing the names, hours of time and amount due each man who had worked on the job, and testified that the slips of paper were correct statements of the facts in each case as far as he could recollect, and that he knew they were correct when made, such slips are admissible to prove the amount of money advanced: Curtis v. Bradley, 65 Conn. 99, 48 Am. St. Rep. 177, 31 Atl. 591, 28 L. R. A. 143. But a memorandum by an agent of a corporation of the time of an employé and his compensation is not admissible without showing that the agent's memory is faulty in respect to the matter, or that he knew that the memorandum was true when made: Susewind v. Lever, 37 Or. 365, 61 Pac. 644. And where a payroll book is not a book of original entries, but consists of copies of entries made in "monthly ledgers" from time-books, it is not admissible as evidence of the facts appearing in it: Price v. Garland, 3 N. M. 285, 6 Pac. 472. A time-book is not admissible to show the number of days' work done by plaintiff's employés without the testimony of the persons who kept

the time or that of the employés who performed the work. When the maker of the entries can only testify that he acted upon information and wrote in accord with it, it must be shown that the information conformed to the facts: Collins v. Carlin, 106 App. Div. 204, 94 N. Y. Supp. 317. It has also been held that if one person claims to have been in the employ of another at a certain time, the time-book of the latter is not admissible in evidence to show such claim to be untrue, since the knowledge of the owner of the time-book is the primary and best evidence when he is able to testify to the fact: Conover v. Nehr-Roos Co., 38 Wash. 172, 107 Am. St. Rep. 841, 80 Pac. 281. In Nebraska the court, regarding the purposes of a time-book as being to enable the maker of it to settle with his employés and incidentally keep an account of the cost of each job, refused to allow such a book in evidence under a statute allowing books of account, and observed that there was no authority outside of the statute for its admission: Van Every v. Fitzgerald, 21 Neb. 36, 31 N. W. 264, 59 Am. Rep. 835.

c. **Books and Reports Showing Quantities and Qualities of Material Used, Manufactured or Produced.**—A book kept by the owner of an iron foundry which was kept for the purpose of settling with his workmen, and which contained the names of persons to whom iron was delivered, together with the quantity and sometimes the price, is not admissible as evidence in a suit for the price of the iron: Rogers v. Old, 5 Serg. & R. 404. For the purpose of establishing the quantity of straw destroyed by fire, "stack sheets" made in the regular course of business for the purpose of keeping an inventory of the amount of straw on hand are admissible, even though they were made up from scale tickets and memoranda kept by the person who did the weighing at the scales where the persons making such scale tickets testify that the weights were correctly taken and set down on the scale tickets: Chicago etc. R. Co. v. American Strawboard Co., 190 Ill. 268, 60 N. E. 518. Where, according to the system of conducting a person's business, an employé reports the quantity of materials used in doing a certain piece of work and the cost of doing the same, and later on a bookkeeper enters the items in a day-book, charging the person for whom the work was done with the cost of the materials used and a charge for doing the work, the slips cannot be regarded as a book of original entries, but they are competent evidence of the facts when introduced with the day-book and a ledger which was a condensation of the day-book, since they all formed together a system of carrying on business: Diament v. Colloty, 66 N. J. L. 295, 49 Atl. 445, 808. A scaling-book made by an employé of a lumber company of timber, where the employé did not know where the timber came from that was entered therein except by certain letters placed on said timber by other employés, is not admissible in an action for the conversion of lumber: C. W. Zimmerman Mfg. Co. v. Dunn, 151 Ala. 435, 44 South. 533. So, also, where a scale-book was made up from memoranda made by employés on boards or pieces of paper, the employer cannot refer to the scale-book, and to all intents, put in evidence on the issue of the

number of feet of logs placed by him in the water: Tingley v. Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098. A book kept by a surveyor of lumber in which he entered the names of the buyer and seller of lumber which he surveyed has been held admissible, with his suppletory oath, in a suit by himself against the buyer for his fees on the ground that it is a book of accounts: Witherell v. Swan, 32 Me. 247.

A report of an expert packer that he had processed and boxed a certain quantity of prunes of various grades is not admissible to show the value of the prunes where it does not show how many boxes of each grade were packed, and was not offered in connection with the testimony of the packer: Peterson v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

d. **Note Registers Check-books, Inventories and the Like.**—A note register or book of bills receivable is not a book of account, and for that reason its admissibility has been denied. Its use as a memorandum has, however, been recognized: Karsing v. Walter (Iowa), 65 N. W. 832; Martin v. Scott, 12 Neb. 42, 10 N. W. 532; Laboree v. Klosterman, 33 Neb. 150, 49 N. W. 1102. So, also, a teller's book of a bank has been allowed in evidence to show that on a certain day no money was received for certificates of deposit, where it is shown in connection with said book that in the regular course of business such money, if received, would have been entered in the book: American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644. Records of a cash register offered to show that no sales of liquor to a certain amount were made on a certain day are not admissible, since they are not books of account, but, memoranda made by a party in his own interest: Cullinan v. Mancrief, 90 App. Div. 538, 85 N. Y. Supp. 745. Books of the stock exchange in which are recorded the sales of stock at the exchange are not admissible as original evidence against third persons of the facts stated therein, when the person who made the entries in such books is alive and might be but is not called to testify to the transaction: Terry v. Birmingham Nat. Bank, 93 Ala. 599, 30 Am. St. Rep. 87, 9 South. 299. Hotel registers are not admissible to prove the extent of business of a hotel, since they do not afford proof of the actual number of guests or whether they were paying customers or the duration of their stay: Wittenberg v. Mollyneaux, 55 Neb. 429, 75 N. W. 835. Where there is no proof that entries on the stub of a promissory note-book were made in the usual course of business and contemporaneous with the transaction to which they relate, they are not admissible under a statute which admits entries so made, nor are they admissible as entries in a book of accounts: Kelly v. Crawford, 112 Wis. 368, 88 N. W. 296.

The stub of a check is not admissible as a book of accounts, and regarded merely as entries made in the usual course of business they have been denied admissibility on the ground that the rule in favor of such admissibility has relation to entries made by an agent and not by a principal: Carter v. Fischer, 127 Ala. 52, 28 South. 376; Watts v. Shewell, 31 Ohio St. 331; contra; Fulkerson v. Long, 63 Mo. App. 268. In Simons v. Steele, 82 App. Div. 202, 81 N. Y. Supp. 737, affirmed in 177 N. Y. 542, 69 N. E. 1131, the court said: "It is conceded that the

stub entries in the check-books were not admissible in evidence to show cash transactions, if they are to be treated as books of account. Such is the effect of the decisions: Vosburgh v. Thayer, 12 Johns. 461; Smith v. Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138. The plaintiff claims, while admitting this rule, that they were admissible as a part of the res gestae, and as constituting the best evidence procurable. If admissible for the purpose of showing that the parties had transactions, and for nothing else, they would be insufficient to establish an indebtedness, and resort could not be had to them for that purpose. Consequently, if admissible to this limited extent, the plaintiff would not be aided, because they did not establish the indebtedness, and were not competent for such purpose. It can scarcely be claimed with any show of reason that because no other evidence was procurable, therefore they may be resorted to to establish an indebtedness. Lack of evidence may be the plaintiff's misfortune, but it does not avail as a basis upon which to found a claim. That must be proved by competent testimony."

Where several persons co-operate in making an inventory of a stock of goods, the inventory is not admissible in evidence, as a memorandum in connection with the testimony of any one of them unless he can verify it in its entirety as representing his knowledge on the subject: Whitley Grocery Co. v. Roach, 115 Ga. 918, 42 S. E. 282. In such a case, the memorandum relates to matters to which the maker of the memorandum cannot testify because of his want of personal knowledge: Town of Norwalk v. Ireland, 68 Conn. 1, 35 Atl. 804. But in Burchwell v. Koon, 8 Colo. App. 463, 46 Pac. 932, the court in allowing an inventory to be admitted in evidence said: "There is no other method by which a stock can be taken, and by which parties can testify and intelligently lay before the jury a discription of the goods, of the amounts, and of the values. Few men can retain in their memory, and state, item by item, a stock of goods which they have examined, even though the purpose of the examination was to ascertain the value of it."

After one has testified to this result of his examination as to the existence of deeds, mortgages and other liens, a list of such documents compiled by him from the records of the register of deeds is not admissible: Plano Mfg. Co. v. McCoid (Iowa), 80 N. W. 659. Tabulated statements made by competent persons from voluminous and complicated records which are in evidence are not substantive evidence tending to show the facts stated therein, but are admissible to assist in the understanding of the records: State v. Brady, 100 Iowa, 191, 62 Am. St. Rep. 560, 69 N. W. 290, 36 L. R. A. 393. But a sheet of paper containing an itemized account of expenditures adopted by an employer in making a settlement with his copartners is admissible in an action by a clerk for his wages to show the rate of wages he was drawing: Story v. De Armond, 179 Ill. 510, 53 N. E. 990.

IV. Admissibility of Books Containing Memoranda of Daily Transactions and Doings.

Entries in a diary are not admissible to show the amount and nature of services rendered by a deceased lawyer in an action for his

services since the entries must be regarded as self serving declarations: Burke v. Baker, 188 N. Y. 561, 80 N. E. 1033. So, also, separate sheets of paper called "blotter sheets," on which were entries in the nature of diary entries showing acts of the parties are not admissible as testimony, but may be used for the purpose of refreshing the recollection of a witness: Luidenthal v. Hatch, 61 N. J. L. 29, 39 Atl. 662. And where it is sought to be shown that a certain deed was forged, diary entries of the grantor showing that he was not at the place where the deed purported to be signed and acknowledged were held not admissible where it was not shown that the diary was in his possession at the place or on the day that the entry purported to have been written, the court saying: "We have searched in vain for the rule of evidence which renders admissible the statements as contained in the diary of Vincent Hamilton. Suppose he had made the statements to a third party, and this third party was offered as a witness to prove his statement, would it be contended seriously that this testimony would be competent? This diary does not belong to that class of documentary evidence which is admissible. It is not in the nature of a book account, which upon showing that it was correctly kept would render it admissible. It is merely a statement purporting to be made by Hamilton, and is of no more force or effect than if he had made such statements to some witness the day before he died. Again, it is inadmissible because it falls within that class of testimony denominated self-serving statements": Elliott v. Sheppard, 179 Mo. 382, 78 S. W. 627. Hence a diary in which are noted the transactions of the day is regarded as a mere memorandum, and admissible only to the extent that such entries of that class are admissible. An ordinary diary is not regarded as an account-book and admissible as such: Costello v. Crowell, 139 Mass. 588, 2 N. E. 698. But where the entries in a diary are of such a nature that the book may be classed as a book of accounts, the diary will be admissible as a book of accounts: Remick v. Rumery, 69 N. H. 601, 45 Atl. 574.

V. Admissibility of Books and Reports Used as Part of System of Conducting Business.

a. In General.—A mere memorandum for convenience, which discloses no purpose to charge or bind anyone may be resorted to for the purpose of aiding the memory of a witness but not as proof of a disputed fact: Cairns v. Hunt, 78 Ill. App. 420. Field-books used in mining operations showing the levels, slopes, drifts and other places in which work was done, the character of the work and the amount of powder, fuse and the like used in doing the work. Which books were made up by shift bosses, but not claimed to be strictly accurate, and merely kept for the convenience of the company in the management of its business, are not competent evidence as to isolated and collateral facts in a suit between the corporation and a stranger: Eureka Hill Min. Co. v. Bullion etc. Min. Co., 32 Utah, 236, ante, p. 835, 90 Pac. 157. A statement of a customer's account with a bank is not admissible against the customer where only evidence of its correctness is that of bank's cashier who made it from bank's books, which were

not kept by him: Walling v. Morgan County, 126 Ala. 326, 28 South. 433. The note-book of a deceased surveyor showing certain levels and other figures in a survey made for the purpose of a drainage scheme and used by him in making his report on the matter is admissible to show line to which the bi-monthly spring tide flowed at that time, since the entries were made in the discharge of professional duty at or near the time when the work was done: Mellor v. Wolmesley, [1905] L. R. 2 Ch. 164. Evidence in the form of tables representing the average business of a railroad company is receivable in a suit to enjoin enforcement of a tariff made by railroad commissioners although covering only occasional or alternate months in the year, where it is also shown that those months are fairly representative of the whole year and the preparation of schedules for the entire period would curtail a very large amount of labor and expense: Northern Pacific Ry. Co. v. Keyes, 91 Fed. 47. Bills for material purchased by plaintiff, some items of which were used and others not, were held inadmissible in a suit on a contract, the court saying: "It would probably have been proper to permit the witness to refer, while testifying, and for the purpose of refreshing his recollection, to bill containing items which did not go into the building as well as those which did, but we are of opinion such bills could not properly go to the jury, containing, as they did, items used elsewhere and not in the work done by appellants": Schuellbacher v. Frank M. Loughlin Plumbing Co., 85 Ill. App. 158. Schedules which are a mere summarization of the results of an expert's examination of accounts are admissible subject to cross-examination as to the items comprising the schedules: San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 Pac. 410.

b. Books of Rules and Instructions Furnished to Employés.—Rules of a railroad company, prescribing the duties of its agents, and merely intended as private instructions to the company's employés, are not admissible in evidence on behalf of the company against a plaintiff not shown to have contracted with reference thereto nor shown to have had any knowledge thereof: Central R. R. etc. Co. v. Skellie, 90 Ga. 694, 16 S. E. 657. Such books of rules, however, are sometimes admitted in evidence against the railroad company as admissions: Lake Shore etc. R. Co. v. Ward, 135 Ill. 511, 26 N. E. 520; Illinois Central R. Co. v. Stith's Admx., 27 Ky. Law Rep. 596, 85 S. W. 1173, 1 L. R. A., N. S., 1014.

c. Reports of Agents, Employés and Subordinate Officials.

1. **In General.**—The rule in respect to the admissibility of reports was stated by the court in New York v. Second Ave. R. Co., 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905, in admitting a time-book in evidence. The court said: "The case is of an account. Kept in the ordinary course of business, of laborers employed in the prosecution of work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who, in time, also in accordance with his duty, entered the time as

reported. We think entries so made, with the evidence of the foreman that they made true reports, and of the person who made the entries that he correctly entered them, are admissible. It is substantially by this method of accounts that the transactions of business in numerous cases are authenticated. and business could not be carried on and accounts kept, in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned. In a business where many laborers are employed, the accounts must, in most cases, of necessity, be kept by a person not cognizant of the facts, and from reports made by others. The person in charge of the laborers knows the fact, but he may not have the skill, or for other reasons it may be inconvenient that he should keep the account. It may be assumed that a system of accounts based upon substantially the same methods as the accounts in this case is in accordance with the usages of business. In admitting an account verified as was the account here, there is little danger of mistake, and the admissibility of such an account, as legal evidence is often necessary to prevent a failure of justice.

"We are of opinion, however, that it is a proper qualification of the rule admitting such evidence that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing to the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation."

"Service marks" on an original telegram indicating that it was sent are admissible together with the testimony of the operator to show the sending and receiving of the message: St. Louis etc. Ry. Co. v. White Sewing Mach. Co., 78 Ark. 1, 93 S. W. 58. But the time card of a street-car conductor is not admissible to show the time when an accident occurred in a suit for personal injuries: Lucas v. Metropolitan St. Ry. Co., 56 App. Div. 405, 67 N. Y. Supp. 833. A report made by an insurance agent to his company of his daily business is not admissible to support the agent's contention that they were without knowledge of the existence of other insurance covering the same property when they issued their policy of insurance: Strauss v. Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822.

2. **Train-sheets and Railway Inspection Reports.**—Records of entries made in the usual course of business on "train-sheets" by a train dispatcher from reports telegraphed to him by station agents as to the time of the arrival and departure of trains are admissible in evidence to show the position and place of a train at a certain time: Louisville etc. R. Co. v. Daniel, 28 Ky. Law Rep. 1146, 91 S. W. 691, 3 L. R. A., N. S., 1190; Louisville etc. Ry. Co. v. Hall, 29 Ky. Law Rep. 584, 94 S. W. 26; Donovan v. Boston etc. R. Co., 158 Mass. 450, 33 N. E. 583; Big River Lead Co. v. St. Louis etc. Co., 123 Mo. App. 394, 101 S. W. 636; Fireman's Ins. Co. v. Seaboard Air Line Ry., 138 N. C. 42, 107 Am. St. Rep. 517, 50 S. E. 452.

The record-book of an inspector of cars or locomotives is not admissible as original evidence of the facts stated therein, but such a book may be used by the inspector who made the entries therein for the purpose of refreshing his memory: Baltimore etc. Ry. Co. v. Tripp, 175 Ill. 251, 51 N. E. 833; Illinois Central R. Co. v. Barrett, 23 Ky. Law Rep. 1755, 66 S. W. 9; Hoffman v. Chicago etc. Ry. Co., 40 Minn. 60, 41 N. W. 301; Hicks v. Southern Ry. Co., 63 S. C. 539, 41 S. E. 753. If the original memoranda of locomotive engineers or inspectors are shown to be lost, other memoranda made from original slips by a clerk whose duty it was to make them, and shown by the evidence of such person to be correct, are admissible in evidence: Manchester A. Co. v. Oregon R. Co., 46 Or. 162, 114 Am. St. Rep. 863, 79 Pac. 60.

3. **Livestock Registers and Herd-books.**—Books of pedigree, such as livestock registers and herd-books, kept by associations which make it their business to register the pedigree information of animals, and which books are looked to as authority on such questions, are held admissible, but on the ground that they are books of a historical character and as belonging to the same class of evidence which is receivable in matters of pedigree concerning human beings: Kuhns v. Chicago etc. R. Co., 65 Iowa, 528, 22 N. W. 661; Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317, 66 Am. St. Rep. 754, 45 S. W. 790, 40 L. R. A. 518. But a mere private catalogue giving the history of the sire of a horse is not regarded as a book of pedigree, and is not admissible on the ground that the statements therein are mere hearsay: Louisville etc. R. Co. v. Frazee, 24 Ky. Law Rep. 1273, 71 S. W. 437. A certificate of registration of a cow in the Holstein-Friesian Association of America, given by the holder to a person who purchased the cow, though admissible as a verbal act of representation between the parties, is not admissible in a suit by the last owner of the cow against a railroad company for the killing of the cow: Austin etc. R. Co. v. Saunders (Tex. Civ. App.), 26 S. W. 128.

VI. Admissibility of Books and Records of Corporations, Lodges and Similar Organizations.

a. **By-laws.**—"The by-laws of a private corporation, as well as the entries in its books, are not, strictly speaking, records. A record is a written memorial made by a public officer authorized by law to perform that function; the memorial being intended to serve as evidence of something written said or done: Bouvier's Law Dictionary.

"The written or printed by-laws of a private corporation are documents; and the general rules as to the production and proof of documentary evidence apply to them": Knights etc. of America v. Weber, 101 Ill. App. 488. Hence by-laws of corporations, lodges and fraternal insurance organizations are admissible when properly proved in all cases where these provisions have relevancy to the cause of the action: Star Loan Assn. v. Moore, 4 Penne. (Del.) 308, 55 Atl. 946; Frank v. Morrison, 58 Md. 423; Schubert Lodge v. Schubert etc. Verein, 56 N. J. Eq. 78, 38 Atl. 347; Herman v. Supreme Lodge, 66 N. J. L. 77, 48 Atl. 1000; Page v. Knights etc. of America (Tenn. Ch.), 61 S. W.

1068; Cotton Jammer's etc. Assn. v. Taylor, 23 Tex. Civ. 367, 56 S. W. 553.

b. Minute-books and Other Books of Record.—The records of a Masonic lodge are admissible to show what action was taken by that body in adopting a deed made by one of its officers: Leach v. Dodson, 64 Tex. 185. And in a suit against a surety company on a policy of insurance issued by it as a protection against embezzlement, the books and records of the lodge are admissible to show the condition of affairs existing between the lodge and the officer who was insured: Union Pacific Lodge v. Bankers' Surety Co., 79 Neb. 801, 113 N. W. 263. Entries in the minutes of a lodge have also been allowed as evidence of collateral facts where they were made over thirty years previously, on the theory that they are similar to ancient documents under such circumstances: Howard v. Russell, 75 Tex. 171, 12 S. W. 525. But recitals in the minute-book of a lodge as to the age of a member have been rejected as hearsay and not admissible as proving pedigree: Connecticut etc. Ins. Co. v. Schwenk, 94 U. S. 593, 24 L. ed. 294.

Minute-books of corporations are, of course, when properly authenticated, evidence on behalf of the corporation of the transactions shown by the minutes to have taken place at the meeting: Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894, 6 South. 46, 9 South. 265; Booth v. Dexter Steam Fire Engine Co., 118 Ala. 369, 24 South. 405; Smith v. Woodville etc. Min. Co., 66 Cal. 398, 5 Pac. 688; Howard Ins. Co. v. Hope Mutual Ins. Co., 22 Conn. 394; Brower v. East Rome Town Co., 84 Ga. 219, 10 S. E. 629; Fitch v. Penckard, 5 Ill. 69; Vawter v. Franklin College, 53 Ind. 88; St. Louis etc. R. Co. v. Eakins, 30 Iowa, 279; Morris v. Morton's Exr. (Ky.), 20 S. W. 287; Wiley v. Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342; United Growers Co. v. Eisner, 22 App. Div. 1, 47 N. Y. Supp. 906; Wyss-Thalman v. Beaver Valley Brewing Co., 219 Pa. 189, 68 Atl. 187.

Self-serving declarations in the minutes of a corporation are not evidence in favor of the corporation against third parties. Thus the court in Dolan v. Wilkerson, 57 Kan. 758, 48 Pac. 23, said: "Its books and records are under its own control, and third persons are not chargeable with knowledge of entries made therein. Entries of the character stricken out by the court are of a self-serving character, and cannot be used to establish the rights of the corporation against third parties. While the entries might be received in evidence in disputes between members of the corporations or against the corporations, they cannot be used in its favor unless they are made competent by legislative enactment: 1 Greenleaf on Evidence, sec. 493; 1 Wharton on Evidence, sec. 662; Angell & Ames on Corporations, sec. 679; Commonwealth v. Woelper, 3 Serg. & R. 29, 8 Am. Dec. 628; Wetherbee v. Baker, 35 N. J. Eq. 501; Haynes v. Brown, 36 N. H. 545."

Books of a corporation are admissible in a controversy between it and its members in matters pertaining to its corporate acts, but where the corporation deals with its members as with other individuals, such

books are governed by the same rules which obtain with respect to individuals: Norman etc. Supply Co. v. Ford, 77 Conn. 461, 59 Atl. 499; Lowry Nat. Bank v. Fickett, 122 Ga. 489, 50 S. E. 396; Trainor v. German-American Sav. etc. Assn., 204 Ill. 616, 68 N. E. 650; North River Meadow Co. v. Shrewsbury Church, 22 N. J. L. 424, 53 Am. Dec. 258; South Hampton v. Fowler, 52 N. H. 225; Chesapeake etc. Ry. Co. v. Deepwater Ry. Co., 57 W. Va. 641, 50 S. E. 890.

Thus, in condemnation proceedings, a corporation's books are admissible to show that its entire capital stock has been subscribed in order to show that it comes within the requirements of a statute which the whole of its capital stock to have been subscribed in order to be allowed to condemn land: State v. Superior Court, 44 Wash. 108, 87 Pac. 40. But a certified copy of a corporation's report of its financial condition is not evidence of the truth of the statements contained in such report: Whitaker v. Miller, 63 N. J. L. 587, 44 Atl. 643.

KIMBALL v. SALT LAKE CITY.

[32 Utah, 253, 90 Pac. 395.]

MUNICIPAL CORPORATION—Change of Grade of Street, Property Owner's Right to Recover for.—If, through grading as previously done on a street, a grade is established and property graded accordingly in such a manner as to diminish the value of property fronting thereon, the owner may recover of the municipality to the extent that such diminution exceeds the direct benefit from the improvement causing the damage, if the constitution of the state provides that private property shall not be taken or damaged for public use without just compensation. (p. 861.)

CONSTITUTIONAL LAW—Grade of Streets, Damage to House Built Before the Adoption of the Constitution.—Under constitutions providing that private property shall not be taken or damaged for public use without just compensation, the fact that a house had been constructed near a public street before the adoption of the constitution does not preclude its owner from recovering all damages sustained by him from the grading of the street after the constitution went into effect. (p. 863.)

INTEREST ON DAMAGES.—In an action to recover damages for the grading of a public street to the injury of a property owner, he is entitled to recover the damages sustained up to the time when the grading was completed, with interest to the date of the trial. (pp. 863, 864.)

Ogden Hiles and H. J. Dininny, for the appellant.

King, Burton & King and S. Russell, for the respondents.

256 FRICK, J. This action was instituted by the plaintiffs, respondents in this court, against the defendant city, appellant, to recover consequential damages to real property caused by public improvements made by appellant in changing a street grade in front of respondents' property. The

property in question was used as a residence, and was materially affected by a fill of about ten feet in front thereof. The respondents filed a claim against the city for damages as provided by law, which was denied, and hence this action. The case was tried to a jury, which awarded damages to respondents, upon which the court entered judgment, from which this appeal is prosecuted.

The appellant assigns various errors, but they all may be condensed into the following: (1) Error in allowing any damages; (2) error in the allowance of interest on the amount allowed by the jury from the date of presentation of the claim to the city; and (3) error in giving certain instructions to the jury by the court.

The first alleged error arises as follows: The property in question was improved some time during 1889 or 1890 by erecting a dwelling-house with all modern conveniences thereon. In 1884, as the evidence discloses, the city established a certain grade in front of the property which changed the natural or surface grade, but no attempt was ever made by the city to make the street conform to the grade as established by it. This grade, if it had been adhered to, would not have materially affected respondents' property. In the year 1903 the appellant changed the grade as established in 1884, and the filling in of the sidewalk and street in front of respondents' property was made to conform to this later [257] grade. It is urged by the appellant that the first grade was a mere "paper grade"; and, as nothing was attempted under it, it was in effect the same as if no grade had been established. It is further contended that the city had a right to establish or fix one grade changing the original or surface grade without becoming legally liable for consequential damages to property injuriously affected thereby, if such change was reasonably and carefully effected. No complaint being made in that regard, it is urged that appellant is not liable in this case.

This claim is based upon section 282, Revised Statutes of 1898, which in effect provides that the cities of this state shall be liable for consequential damages to property in case the established grade is changed after improvements have been made upon the property in conformity with a prior established grade. Section 282 was passed in 1896 (Laws 1896, p. 120, c. 36), after the adoption of the constitution of this state, and evidently for the purpose of harmonizing the statutes of this state with section 22 of article 1 of the constitution, which provides: "Private property shall not

be taken or damaged for public use without just compensation." In addition to the provision before alluded to, section 282 also provides that the right to recover damages for changes of grade shall apply to all cases of improved property, where grades have theretofore been determined upon and established but not carried into actual effect. In view of a possible construction of section 282, we need not determine, in this case, whether that section is or is not in harmony with the constitutional provision above quoted. The evidence is clear that the grade counsel for appellant call a "paper grade" was established in the year 1884 and that the respondents' dwelling was erected and improved in 1889 or 1890, and that the grade of 1884, if it had been carried into effect, would not have materially affected respondents' property, since the change of that grade was slight from the natural surface grade in front of the property. The house was thus erected and improvements made after the grade had been established and before the change thereof in 1903, under which the work [258] was done which caused the alleged damages. But apart from this, the weight of authority is that, under constitutional provisions such as the one above quoted, the party whose property is injuriously affected by any change of grade may recover damages against the city for the diminution of the market value of his property to the extent that such diminution exceeds the direct benefits derived from the improvements causing the damage. It is true that, under the older constitutions which provided for remuneration for the property actually taken only, the right to recover consequential damages, unless expressly authorized by statute, was denied. It is likewise true that in some states the law is still to the effect that consequential damages are recoverable only where one established grade is changed to another, and that, until the grade is actually established and acted upon, the municipality is not liable for consequential damages. In other words, the city is given the right to depart from the natural or surface grade and establish a different one without liability, if not otherwise liable for negligence or want of care in constructing the improvement. This, however, is not the law under constitutional provisions like ours, which is thoroughly demonstrated by the following, among other cases upon the subject: Lees v. Butte, 28 Mont. 76, 98 Am. St. Rep. 545, 72 Pac. 140, 61 L. R. A. 601; Searle v. City of Lead, 10 S. D. 312, 73 N. W. 101, 39 L. R. A. 345; Eachus v. Los Angeles etc. Ry. Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; Smith v. City of St.

Joseph, 122 Mo. 643, 27 S. W. 344; Davis v. Missouri Pac. Ry. Co., 119 Mo. 180, 41 Am. St. Rep. 648, 24 S. W. 777; Hickman v. Kansas City, 120 Mo. 110, 41 Am. St. Rep. 684, and notes, 25 S. W. 225, 23 L. R. A. 658; City of Harvard v. Crouch, 47 Neb. 133, 66 N. W. 276; City of Bloomington v. Pollok, 141 Ill. 346, 31 N. E. 146. In section 223 of 1 Lewis on Eminent Domain, the rule is tersely stated by the author, and the cases upon the subject to a very large extent, are there given. We have carefully examined all the cases cited by counsel for appellant, with some others upon this subject. While many of them sustain their contention, these cases do so only because of the constitutional [259] or statutory provisions prevailing in the states from whose courts they emanate. In all of those states the constitutional or statutory provisions differ from our own, and hence these cases are not in point. There is, however, one exception to be noted, viz., the case of Leiper v. Denver City, 36 Colo. 110, 85 Pac. 849, 7 L. R. A., N. S., 108, in which the supreme court of Colorado follows what may be denominated the old rule, notwithstanding that that state has the constitutional provision found in many of the constitutions adopted since 1870, above quoted. The supreme court of Colorado, however, frankly concedes that the great weight of authority is contrary to its holding in those states whose constitutions are like ours, but feels constrained to hold to the latter view, for the reason that that court had in a former case in effect held that way. The adherence to precedent is no doubt a commendable judicial virtue, but, if carried to extremes, may easily, like most virtues, border upon vice. The law as declared by the courts should not be permitted to prevail against valid statutory enactments, and should in no event curtail or minimize constitutional provisions. This is well illustrated in the case of Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. Rep. 820, 31 L. ed. 638. The difference between the earlier and later rule of allowing a recovery for consequential damages arising out of public improvements is, after all, a difference of methods only in distributing burdens. Under the new rule the burdens for such damages are distributed among all the taxpayers, while, under the old, they fell upon those only who sustained the injury, unless relieved by special statutes. Sound arguments may be made in favor of both methods. One argument in favor of the old rule usually presented is that under the new rule the cities are often compelled to pay unreasonable damages for merely imaginary injuries. If this be so, then it is due to the fact

that juries allow them and the trial courts permit them. If the damages allowed are excessive, the trial court can and should promptly correct the evil; but if all damages are withheld, there is no redress. We are constrained, therefore, to hold that appellant's contention upon this point cannot prevail.

[260] In this connection, counsel for appellant also contend that, inasmuch as the house was erected before the constitution of this state went into effect giving relief for consequential damages, and as such damages could not have been recovered at the time the house was erected nor for a long time thereafter, therefore no recovery can be had in this case. Counsel, we think, overlook the purpose of the constitutional provision which was expressly adopted to afford a relief not then existing to all whose property might thereafter be damaged. No right to damages could accrue unless and until some injury was done. No injury was inflicted until the summer and fall of 1904, when the improvement was actually made by appellant. No right of action arose until then, and no cause for complaint existed prior to that time. It is well settled that the law in force at the time of the injury controls in actions of this kind: City of Bloomington v. Pollok, 141 Ill. 346, 31 N. E. 146. It is manifest, therefore, that respondents are entitled to recover in this case under both the constitutional provision as well as under the statute aforesaid.

Another assignment is that the court erred in instructing the jury to compute legal interest on the amount of damages found by them from the date respondents presented their claim to appellant for allowance. At the time the claim was presented the injury and damages were complete, and respondents were limited in their proof in respect to the amount of damages as of the time when the improvements were completed. If, therefore, respondents were entitled to compensation at all, they were entitled to it from the time of the completion of the work at which time the entire injury to the property was complete. The difference of the market value of the property affected between the date of the commencement of the work and the date of its completion less direct benefits is the measure of damages, and this difference was owing from the appellant to respondent from the date that the work was completed, or, in any event, from the date of filing the claim. We have had occasion to pass upon the subject of when interest is to be allowed on claims for unliquidated damages at this term in the case of Fell v. Union [261] Pacific Ry. Co., 32 Utah, 101, 88 Pac. 1003, and this case

clearly falls within the principles announced in that case. In addition to the authorities there cited, the following support respondents' contention that interest is to be allowed in this class of cases as a matter of legal right: Cincinnati v. Whetstone, 47 Ohio St. 196, 24 N. E. 409; Hampton v. Kansas City, 74 Mo. App. 129.

The error assigned in respect to the instruction offered by appellant as modified by the court cannot prevail. The instruction as offered by appellant covered no issue in the case, and the court's modification made it neither better nor worse. If the instruction had been applicable to any issue, the modification, we think, was proper. As appellant offered the instruction, and as the modification of it by the court left it as harmless as it was before, appellant cannot complain upon the ground that it may have misled the jury.

The judgment ought to be, and accordingly is, affirmed, with costs.

McCarty, C. J., and Straup, J., concur.

The Question Involved in the Principal Case was presented to the same court, and resulted in a like decision in Hempstead v. Salt Lake City, 32 Utah, 261, 90 Pac. 397, and in Felt v. Salt Lake City, 32 Utah, 275, 90 Pac. 402. The court held that where improvements on property abutting on a street were made to conform to the original or surface grade of the street, as the same had been used for travel and recognized by the city, it was liable for damages to the property resulting from a change in the grade made for the purpose of reaching outside property, so as to make it more accessible and convenient for use. In the former case, the court considered the benefits to property resulting from a change in the grade of the street for the purpose of determining whether they were special, and declared that the test is not whether the improvement affects one or more owners by creating special advantages to their property, but whether the benefits are in fact such as add anything to the convenience, accessibility and use of the property as contradistinguished from benefits arising incidentally out of the improvements and enjoyed by the public in general. Upon the question of the damages sustained by him, the plaintiff was permitted to show the rental value of his property before and after the change, and that the change had rendered his dwelling-house thereon unfit for residence, but the court instructed the jury that this evidence was received only for the purpose of enabling them to determine the actual diminution in the market value of the property resulting from the change of the grade, and that the loss of rents could be considered only as incidental to this question; and further, that it was proper for the plaintiff to introduce expert witnesses, and after showing that they were qualified to testify upon the subject, to state the amount of depreciation in the market value of the property, instead of

first stating the value before and then stating the value after the improvement was made.

The Liability of Cities for Changing the Grade of Streets is the subject of a note to O'Brien v. Philadelphia, 30 Am. St. Rep. 835. Under a constitutional provision that private property shall not be taken or damaged for public use without just compensation, a city is liable to the owner of property for damages thereto resulting from the first grading of the adjacent street: Sallden v. City of Little Falls, 102 Minn. 358, 120 Am. St. Rep. 635; Less v. City of Butte, 28 Mont. 27, 98 Am. St. Rep. 545. Compare, however, Leiper v. City and County of Denver, 36 Colo. 110, 118 Am. St. Rep. 101. In Brand v. Multnomah County, 38 Or. 79, 84 Am. St. Rep. 772, it was held that a municipality is not answerable in damages for injuries resulting from the establishment of, or change in, street grades, unless specially required to respond by some constitutional, statutory or charter provision, and that the injury which arises is not a taking of property within the meaning of the constitutional inhibition that private property shall not be taken for public use without just compensation. But compare with this holding the decisions in Eachus v. Los Angeles etc. Ry. Co., 103 Cal. 614, 42 Am. St. Rep. 149; Eachus v. Los Angeles, 130 Cal. 492, 80 Am. St. Rep. 147; Blair v. Charleston, 43 W. Va. 62, 64 Am. St. Rep. 837; O'Brien v. Philadelphia, 150 Pa. 589, 30 Am. St. Rep. 832. A municipality has the right to change the grade of a street without compensating adjoining lot-owners if no injury can result to their property: New Decatur v. Scharfenberg, 147 Ala. 367, 119 Am. St. Rep. 81.

SALT LAKE INVESTMENT COMPANY v. FOX.

[32 Utah, 301, 90 Pac. 564.]

ADVERSE POSSESSION by Purchaser of Property at a Tax Sale.—During the time when property is subject to redemption from a tax sale, the possession of the purchaser is not, and cannot be, adverse to the owner, and the statute of limitations cannot commence to run against the latter. (pp. 866, 867.)

Cyrus G. Gatrell and B. F. Johnson, for the appellant.

C. S. Patterson, for the respondent.

303 McCARTY, C. J. Plaintiff brought this action to quiet title to all of lots 25 to 36, in block 2 of South Lawn addition to Salt Lake City. The answer denies plaintiff's ownership to the lots, and alleges the title and right of possession thereof to be in the defendant.

It is admitted that the record title to the lots in question is in the defendant. Plaintiff, however, claims title by adverse possession. The facts upon which plaintiff (respondent here) bases its claim of title by adverse possession are as follows: On January 4, 1896, the lots in question were sold for taxes to E. Martin, who received a tax sale certificate

therefor. On December 31, 1896, Martin assigned the tax sale certificate to M. C. Moon. On February 3, 1897, the lots were again sold for taxes, and A. T. Moon, acting as the attorney and agent for M. C. Moon, his mother, bid in the lots for her and received a tax sale certificate issued in her name. In the spring of 1897, A. T. Moon, as agent for M. C. Moon, took possession of the lots under the tax sale certificate mentioned, and leased them to one Souther, who farmed [304] and cultivated the property from year to year until 1906. On July 5, 1898, M. C. Moon received a tax deed for the lots; but plaintiff does not rely upon this deed as a muniment of title. It was offered and admitted in evidence only for the purpose of "showing the claim that M. C. Moon had to the property and to the fact that she paid taxes in 1895." On April 27, 1901, M. C. Moon conveyed by warranty deed the lots in question to Lillian M. Moon, who, on June 6, 1904, conveyed them by warranty deed to the plaintiff. A. T. Moon testified: "I claimed title partly under these certificates. I was renting my office from the Groesbecks, and they told me that this property would never be redeemed, and that I would own it, and acting on their advice, as they were the former owners of the property, I considered I owned the property." And he further testified: "I base my claim of ownership on the tax titles, and the possession, and the assurances of the former owners." The court, among other things, found: "That the possession of the plaintiff and its grantors has been open, continuous, peaceable and adverse to all persons for a period of more than seven years prior to the commencement of this action." Judgment was accordingly entered in favor of plaintiff quieting its title in the lots mentioned, as against the defendant. To reverse this judgment defendant has appealed to this court.

The rule is elementary that possession, to be adverse, must not only be under claim of right, but hostile to and inconsistent with the possession or right of possession of the true owner: 1 Am. & Ency. of Law, 2d ed., 789; 1 Cyc. 1026. Under the statutes of this state in force at the time of the first tax sale (January 4, 1896), the owner of the lots in question had a right to redeem them at any time within two years from the date of sale. The law then in force was repealed April 5, 1896, and the time for redemption of real estate sold for taxes extended to four years. Therefore, the possession of the plaintiff and its grantors of the lots during the period of redemption was not adverse, but subject to and consistent with the title of defendant and his grantors. The

[805] fact that Moon went into possession under and by virtue of the tax sale certificate was, in effect, an admission on his part that he held the property subject to the owner's right of redemption: Pease v. Lawson, 33 Mo. 35; McKeighan v. Hopkins, 14 Neb. 361, 15 N. W. 711; Bowman v. Wettig, 39 Ill. 416.

We are of the opinion, and so held, that the evidence is insufficient to support the finding, and the judgment based thereon, that respondent acquired title to the premises in question by adverse possession.

The cause is reversed with directions to the lower court to grant a new trial; costs of this appeal to be taxed against respondent.

Straup and Frick, JJ., concur.

A Certificate of Purchase Issued on a Tax Sale does not constitute color of title in some jurisdictions, and a tax deed subsequently issued does not relate so as to constitute color before the actual execution of the deed. But in Tennessee a tax certificate describing the boundaries of the premises is color. And in Arkansas it is held that a certificate of purchase is color, since the statute makes the sale, and not the deed, the investiture of title so far as adverse possession is concerned: See the note to Power v. Kitching, 88 Am. St. Rep. 729.

EDGAR v. RIO GRANDE WESTERN RAILWAY COMPANY.

[32 Utah, 330, 90 Pac. 745.]

RAILWAYS—Negligence, Uncertainty as to Party Guilty of.—Where the evidence leaves it uncertain whether a railway company or some unknown person was guilty of an act of negligence in leaving a switch unlocked, an employé cannot recover if injured thereby. (pp. 872, 873.)

NEGLIGENCE—Proximate Cause—Railways.—The leaving of a switch unlocked cannot be held to have been the proximate cause of the derailment of a locomotive, when the evidence shows that, notwithstanding the switch being unlocked, trains repeatedly passed over the line on the same day and before the accident, and tends to show that no train running over the rail could throw the switch out. (pp. 873, 875.)

NEGLIGENCE, Action, When will not Lie for.—An act or omission, to constitute negligence for which an action will lie, must directly, as its natural consequence, produce injury to another. (p. 874.)

Warner & Davis, for the appellants.

Sutherland, Van Cott & Allison and W. D. Riter, for the respondent.

333 McCARTY, C. J. This action was brought by the heirs at law of George Edgar, deceased, to recover damages from defendant company for the alleged wrongful death of deceased, which occurred on the fifth day of July, 1905, at Park City, Utah. The complaint alleges that the deceased, on and prior to July 5, 1905, was a fireman in the employ of defendant company, and that on said day the engine on which he was riding was derailed by running into an open switch, thereby causing said engine to tip over and fall on its side, and thereby causing the death of said deceased, who was caught under the engine as it fell. It is further alleged "that said defendant company negligently and carelessly failed to keep said switch closed, in proper and safe condition so that cars would not leave the rails when passing over the same, and negligently failed to keep said switch locked, and negligently left said switch unlocked and open, and negligently failed to supply said switch with proper and safe signals, in that the signal maintained at said switch by said defendant company was too small, and the paint on the same was worn off and dingy and was dim and small, and that the same could not be seen by the said engineer or the said George Edgar, deceased, when employed as aforesaid in said engine." The answer of the defendant denies the negligence alleged in the complaint, and alleges that deceased was guilty of contributory negligence, and that he assumed the risk of injury to himself in the manner alleged in the complaint. At the conclusion of the plaintiffs' evidence the court, on motion of defendant, granted a nonsuit. A motion for a new trial having been made and overruled, plaintiffs thereupon appealed to this court from the judgment of nonsuit.

The facts, as disclosed by the record, are as follows:

334 The deceased, at the time of the accident mentioned in the complaint, was, and for five years prior thereto had been, a locomotive fireman on the Park City branch of the defendant's railroad. The train on which he was employed was the regular passenger train running between Salt Lake City and Park City daily. The train left Salt Lake City each morning, and arrived at Park City at 10:50 o'clock in the forenoon, and departed daily on its return trip to Salt Lake City at 3:20 o'clock in the afternoon. This was the schedule run on July 5, 1905, the day on which the deceased met his death. On this day this particular train, in the switching operations, before it started on its return trip to Salt Lake City was run back and forth over the switch in

question three times; the last time being about 11 o'clock in the forenoon. Each time when the train passed the switch and rails were in proper condition and were set and aligned for the safe passage of trains over the main line. After passing over the switch for the last time, the train was backed southward to the defendant's depot building, and there stopped, with the engine facing toward the north, ready to start for Salt Lake City at the usual time. The switch in question was about one thousand feet distant in a northerly direction. When the train pulled out, and had reached a point about one hundred and fifty feet from the switch, the engineer, Joseph W. Bywater, for the first time noticed there was a break in the rails at that point, and he shouted to the deceased, "Jump, George! The switch is wrong," and at the same time set the brake, reversed the engine, and opened its throttle. The deceased, when thus warned of the danger, leaped from the engine. The train could not be stopped, and as a result thereof the engine ran into the open switch, was derailed, and turned over on to its side, with the fireman, George Edgar, underneath, thereby crushing him to death.

The switch-stand used to manipulate this switch was rotary or revolving stand, and stood five or six feet from the rails, and was used to throw the rails from one track to the other. It consisted of a pedestal of cast iron spiked or bolted to a tie which extended out from the track. There was a lever [335] attached to the top above the pedestal, and on the pedestal was a disk, with slots in it, to permit the reception of the lever. By means of this lever the disk was revolved, and the lever dropped into one or the other of two slots. When the lever was in one position, the alignment of the rails was properly made for the main line, and when in another the continuity of the rails would cause a train going south to run onto a side track called the "house track." On this point Bywater, the engineer, testified in part as follows: "When the lever is there [in a slot] it is absolutely safe, even if the lock were unlocked. No train running over the rails could throw it out. I cannot recollect the exact amount of power required to lift it out of the south slot and then bring it around and drop it into the west slot. It requires an ordinary pull for a man to pull it around. I should say an exertion of probably fifty or seventy-five pounds—that would do it, I think. The force to pull this lever from the south clutch to the west clutch must move the rails." An indicator or disk, consisting of sheet iron and about ten or twelve inches in diame-

ter, was attached to the switch-stand. There was also a sheet iron or steel arrow, twelve or fourteen inches in length, which indicated the position of the rails. This arrow pointed in the direction in which the rails extended when adjusted or moved by the switch. When the arrow is at right angles with the main track, it means that the switch is turned, and that the continuity of the rails on the main line is broken. The switch in question was about one thousand feet from the Park City depot, and the disk or target, as well as the arrow, could, with the exception of a short distance, be seen by the fireman from the time the train left the depot until it arrived at the switch. The deceased was familiar with this switch and knew how it was manipulated. On this point Bywater, the engineer, testified as follows: "I have been running as locomotive engineer on the Park City branch about six years. Mr. Edgar fired for me nearly five years, and was on duty practically all the time. Each time we went up to Park City on the engine he passed this switch. Except for a few days he was laying off, Mr. Edgar passed that switch every [336] day in the year, including Sundays, for five years. He knew what kind of a switch stand it was. . . . We would pass it six or eight times a day with Mr. Edgar on the engine. I have seen him unlock that switch and manipulate it on numerous occasions prior to the accident." Oscar Cunnington, a boy eight years of age, testified that he passed by the switch-stand between 8 and 9 o'clock in the morning of the day of the accident and that he observed that the lock in the switch-stand was unlocked; that he removed the lock, examined it, and then replaced it in its proper position.

The members of the different train crews on this branch road and all station employés were furnished with keys which would lock and unlock said switch. The evidence, however, shows that none of the train crew of the train in question used, or had occasion to use, the switch, or to unlock or manipulate it, on the day of the accident, nor for three or four days prior thereto. Bywater, the engineer, testified: "From the last time we backed up to the depot platform there was not, to my knowledge, a Rio Grande Western employé in Park City that day that had any duty to perform about that switch. My engine was the only Rio Grande engine there, and if there had been any cars to be handled, to be put on the house track there at all, it would have to be done by my engine. Our crew was the only train crew there besides the agent. No member of my crew had any duty to perform about or around the switch after we passed it at 11 o'clock.

All our work was over the main line. All that was necessary for us to do was to leave the switch as we first found it in the morning in order to do what we had to do." It further appeared that some three years prior to the date of the accident the defendant company had furnished the agent of the Union Pacific Railway Company at the Park City station a key to said switch, and gave the said Union Pacific Railway Company permission to use said switch and the railroad tracks of defendant company in transferring cars from one road to the other, and at about 9 o'clock on the morning of July 5, 1905, the day on which the accident occurred, the employés of the Union Pacific Railway Company procured the key from the agent, [337] and, after using the switch and tracks in question, returned the key to the agent at about 9:30 o'clock that same forenoon.

While it is alleged in the complaint that the respondent (defendant company) failed to keep and maintain, at the switch where the accident occurred which caused the death of the deceased, George Edgar, proper signals indicating whether the switch was opened or closed, no evidence was offered in support of this allegation; but, on the contrary, the evidence introduced with respect to the indicators, which consisted of a disk and arrow attached to the switch-stand, tended to show that they in every respect fully answered the purposes for which they were intended, and that the accident was in no manner due to their alleged imperfect condition. In fact, the evidence, as the record now stands, shows that the switch-stand and the tracks with which it was connected were in good condition and in perfect working order. We shall therefore confine our consideration of the case to the question as to whether or not the position of the switch at the time of the accident was due to the negligence of respondent company.

While it may be fairly inferred from the evidence that some person in the employ of the respondent, or some party to whom it had intrusted one of its keys to the switch, left the switch unlocked, yet there is a total want of evidence to support a finding that the switch was left open either by respondent or by any person who, with respondent's consent, used the switch or carried one of the keys thereto. The only use made of the track in question on the day of the accident, after the train on which the deceased was fireman reached Park City and before it started on its return trip to Salt Lake City, was in the switching operations of this particular train, during which time it passed over the switch where the derailment

took place three times; the last time being about 11 o'clock in the forenoon. On this point witness Bywater testified, and his testimony is not disputed: "We passed that switch before [338] the accident on that day about three times, and everything appeared to be all right. The rails were continuous for the main line on each of these occasions. Before the accident we passed over the switch about 11 o'clock the last time, and the rails were safe for the passage of the train. There was nothing to indicate that there was anything wrong with the track." And again he says, referring to the switch: "I did not manipulate it on that day at all. We had no occasion to use the house track on that day. All our work was done over the main line."

Counsel for appellants, in their brief, say: "It is certain that the switch was open. It is equally certain that some one was responsible for its condition. From this evidence there must be one of three inferences deduced as to who was responsible for the open switch. It was either the defendant company, the deceased, or some third person. One or the other of these inferences must necessarily arise from the proven facts that the switch was unlocked and that the switch was open." And then, by way of argument, they say: "While it might be said that either one inference or the other might be deduced from the evidence by a reasonable person, still it seems to us that the inference that the defendant company was responsible is the more reasonable." It will be seen that it is practically conceded that the question as to whether defendant company or some other party left the switch open is a matter of conjecture and speculation. The evidence to which we have referred, however, instead of pointing to either defendant company or to the deceased, rather tends to show that neither of them was responsible for the open switch. Therefore, the allegation in the complaint that the defendant left the switch open remains wholly unproved. It was not sufficient for appellants to show that defendant company may have been guilty of this particular act of negligence. It was incumbent upon appellants to produce some substantial evidence which would at least tend to fasten the blame on defendant for the misplaced switch which caused the accident. Where, as in this case, the evidence leaves the matter uncertain as to whether the defendant or some unknown party is responsible [339] for the act of negligence alleged, a recovery cannot be had. In the case of Patton v. Texas & P. R. Co., 179 U. S. 658, 21 Sup. Ct. Rep. 275, 45 L. ed. 361, Justice Brewer, speaking for the court, says: "It is not sufficient

for the employé to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion": 2 Labatt on Master and Servant, 837; Fritz v. Salt Lake etc. Electric Light Co., 18 Utah, 493, 56 Pac. 90; Sorenson v. Menasha Paper & Pulp Co., 56 Wis. 338, 14 N. W. 446; Deserant v. Cerrillos Coal R. Co., 9 N. M. 495, 55 Pac. 290; Shaw v. New Year Gold Min. Co., 31 Mont. 138, 77 Pac. 515; Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537.

The important question, therefore, is: Was the leaving of the switch unlocked the proximate cause of the derailment of the engine in question? We think this question must be answered in the negative. The evidence, we think, conclusively shows that the unlocked condition of the switch was not the proximate cause of the death of the deceased, nor did it in any manner contribute thereto. The record shows that, before the continuity of the rails on the main line was broken by the misplacement of the switch between 11 o'clock A. M. and 3:20 o'clock P. M. on the day in question, the main track where it passed the switch was "absolutely safe, even if the lock were unlocked, so far as the trains passing over it was concerned"; that "no train running over the rails could throw it out"; and that it would require an exertion equivalent to from "fifty to seventy-five pounds" to throw open the switch and thereby break the continuity of the rails on the main line. Under these conditions it is evident that the unlocking of the switch and leaving it in that condition could not in any degree have rendered the track dangerous or unsafe for the passage of trains; for, had it not been for the subsequent and independent act by which the switch was turned and the continuity of the rails on the main track thereby [340] broken, the accident in all probability would not have happened. In other words, there was not such an unbroken connection between the leaving of the switch unlocked and the subsequent misplacement of the rails as to make it one continuous operation. And even if it be assumed, for the purposes of this case, that the unlocking of the switch in the first instance was a cause without which the accident would not have

occurred, it was at most a remote cause; the direct and proximate cause of the accident being the subsequent misplacement of the switch.

The law is well settled that an act or omission, in order to constitute negligence for which an action will lie, must directly, as its natural consequence, produce injury to another. Cooley, in his work on Torts, second edition, pages 73-76, says: "It is not only requisite that damage actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded, and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not the remote cause. The explanation of this maxim may be given thus: If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last proximate cause, and refuse to trace it to that which was more remote." Continuing, the author says: "A writer on this subject has stated the rule in the following language: If the wrongs and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

In the case of Aetna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395, it is said: "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones."

In the case of Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256, the court says: [341] "The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is generally held that in order to warrant a finding that negligence, or an act not

amounting to a wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances'': Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583; Bailey on Master's Liability to Servants, p. 420; Cole v. German Sav. & Loan Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; Claypool v. Wigmore, 34 Ind. App. 35, 71 N. E. 509; Smith v. County Court, 33 W. Va. 713, 11 S. E. 1, 8 L. R. A. 82, and cases cited in note; Afflick v. Bates, 21 R. I. 281, 43 Atl. 539.

Applying the law as declared by the foregoing authorities to the facts in this case, we are clearly of the opinion that the leaving of the switch unlocked was not the proximate cause, nor was it a concurring cause, of the accident; and, as the evidence fails to show that the defendant company displaced and left the switch open on the occasion referred to, the trial court did not err in granting defendant's motion for a nonsuit.

The judgment is affirmed, with costs.

Frick, J., concurs.

STRAUP, J. I think the decisive question is insufficiency of evidence to charge the defendant with the commission of the acts of negligence alleged in the complaint, rather than the proximate or intervening cause of injury. On that ground I concur in the judgment of affirmance.

The Doctrine of Proximate Cause is the subject of a note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 807.

Presumptions of Negligence from the happening of an accident are discussed in the note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 986; presumptions of the exercise of due care are discussed in the note to Chicago etc. Ry. Co. v. Wilson, 116 Am. St. Rep. 108.

ROGERS v. RIO GRANDE WESTERN RAILWAY COMPANY.

[32 Utah, 367, 90 Pac. 1075.]

NEGLIGENCE, Action, When will Lie for.—Proof of negligence and of injury does not warrant a recovery. In addition thereto, the party on whom rests the burden of proof must show by competent evidence that the negligence proved was the proximate cause of the injury complained of, or, where there was more than one cause, that it was at least one of the causes. (p. 878.)

CONTRIBUTORY NEGLIGENCE Prevents a Recovery, although otherwise a complete prima facie right to recover is shown. (p. 878.)

RAILWAYS—Negligence.—The Mere Failure to Sound a Whistle or Ring a Bell is not sufficient to authorize a recovery, where one riding in a buggy and crossing the track is struck by a train and killed. It must further appear that such failure was a proximate cause of the accident. (p. 878.)

JURY TRIAL—Instruction, Construction of.—To give an instruction its proper effect, it must be considered and construed in connection with all the other instructions given. (pp. 879, 880.)

RAILWAYS—Negligence, Presumption of the Exercise of Due Care, When Rebutted.—Though a person approaching a railway will be presumed to be in the exercise of due care, this presumption may be rebutted, and it is proper to instruct the jury that the presumption is overcome, if it appears from the evidence that if the person injured had looked or listened before driving on the crossing, he must have seen or heard the train approaching. (p. 880.)

NEGLIGENCE—Presumption of Due Care.—The presumption that a person exercised due care in approaching and entering upon a railway crossing is well founded. (p. 881.)

JURY TRIAL—Instruction, Refusal of Where not Based on the Evidence.—It is proper to deny an instruction that the jury may take into consideration, on the question of contributory negligence, any testimony relating to the deceased being blinded and dazzled or deceived by the light from the headlight of the locomotive relating to the speed of the train, if there is no evidence that he saw the headlight at all, and whether he saw it or not is a mere conjecture. (p. 881.)

DEATH OF SON, Damages for.—The measure of damages in an action for the death of a son claimed to have been due to the negligence of the defendant railway company is not the pecuniary value of his life, but what was the pecuniary loss suffered by the plaintiffs. This is not limited to mere contribution in money, but may consist of the various elements that enter into the domestic relations of parent and child living in one family, or otherwise. (p. 882.)

JURY TRIAL—Instruction, When not Deemed Prejudicial.—If in an action by parents to recover for the death of their son, the court gives instruction respecting the measure of damages which may be erroneous, this is not a prejudicial error, if the jury finds in favor of the defendant, and their verdict can only be reconciled with the instructions given on the theory that they found the defendant was not guilty, or that the decedent was guilty of such contributory negligence as precludes a recovery for his death. (p. 882.)

W. R. White and Powers & Marioneaux, for the appellants.

Van Cott and Allison & Riter, for the respondent.

[369] FRICK, J. The plaintiffs (appellants here) and parents of one Lawrence E. Rogers brought this action against the defendant (respondent in this court) to recover damages alleged to have been sustained by appellants by reason of the death of their son Lawrence, alleged to have been caused through the negligence of respondent. The facts, briefly stated, are as follows: On May 29, 1905, at about 4 o'clock A. M., while driving on a public highway, and in crossing, or attempting to cross, the railroad track of respondent with his horse and buggy, Lawrence E. Rogers was struck by a freight train and killed. The crossing was in the open country, outside of the limits of [370] any town or village. There were no eye-witnesses, except the engineer and fireman on the engine of the freight train, and they testified that they saw him just before or about the time of the collision. The direct cause of the accident was left a matter of inference from the evidence. Rogers was on his way home from a farmhouse about nine miles distant from his own home and about five miles westerly from the crossing in question, at which place he had spent the night with a young lady, who, the evidence discloses, was his fiancée. He had worked all the day before the accident, and had driven over to the young lady's home after dark the evening preceding. The morning was somewhat cloudy, and the accident occurred just a little before or at the break of day. The testimony with respect to the speed of the train, the sounding of the whistle, and the ringing of the bell at and before the crossing was reached by the train, was conflicting; appellants' witnesses testifying that the statutory signals were not heard by them, and respondent's witnesses testifying that they were given. The same conflict exists as regards the speed of the train; appellants' witnesses contending that the train ran forty or forty-five miles an hour, while respondent's witnesses gave the speed as thirty miles an hour. The evidence further disclosed without conflict that the headlight on the engine was burning; that Rogers could have seen the train a mile or more as it approached the crossing when he was at a point two hundred and eighty-five feet from the track, and could do so continuously until he reached the crossing; that he drove a gentle horse, and was riding in a top buggy. Upon substantially the foregoing facts with regard to the accident, the court submitted the case to a jury, who returned a verdict for the respondent, upon which the court rendered judgment. The errors alleged, with one or two exceptions,

relate to the instructions, and such as are argued in the brief we will now consider.

The first alleged error relates to the giving of instruction No. 14, which is as follows: "If you believe that the decedent was killed by the defendant railway company, and that such company did not give any signal for the crossing where the decedent was killed, and if you further believe from the [371] evidence that there is no other evidence in the case which shows how the decedent met his death, then you are charged that the plaintiffs have not established that the proximate cause of the decedent's death was the alleged failure of the defendant to give crossing signals, and in that event your verdict should be for the defendant." As we understand counsel's argument, they contend that the vice of the instruction consists in telling the jury that the mere failure to sound the whistle or ring the bell, standing alone, was not sufficient to authorize a recovery. Counsel argue that the failure to give the statutory signals constitutes negligence per se, and therefore respondent's negligence was established, and this being so, the necessary proof entitling appellants to recover existed and could be defeated only by proof of contributory negligence. It may be conceded that the failure to comply with the statute with regard to warning signals generally constitutes negligence per se, as was held by this court in Smith v. Mine & S. S. Co., 32 Utah, 21, 88 Pac. 683, but proof of negligence without more, however, is not enough. In addition to this the party upon whom rests the burden of proof must show by some competent evidence that the negligence proved was the proximate cause of the injury complained of, or, where there is more than one cause that it at least was one of the causes. A prima facie case is not established until this is done, and hence the existence or nonexistence of contributory negligence, under such circumstances, is immaterial. Contributory negligence, if established, prevents a recovery, although otherwise a complete prima facie right to recover is shown. The instruction did no more than to tell the jury that, although respondent may have been guilty of negligence, unless it appeared from the evidence that such negligence was the proximate cause of the injury, a recovery was not authorized upon proof of negligence alone. The instruction, therefore, is not open to the criticism made by counsel, which is clearly demonstrated by the following authorities: 1 Thompson on Negligence, sec. 45; 8 Am. & Eng. Ency. of Law, 2d ed., 416; Byrd v. Southern Express Co., 139 N. C. 273, 51 S. E. 857;

Kearns v. [872] Southern Ry. Co., 139 N. C. 470, 52 S. E. 131; 44 Am. & Eng. Ry. Cas. 484.

It is further contended that the court erred in giving instruction No. 15, which is as follows: "The presumption that the decedent used due care in approaching the crossing in question in order to avoid injury is entirely destroyed, where it appears from the evidence that if he had looked and listened before driving upon the crossing in question he must have seen or heard the train approaching." It is urged that the court, by this instruction, invaded the province of the jury; that it is misleading; and that it is not a correct statement of the law. In order to give the instruction its proper effect, it must be construed in connection with other instructions given, and especially in connection with paragraph 10 of the instructions. In that paragraph the court lays down the correct rule applicable to contributory negligence in attempting to cross railroad tracks, and in that regard tells the jury that, as matter of law, every person is presumed to be in the exercise of due care for his own safety. Instruction No. 15, therefore, in its effect, was no more than a statement that the presumption of the exercise of due care could not prevail if it was made to appear from the evidence that due care had not been exercised. In other words, in the absence of all evidence that presumption prevailed, but that it could not prevail against evidence showing a want of proper care. If instruction No. 15 had been made a part of instruction No. 10, of which, in its effect, it is a part, we think no one would seriously contend that it is subject to criticism as a statement of the law upon the subject of presumptions. Moreover, there was some evidence respecting deceased's opportunity to see and observe the approaching train. The surrounding country was such that if he had looked and listened, as appears from the evidence, he could have both heard and seen the approaching train which caused the accident. If it was proper, therefore, to tell the jury—and it certainly was—that a person approaching a railroad crossing will be presumed to be in the exercise of due care, it was equally proper to tell them in what way and when this presumption might [873] cease to be operative. The presumption is by no means a conclusive one, but is at most evidentiary, and its legal effect in one sense amounts only to a statement, in another form, that negligence is never presumed as matter of law. Nor did the court in any way invade the province of the jury in the instruction, but it left it for them to say whether the presumption was overcome or not. The following, among

numerous other cases that might be cited, we think clearly illustrate that the court, in submitting the case to the jury upon the evidence, gave the appellants all that they were entitled to under the law: Stopp v. Fitchburg R. Co., 29 N. Y. Supp. 1008, 80 Hun, 178; Hook v. Missouri Pac. Ry. Co., 162 Mo. 569, 63 S. W. 360.

Objection is also made to instruction No. 16, for the reason, it is asserted, that the court told the jury that the servants of respondent "had the right to believe that the deceased would look and listen" while approaching or attempting to cross the railroad track, without defining the duties of those in charge of the train with regard to railroad crossings. Here again the court's instruction No. 16½, immediately following No. 16, and which is, in effect, a part thereof, in almost the precise language counsel now contend for, told the jury what were the reciprocal duties of the traveler on the highway and the railroad company applicable to railroad crossings. The court thus did just what counsel insist it should have done,—namely, define the rights and duties of both with regard to railroad crossings. The mere fact that the duty with regard to the traveler was stated in one instruction, and the duty of the company in another, certainly cannot, for that reason, constitute error.

There are other objections to instructions, but in every instance the weak point of counsel's objection lies in the fact that they single out a phrase or sentence from the instruction and base error upon that. This is neither a fair nor a proper test. In some instances a phrase or a sentence may be such a clear misstatement of the law, or an assumption of fact thereby invading the province of the jury, as to require a reversal of the case. But nothing of that kind appears in the instructions [374] criticised, and when all are read and construed together, the law, as applicable to the evidence in the case, seems to have been fully and fairly stated by the court, and the jury could not have been misled by anything the court said or omitted to say.

Appellants further assert that the court erred in refusing to give the following request: "The jury may take into consideration on the question of contributory negligence any testimony relating to the deceased being blinded or dazzled or deceived by the light from the headlight of the engine relating to the speed of the train." The difficulty with this request is that there was no evidence upon which to base it. True, there was some evidence admitted on behalf of appellants to show the effect of a headlight upon a person ap-

proaching a crossing. But the question in the case was not whether or not a headlight affected persons generally, but what, if any, effect this particular headlight had on the deceased. There is an absolute want of evidence that the deceased saw the headlight at all. If he did not see it, then it could not have affected him. Whether he did or did not is mere conjecture. It would be as legitimate to assume that the deceased was asleep in his buggy and thus was oblivious to all his surroundings. This, of course, would be a mere conjecture, but it affords an illustration that one may conjecture one way as readily as another. The court gave the jury the whole law upon deceased's conduct when it instructed them that he was presumed to have exercised due care for his own safety. This presumption is well founded, because it is based upon that universal experience that all rational beings, both from instinct and their own experience, avoid serious danger to themselves. The request, therefore, was based upon the assumption that the deceased saw the headlight, and that he was "dazzled and deceived" by it. It is a mere guess as to whether a certain individual at a certain time and place, and under certain circumstances, will or will not observe a certain thing and be affected thereby. The court therefore did not err in refusing to give an instruction to the jury based [375] wholly upon the presumption of a fact from which the jury could only conjecture the result.

Error is also predicated on the refusal of the court to give the following request: "If the jury find for the plaintiffs, then they may take into consideration the probable value of the life of the plaintiff (meaning deceased) as judged from his earning capacity and from the number of years he was expected to live. His earning capacity is regarded in the nature of an asset." To appreciate the purpose of the request, it is necessary to state that it was offered with a view of overcoming the effect of certain evidence that was admitted on behalf of respondent in mitigation of damages, which evidence was to the effect that the deceased was engaged and was about to be married to the young lady at whose home he spent the night preceding his death. The evidence was admitted over the objection of appellants, and its admission is also urged as error. The court in another instruction charged the jury with regard to the damages to be allowed the appellants, limiting the recovery to such an amount as the deceased would probably have contributed to them from his earnings in view of all the evidence. No exception was taken to this instruction, but it is urged that the measure of recovery was not what

the deceased would probably have contributed merely, but that it was the probable value of deceased's life. In this connection it is urged that in view of the evidence that the deceased was about to be married the jury might infer that he, after he married, would devote his earnings to his wife and prospective family, and hence the jury would assume that appellants would receive little or nothing from the deceased, and thus they may have found against appellants on the ground alone that appellants sustained no appreciable damages. It is contended that if this evidence had not been admitted, the jury might have found in favor of appellants upon the facts. We think the contention of appellants cannot be sustained. The measure of damages in a case like the one at bar is not the pecuniary value of deceased's life, but what was the pecuniary loss suffered by appellants by reason of his death. Under section 2912, Revised Statutes of 1898, the damages recoverable in a [376] case like the one at bar are such as "under all the circumstances of the case may be just." The amount that is recovered is not intended as an asset of the estate merely, but it belongs to those who have suffered or will suffer some direct pecuniary loss by reason of the death. The right of action is given for the benefit of certain persons only, and the amount of recovery is dependent upon the circumstances of each case, the relationship of the parties to the deceased, and in the case of the death of an adult child, the recovery is limited to the probable benefits the parents would have received during his lifetime from the deceased child. Such benefits are, however, not to be limited in all cases to mere contributions of money, but may consist of the various elements that enter into the domestic relations of parent and child, living in one family, or otherwise. In such cases the aim of the law is to repair in a pecuniary way the loss sustained by the parent. Under the evidence in this case the appellants would have been entitled to recover some substantial damages both under the law and the instructions of the court, if respondent was liable at all in the action. The jury, therefore, must have found, as they were justified in finding, that the respondent was not guilty of culpable negligence, or, if it was, that the deceased directly contributed to the accident by his own negligence, or, further, that the real or direct cause of the accident was not established by the evidence. All of these matters were submitted to the jury for determination, and their findings, in view that there is no prejudicial error in the instructions, are conclusive.

We need not discuss the question urged by respondent that in any event appellants cannot complain because the court should have directed a verdict against them as matter of law. Whether this should or should not have been done, in view of the conclusions reached, is an immaterial inquiry.

The judgment is affirmed, with costs to respondent.

McCarty, C. J., and Straup, J., concur.

The Law Requires Railroad Companies to Give Notice and Warning of trains approaching a crossing. What such notice and warning shall be will depend to some extent upon the circumstances of each case, but some suitable means must be adopted and applied which will apprise travelers of the danger of the situation: See Bickel v. Pennsylvania R. R. Co., 217 Pa. 456, 118 Am. St. Rep. 926; Queen Anne's R. R. Co. v. Reed, 5 Penne. (Del.) 226, 119 Am. St. Rep. 301; Weaver v. Southern Ry. Co., 76 S. C. 49, 121 Am. St. Rep. 934. It would seem that one approaching a railroad crossing has a right to assume that the railroad company will give reasonable, necessary and statutory signals of coming trains: See Mitchell v. Illinois Cent. R. R. Co., 110 La. 630, 98 Am. St. Rep. 472, and cases cited in the cross-reference note thereto. It has been held, however, that the negligence of a railway corporation in failing to whistle or ring the bell as a train approaches a crossing is excused by negligence on the part of a person about to cross in not using his senses to discover the danger: Carlson v. Chicago etc. Ry. Co., 96 Minn. 504, 113 Am. St. Rep. 655, and see cases cited in the cross-reference note thereto.

Persons Crossing a Railroad Track are Presumed, as a general rule, to exercise care in looking and listening for approaching trains: Queen Anne's R. R. Co. v. Reed, 5 Penne. (Del.) 226, 119 Am. St. Rep. 301; Bickel v. Pennsylvania R. R. Co., 217 Pa. 456, 118 Am. St. Rep. 926. See the note on presumptions of care to Chicago etc. Ry. Co. v. Wilson, 116 Am. St. Rep. 108; and the note on presumptions of negligence from the happening of an accident to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 986.

CASES

IN THE

SUPREME COURT

OF

WASHINGTON.

CITY OF SEATTLE v. PUGET SOUND IMPROVEMENT COMPANY.

[47 Wash. 22, 91 Pac. 255.]

MUNICIPAL CORPORATIONS—Remedy Over Against Property Owner for Negligence.—If a trapdoor is negligently maintained in a sidewalk by a lot owner in a city for his sole use and benefit, and a person passing along the sidewalk is injured thereby, the city and the lot owner are not joint tort-feasors as between each other, and if damages are recovered against the city for such injury, it has its remedy over against the lot owner, with notice to defend the original suit to recover the amount paid. (p. 887.)

NEGLIGENCE—Dangerous Premises—Unsafe Trapdoors.—The owner of a building in a city is liable for negligence in maintaining unsafe trapdoors over an areaway, placed in the sidewalk exclusively for his benefit, if the building is in his control, although parts of it are leased to third persons. (p. 888.)

Bausman & Kelleher, Peters & Powell and R. P. Oldham, for the appellant.

S. Calhoun and E. E. Todd, for the respondent.

[23] MOUNT, J. This action was brought by the respondent to recover over from the appellant the amount of a judgment for personal injuries, recovered by C. S. Smith against the city, and paid by the city. The case was tried to the court without a jury, and a judgment was rendered against the appellant. The appellant alleges that the court erred in overruling a demurrer to the complaint and in making certain findings of fact. The material allegations of the complaint are as follows:

"That Second avenue is now, and was at all times herein mentioned, a public street in said city of Seattle, being one of the principal streets in said city and a common thoroughfare, and as such was much used by the public; that at all times

herein mentioned said defendant was the owner of lots 1 and 4, in block 6, of the plat of the town, now city, of Seattle, as laid off by C. D. Boren and A. A. Denny, in the county of King, state of Washington; that at all times herein mentioned there was situated on said lot a four-story brick building, known as the 'Boston Block,' and under the sidewalk on Second avenue, in front of said lots, particularly in front of that store building in said block known as No. 722, Second avenue, in said city, said defendant maintained an areaway, and at or near said store building in said sidewalk maintained a trapdoor down into said areaway and cellar, beneath said sidewalk; that on the night of the 19th of October, 1901, and for many months prior thereto, the defendant had negligently and carelessly maintained said trapdoor in said sidewalk, as aforesaid; that said trapdoor, which was made of iron, was unlawfully and dangerously raised above the surface of the adjoining sidewalk from a height of from two to three inches; that said opening in the sidewalk was covered, as aforesaid, by iron trapdoors, which met over the middle of said opening; that at said point of meeting, one of said iron doors projects above the other, and said iron doors had become on the surface worn smooth, and at all times were slippery and dangerous to life and to travelers using the same in walking over said sidewalk [24] in the ordinary and usual manner; that said defendant carelessly and negligently failed to place any danger signals as a warning around or about said defective place in said street and sidewalk and said obstruction therein contained; that on the night of said 19th of October, 1901, one Christina D. Smith, while lawfully traveling along said Second avenue at or near No. 722 Second avenue, stumbled on said iron doors, and the same then and there being slippery, stumbled, slipped and fell, and was thereby thrown on said iron doors on said sidewalk and ground, and therefrom she sustained great and severe injuries."

Then follows allegations of the extent of the injuries to Mrs. Smith, and that she duly presented her claim to the city for damages.

"That thereafter, to wit, on or about the 11th day of February, 1902, said Christina D. Smith and Lee Smith, her husband, instituted an action in the superior court of King county, Washington, to recover damages against the city of Seattle on account of said injuries so received as aforesaid, which cause is numbered 34982 in the files of said court; that said city of Seattle duly defended against said action and issues were joined therein, and a trial was had upon said is-

sues in said court on January 29th, 1903, resulting in a verdict in favor of said Christina D. Smith and her husband in the sum of $7,633.00; that said city of Seattle duly filed its motion for a new trial, which said motion was denied by the court, and judgment entered upon said verdict in the sum of $7,633.00 and costs against said city; that from said judgment the city of Seattle duly appealed to the supreme court of the state of Washington, and, thereafter, the supreme court of the state of Washington affirmed said judgment of the superior court, with costs; that thereafter, on the 23d day of December, 1903, the remittitur from the supreme court affirming said judgment was filed in the office of the clerk of said superior court and final judgment was entered against said city of Seattle for $7,633.00, and costs amounting to $180.15; that on said 23d day of December, 1903, the city of Seattle was forced to and did pay said judgment, with interests and costs, amounting in the aggregate to $8,151.91; that in addition thereto, said city of Seattle was forced to and did expend [25] as necessary expense in defending said suit in prosecuting said appeal the sum of $500."

Then follows an allegation of notice to the appellant to defend the suit.

Upon the sufficiency of this complaint, the appellant argues that the complaint shows that the appellant and the city were joint tort-feasors, and since there can be no indemnity by one joint tort-feasor against another, there can be no recovery in this case. But as we read the allegations of the complaint, we find nothing in it to justify the conclusion that the city and the appellant were joint tort-feasors. The allegations are, that the defendant maintained an areaway beneath the sidewalk and trapdoors in the sidewalk; that the trapdoors were carelessly and negligently maintained by defendant and were unlawfully and dangerously raised above the surface of the sidewalk two or three inches; that said doors were worn smooth and slippery and were dangerous, and that defendant failed to protect against such dangers. These allegations are that the negligence was of the defendant, not of the city. It is true that it is the duty of the city to keep its streets reasonably safe, and if the trapdoors had been placed in the sidewalk by the city for the benefit of the city, it would alone be liable. But where the trapdoors were placed in the sidewalk by the defendant for its sole use and benefit, it was the duty of the defendant to properly and safely place and maintain them. The defendant's negligence in regard thereto would be construed as the city's negligence with reference to third persons

who might be injured thereon, because of the duty of the city to keep the streets reasonably safe. But while the city would be liable to third persons on account of an injury occasioned thereby, it would not be a joint tort-feasor with the defendant, because the act of negligence are the wrongful acts of the defendant alone. The great weight of authority seems to hold that there can be a recovery over by a municipality where a street is rendered unsafe by the wrongful use of another, and where damages are recovered against the municipality [26] therefor. The rule is stated as follows in 2 Dillon on Municipal Corporations, fourth edition, at section 1035: "If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalks or streets, it has a remedy over against the person by whose wrongful act or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrongdoer, as between itself and the author of the nuisance."

In Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298, the supreme court of the United States said: "It is well settled that a municipal corporation having the exclusive care and control of the streets is obliged to see that they are kept safe for the purpose of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and anyone is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault and has so used the streets as to produce the injury, unless it was also a wrongdoer": See, also, Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427; Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. Rep. 564, and note to this case in 40 Lawyer's Co-operative Edition, 712.

In McNaughton v. Elkhart, 85 Ind. 384, the court said: "It is well settled that when a town or city has been compelled to pay damages on account of excavations and obstructions in its streets, wrongfully made, or lawfully made and negligently left in a dangerous condition, it has a right of action over against the author or authors of the nuisance for the amount so paid; and that, if properly notified of the action, such person or persons are bound and concluded by the judgment recovered against the corporation, as to all questions adjudicated in such action."

In Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735, where the town of Milford was compelled to pay a judgment on account of injuries received by one Day through the falling of an awning, the court, in sustaining a judgment over in

[27] favor of the town against the person maintaining the awning, said: "The plaintiffs were not in pari delicto with the defendant, and therefore the principle that one joint wrongdoer cannot have contribution against another has no pertinency. The only fault or negligence which could be imputed to the town, on the facts shown, was a failure to remedy the nuisance which the defendant has caused. This is no bar to their claim for indemnity."

In Canandaigua v. Foster, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 971, 41 L. R. A. 554, a judgment over in favor of the town was sustained. The court of appeals of New York said: "But whoever, even by due permission, cuts a hole in the sidewalk for the benefit of his adjoining property must use reasonable care to protect the public from danger on account thereof. Reasonable care requires that he should provide a proper covering, inspect it from time to time, and repair it when necessary, as otherwise passers-by, for whose benefit the sidewalk is maintained, may be injured."

Measured by these rules the complaint was sufficient.

Appellant also contends that the court erred in finding that the appellant maintained the trapdoors and areaway beneath the sidewalk, and that appellant had control thereof. It is admitted that the appellant owned the building, and that the areaway and trapdoors were placed in the sidewalk exclusively for the benefit of the building. Under these circumstances it became the duty of the appellant to maintain the trapdoors reasonably safe for passers-by. The evidence conclusively shows that the building was at all times under the control of the appellant. It is true the appellant leased offices and storerooms therein to different tenants, but the control of the building and its maintenance and the actual possession of a part of the building were in the appellant personally at all times, Under these circumstances appellant would be liable. As relating [28] to both these points, the rule is well stated in Canandaigua v. Foster, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 971, 41 L. R. A. 554, as follows:

"While the owner cannot be held liable in this action for failing to repair the entire sidewalk in front of his premises, was he properly held liable for failing to keep in repair the grate itself, which was his own structure? This depends upon the duty that he assumed when he cut a hole in the sidewalk and covered it with the grate. That duty included proper construction in the first place, and reasonable care on the part of the owner to keep the grate in repair thereafter, as long as he continued in possession. The duty sprang from the neces-

sity of having safe sidewalks, and as the necessity is continuous, so is the duty. Upon no other ground can the construction of a grate in a sidewalk, which is an interference with a public highway, be justified, even when permission is duly granted. Upon the transfer of the entire interest and possession to another, as the duty runs with the land, it would be cast upon the grantee. So a lease of the entire premises and possession thereof by the tenant, would doubtless throw the burden upon the latter: Shearman & Redfield on Negligence, 5th ed., secs. 710, 713. The conveyance of an undivided interest, however, would not have that effect, and the demise of a part of the premises should not. The obligation goes with the land and cannot be discharged by a partial alienation of the land, at least, unless the alienation, if for a fixed term, carries with it the exclusive possession of the premises for that term. Entire possession by a tenant from foundation to roof doubtless involves the duty of keeping a grate in front of the premises in repair, which otherwise rests on the owner of the fee. But whoever, even by due permission, cuts a hole in the sidewalk for the benefit of his adjoining property must use reasonable care to protect the public from danger on account thereof. Reasonable care requires that he should provide a proper covering, inspect it from time to time, and repair it when necessary as otherwise passers-by, for whose benefit the sidewalk is maintained, may be injured. If he parts with the premises, or parts with the possession thereof for a period, the burden falls on his successor in title or possession. If he transfers either title or possession in part only he does not escape the burden. The implied duty assumed when the hole was cut and the grate placed over it requires reasonable precaution on the part of the owner to protect the public as long as he remains [29] the owner and is in possession of any part of the building on the abutting land. He cannot cast the burden of maintenance on the public any more than he could have cast upon them the burden of original construction, for the grate is wholly for the benefit of his property. Nor can he relieve himself of the duty without parting with the entire possession of the property benefited, for the safety of the public requires that the owner, as long as he is in possession of any part of the property, should be compelled to keep his structure in the sidewalk in suitable condition for use as a part of the sidewalk. As the duty is imposed by law for the public safety, its extent is measured by whatever public safety requires. Anything less than the alienation of the entire

property, either permanently as by deed, or temporarily, as by lease, would leave the public without adequate protection. A person injured by a defective grate should not be subject to the hazard of ascertaining the precise relation existing between the owner and one of his tenants with reference to the control of the grate, but a simple rule, resting upon ownership and possession, in whole or in part, of the adjacent structure, is required by sound public policy": See, also, Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735; Port Jervis v. First Nat. Bank, 96 N. Y. 550.

We find no error in the record. The judgment is therefore affirmed.

Hadley, C. J., Fullerton, Crow, and Root, JJ., concur.

Where a City Grants Permission to a Property Owner to Maintain a Coal-hole in a sidewalk in front of his premises, the duty immediately arises, both on the part of the city and the person constructing it, to see that it is kept safe for public use: Drake v. Kansas City, 190 Mo. 370, 109 Am. St. Rep. 759; French v. Boston Coal Co., 195 Mass. 334, 122 Am. St. Rep. 257; note to Hay v. City of Baraboo, 115 Am. St. Rep. 994; Earl v. Dlask, 126 Iowa, 361, 106 Am. St. Rep. 361. In Hayes v. Seattle, 43 Wash. 500, 117 Am. St. Rep. 1062, a city was held liable to a pedestrian for an injury sustained by a fall into an open and unguarded trapdoor situated upon the sidewalk of one of the principal streets of the city in constant use by pedestrians, although the door had been opened but a few moments at the time of the accident.

As to Whether an Abutting Owner is Liable Over to the City where a judgment has been recovered against the city for personal injuries due to a dangerous condition of the sidewalk, see the note to Browning v. Springfield, 63 Am. Dec. 356; Rochester v. Campbell, 123 N. Y. 405, 20 Am. St. Rep. 760; Wilhelm v. Defiance, 58 Ohio St. 56, 65 Am. St. Rep. 745; Canadaigua v. Foster, 156 N. Y. 354, 66 Am. St. Rep. 575; Pawtucket v. Bray, 20 R. I. 17, 78 Am. St. Rep. 837; New Castle v. Kurtz, 210 Pa. 183, 105 Am. St. Rep. 798. The common law appears to cast no duty upon the owner of property abutting upon a public street to maintain the street or sidewalk in a good state of repair: Hay v. Baraboo, 127 Wis. 1, 115 Am. St. Rep. 977, and note.

COLLINS v. GLEASON.

[47 Wash. 62, 91 Pac. 566.]

JUDGMENTS—Res Judicata.—If there is a breach of an indivisible contract to convey certain tracts of land, a judgment for specific performance as to one of the tracts is a bar to an action for the specific performance of the contract to convey another of the tracts. (p. 894.)

JUDGMENTS—Res Judicata—Breach of Indivisible Contract.—For one breach of an indivisible contract there can arise but one cause of action, and if in such action the plaintiff does not demand the entire relief to which he is entitled, he is estopped and cannot afterward complain. (p. 894.)

JUDGMENTS—Res Judicata—Estoppel.—Failure of a defendant to plead a former judgment as res judicata does not estop him from setting up that defense by motion, for judgment on the pleadings, if the plaintiff sets up the former judgment in a reply. (p. 894.)

JUDGMENTS—Res Judicata—Breach of Indivisible Contract.—If a person seeking the specific enforcement of a contract for the conveyance of land discovers, before the entry of the judgment granting the relief prayed for, a failure to convey other lands as required by the contract, but fails to ask the additional relief in an amended complaint, the judgment is a bar to another suit for specific performance concerning the lands not conveyed by the contract. (p. 895.)

JUDGMENTS—Res Judicata—Estoppel.—If a person inadvertently or by reason of negligence or mistake, and without fault or fraud of the adverse party, takes a judgment for less than he is entitled to recover, he is estopped from bringing a second action for the residue. (p. 895.)

W. Martin and J. F. McElroy, for the appellants.

J. B. Hart and M. D. Leehey, for the respondents.

64 CROW, J. This action was commenced on June 22, 1901, by John Collins, now deceased, against James P. Gleason, H. S. Connor, and the Fidelity Trust Company of Seattle, a corporation, to compel the conveyance of certain lands in sections 25 and 30, township 21 north, range 5 E., W. M., in King county, Washington. The plaintiff in his amended complaint, dated October 2, 1902, alleged that Connor and Gleason were the president and secretary of the defendant corporation; that on or about January 22, 1901, an action, No. 31,138, had been commenced by John Collins, as plaintiff, against the same defendants, to compel the defendants to transfer to him certain stock in the Fidelity Trust Company, or to reconvey certain property theretofore conveyed by him to such company; that the cause was afterward settled, a written memorandum or agreement being made as follows:

"Seattle, Washington, May 3rd, 1901.

"Collins surrender 6240 shares, stock and trust certificate on Island County land.

"Fidelity Trust Company make special warranty to Collins for all real estate conveyed by him to company, mortgage on tide land assumed by Collins and take property in mortgage. Company also to convey to Collins one-half interest in Anacortes judgment. All monies now on hand belonging to corporation, except Colman money now in court, to go to plaintiff.

"Collins vs. Fidelity Trust Company to be dismissed, each party to pay own costs.

"Defendants to have Colman money now in court, and to have no other money from plaintiff.

"Defendants to pay no cost of receivership.

"Martin vs. Fidelity Trust Company to be dismissed without cost to either party.

[65] "Conner vs. Collins to be dismissed without cost to either party.

"Fidelity Trust Company vs. Colman to be dismissed with out cost, and release of all claims against each other, growing out of any of said suits.

"ROBERTS & LEEHEY,
"Attorneys for Defendant.
"WILLIAM MARTIN,
"Attorney for Plaintiff."

That the plaintiff fully performed the agreement on his part; that the plaintiff had theretofore conveyed to the defendant company the land above mentioned, but that the defendant neglected and refused to reconvey it to him in pursuance of the terms of the written agreement. The defendants in their answer, after making certain denials, in substance alleged that the defendant company never authorized the written agreement; that it had never ratified the same; that the plaintiff was not entitled to any conveyance, and that the defendant company, by its answer, offered, by placing all parties in statu quo, to rescind any action its officers had taken toward part performance of the written agreement. To this answer the plaintiff originally replied by denials only. On July 11, 1903, it having been suggested to the trial court that the plaintiff John Collins had died testate, an order was entered substituting Angie B. Collins, John Francis Collins, and R. L. Hodgdon, his executors and trustees, as parties plaintiff. On March 30, 1904, the substituted plaintiffs, with leave of court, served and afterward

filed a supplemental reply, in which they affirmatively alleged that theretofore, to wit, on May 7, 1901, John Collins, as plaintiff, instituted action No. 32,452 against the Fidelity Trust Company of Seattle, one of the defendants herein, to compel specific performance on the part of the Fidelity Trust Company of the above contract, by requiring it to assign to Collins a certain lease from the state of Washington to the Fidelity Trust Company of a certain harbor area in King county, Washington, in said lease and in the pleadings of said action particularly described, [66] being lease No. 64, the said contract upon which said action was brought being the same contract and agreement set forth in the amended complaint and the answer in this action; that thereafter such proceedings were had in said cause No. 32,452 that, on August 20, 1902, a final decree was entered in favor of the plaintiff Collins, requiring the defendant Fidelity Trust Company to specifically perform the contract by assigning the lease; that the Fidelity Trust Company appealed to the supreme court of the state of Washington; that on October 3, 1903, subsequent to the filing of the original reply herein, the supreme court affirmed said decree, and that all issues raised by the affirmative defense herein were raised in said cause No. 32,452, and determined in favor of the plaintiff Collins. Upon these issues, trial was had, and after the plaintiffs had introduced their evidence and rested, the defendants declined to offer any evidence, but moved for judgment. The trial court thereupon, without making any findings of fact, entered a final judgment dismissing the action. The plaintiffs have appealed.

The appellants contend that the trial court erred in dismissing the action. The respondents contend (1) that the act of the attorneys in making the memorandum of settlement was unauthorized; (2) that the same was never ratified by the Fidelity Trust Company; and (3) that, even if it was executed with full authority and subsequently ratified, this action cannot be maintained, as the appellants' testator during his lifetime maintained one action to enforce the same agreement in which he obtained judgment, and that if the testator ever had any cause of action against the respondent company, as alleged in the complaint herein, the same was split by the former action, and the present one cannot be maintained.

The last point being conclusive of this case, the others will not be considered. It appears from the evidence, as well as the allegations of the supplemental reply, that action No.

32.452 in the superior court of King county was instituted for [67] the purpose of securing the specific performance of the identical agreement upon which the present action is based, and that the decree entered therein, in favor of appellants' testator, was afterward affirmed by this court: Collins v. Fidelity Trust Co., 33 Wash. 136, 73 Pac. 1121. This is a subsequent and independent action, brought on the same contract. Although appellants' testator heretofore compelled the respondent, the Fidelity Trust Company, to specifically perform the contract by assigning to him the tide land lease, they are now seeking to compel it to further specifically perform by conveying to them the land in dispute. Appellants' testator never had more than one cause of action on the contract. The failure of respondent to convey all the lands contemplated thereby was but one breach, which authorized one action only. For one breach of an indivisible contract there can arise but one cause of action, and if in such action the plaintiff does not demand the entire relief to which he is entitled, he cannot afterward complain. If this action can now be maintained the appellants can hereafter maintain any number of additional actions upon the same contract. The recent case of Kline v. Stein, 46 Wash. 546, 123 Am. St. Rep. 940, 90 Pac 1041, is controlling here.

Appellants contend that the respondents cannot claim they are estopped by the former judgment, for the reason that the respondents did not plead such former judgment. The appellants themselves pleaded it in their supplemental reply, and when they did so, the respondents demanded judgment upon the pleadings. The former judgment had not been entered when the original answer was made herein. The facts were all before the court in this action, and we fail to see why it should not apply the law to the facts pleaded and admitted whether pleaded by the respondents or the appellants. The appellants further contend that, at the time of the bringing of the former action, they had not discovered the failure of the respondents to convey the land now in dispute; that they [68] learned of such omission later but prior to the commencement of this action. The amended complaint, however, contains no allegation that such want of knowledge was due to the fraud or deceit of the respondents. Appellants' testator did discover such failure to convey, not only before the former judgment was entered, but also before he filed his amended complaint in this action. He had ample opportu-

nity to ask the additional relief, by specific performance, in such amended complaint, but failed to do so. It is a general rule in both law and equity that, where a party inadvertently or by reason of his own negligence or mistake, and without fault or fraud of the adverse party, takes judgment or decree for less than he is entitled to recover, he is estopped from bringing a second action for the residue. When the appellants' testator discovered the omission or failure of the respondents to make an assignment of the tide land lease it was his duty to immediately ascertain whether other omissions or breaches of the contract existed, and to bring his action for all remedies to which he was then entitled. Having failed to do this, he certainly could, in his amended complaint, have demanded the further specific performance now sought, as the record discloses that he did actually learn all the facts in ample time to do so. In Kline v. Stein, 46 Wash. 546, 123 Am. St. Rep. 940, 90 Pac. 1041, we said: "But the appellants assert that the allegation to the effect that this tract was left out of their original complaint through accident and mistake was made advisedly, and, inasmuch as the respondents' motion for judgment on the pleadings concedes it to be true, this fact alone is sufficient to show the inconclusiveness of the original judgment. This contention, also, mistakes the rule. If the appellants have, by accident or mistake on their part, failed to recover all of the land that they were entitled to recover, their remedy is not to sue for the omitted portion, but is rather to seek relief in the original action by opening up the judgment, amending their pleadings, and trying anew their rights to the property."

The appellants in this action have not only elected to retain the original judgment and its fruits, but they have also [69] rejected the offer and tender of the respondents to place the parties in statu quo.

The judgment is affirmed.

Hadley, C. J., Fullerton, Rudkin, Mount, and Dunbar, JJ., concur.

Res Judicata—Splitting Cause of Action.—The principal case is supported by Kline v. Stein, 46 Wash. 546, 123 Am. St. Rep. 940, where it is held that when by the same act of trespass adverse possession is taken of land, but one action can be maintained to recover such possession, and if an action is brought and judgment rendered for part only of the tract, no subsequent action can be maintained for the remainder, though it is claimed that the bringing of the action for a part only was due to accident and mistake.

ANDREWS v. HOESLICH.

[47 Wash. 220, 91 Pac. 772.]

REPLEVIN Against One Out of Possession.—Replevin cannot be maintained against a defendant not in possession at the time the demand is made or the suit is commenced. (p. 897.)

REPLEVIN Against One Who has Parted with Possession.—If property has been in defendant's possession and he has wrongfully transferred it without the owner's knowledge before the commencement of the action, the rule that replevin will not lie against one not in possession at the time of the commencement of the action does not obtain. (p. 897.)

REPLEVIN—Tender.—In replevin for a pawn the plaintiff keeps good his tender of the amount received on the pledge if the money is paid into court before the service of summons, and remains there even if it is not paid as alleged with the filing of the complaint. (p. 900.)

J. E. Humphries and G. B. Cole, for the appellant.

J. C. Allen, for the respondent.

221 CROW, J. This action, which was brought by Jacob Andrews against Joseph Hoeslich and the Uncle Joe Diamond Broker, a corporation, to recover possession of a diamond ring, has heretofore been before this court on an appeal prosecuted by the defendant corporation, and a statement of the pleadings and the facts involved may be found in the opinion then filed: Andrews v. Uncle Joe Diamond Broker, 44 Wash. 668, 87 Pac. 947. At the former trial the defendant, Joseph Hoeslich, was not in court. He was served afterward, and on July 28, 1906, served his answer, in which, after denying allegations of the complaint, he affirmatively pleaded that on August 27, 1904, the plaintiff left the ring with him as a pawn to secure a loan of $50; that he issued a pawn ticket to the plaintiff; that thereafter the plaintiff sold and delivered the pawn ticket to him for the sum of $5 in addition to the $50 loan, and that the plaintiff then ceased to have any further interest in the ring. This affirmative answer being denied, the cause was tried on the issues thus joined between the plaintiff and the defendant Joseph Hoeslich. The trial court made substantially the same findings as those made on the former trial, sustaining all the allegations of the complaint, and further found that, within a week or so after the ring had been pawned, the defendant, Joseph Hoeslich, sold it without the knowledge or consent of the plaintiff; that in this action the plaintiff tendered to the defendant, and paid into court for his use and benefit, the sum of $75, which has ever since remained in the registry of the

court, and that the ring was of the reasonable value of $216. Upon these [222] findings a final judgment was entered in favor of the plaintiff for the return of the ring, or in case a return could not be had, for the sum of $141, being its value less the $75 in the registry of the court. The judgment further provided that, if the ring should be returned, the $75 in the registry of the court should be paid to the defendant; but that otherwise the plaintiff was not only to have judgment for $141, but the $75 should also be returned to him. The defendant has appealed.

The appellant's first assignment of error is based upon his exceptions to the findings of fact. We have carefully examined the evidence, and conclude that the findings are supported by its preponderance. The appellant raises the same question based upon the statute of frauds that was urged by the defendant corporation on the former appeal, but we now adhere to our views then expressed.

The appellant further contends that, as he was not in possession of the ring at the time of the commencement of this action of replevin, the respondent cannot recover. The common-law rule undoubtedly is that an action of replevin cannot be maintained against a defendant who is not in possession at the time the demand is made or the suit is commenced. This doctrine was announced in Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355. In that case, however, it affirmatively appeared that the plaintiff instituted her action after she had learned and positively knew that the defendant, as sheriff of Spokane county, had parted with the goods, by delivering them to a receiver, in obedience to an order of court. Here the court did not find, nor is it suggested by the evidence, that the respondent knew at any time prior to the commencement of the action that the appellant had sold the ring or parted with its possession. Under such circumstances an exception must be recognized to the rule in Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355.

Where, as in this case, property has actually been in appellant's possession and has been wrongfully transferred by [223] him without respondent's knowledge, before the commencement of an action for the recovery of its possession, the rule that replevin will not lie against one not in possession at the time of the commencement of the action will not obtain. The evidence and findings show that the appellant's disposition or sale of the ring was wrongful. In an action for the recovery of the possession of personal property, when

it appears for the first time during the progress of the trial that the defendant theretofore in possession had, prior to the commencement of the action, without the knowledge or consent of the plaintiff, wrongfully disposed of the property, it would be a rank injustice for any court to hold that the plaintiff cannot for that reason recover. Many well-considered cases hold that the action does not fail under such circumstances: Wells on Replevin, 2d ed., sec. 145; McBrian v. Morrison, 55 Mich. 351, 21 N. W. 368; Gildas v. Crosby, 61 Mich. 413, 28 N. W. 153; Helman v. Withers, 3 Ind. App. 532, 50 Am. St. Rep. 295, 30 N. E. 5; Holliday v. Poston, 60 S. C. 103, 38 S. E. 449; Latimer v. Wheeler, 3 Abb. App. 35; Ellis v. Lersner, 48 Barb. 539; Ross v. Cassidy, 27 How. Pr. 416; Brockway v. Burnap, 16 Barb. 309; Nichols v. Michael, 23 N. Y. 264, 80 Am. Dec. 259; Harkey v. Tillman, 40 Ark. 551.

In the last mentioned case the supreme court of Arkansas said: "Actual possession of the property by defendant is not always essential, at the time of the writ. That would be a very inconvenient rule, which would enable one who had wrongfully taken or detained property from the owner to refuse to deliver and hold to the last moment before the writ, and then evade a suit by a transfer of possession. His successor might do the same, and his after him, and so on toties quoties, until the costs of writs to the owner would consume the property. When one is wrongfully detaining property and refuses it on demand, he is liable to the action, although it may not remain in his possession when suit is brought."

In Sinnott v. Feiock, 165 N. Y. 444, 80 Am. St. Rep. 736, 59 N. E. 265, 53 L. R. A. 565, the court of appeals, in a well-considered case, held that a defendant is [224] not liable in an action of replevin for the recovery of chattels, after they had been taken from him by process legal as to him, and not by any voluntary act on his part; but in its opinion, in which many of the earlier cases are considered and reviewed, it clearly recognizes the doctrine announced in Nichols v. Michael, 23 N. Y. 264, 80 Am. Dec. 259, and other cases above cited. In this state an action to recover the possession of personal property may be prosecuted without claiming delivery until after final judgment on the merits. In such a case the reason for the common-law rule forbidding the prosecution of an action of replevin against one not in possession fails, and we see no reason why an alternative judgment for the possession of the property or the

recovery of its value may not be obtained, although the evidence establishes the fact that the defendant was not in possession at the commencement of the action, or at any time thereafter, provided it further appears that the defendant had theretofore been in possession, had voluntarily, wrongfully and fraudulently parted with such possession, and that the plaintiff did not know before commencing action that the defendant had so parted with possession. The appellant, who wrongfully disposed of the ring without the knowledge or consent of the respondent, who failed to advise the respondent of such disposition prior to the commencement of this action, and who concealed his wrongful acts from the respondent at all times prior to the trial, is now in no position to contend that judgment shall be entered against the respondent, because the evidence fails to show that he, the appellant, had possession of the ring at the commencement of the action.

The appellant further contends that the respondent did not keep his tender good. The complaint was filed on January 27, 1906, but the respondent did not deposit the $75 in the registry of the court until March 21, 1906, and the appellant now insists that the tender was not kept good as the money was not deposited when the complaint was filed. Under the [225] facts before us, there is no merit in this contention. Although the respondent made a tender prior to the commencement of this action, he has proceeded upon the theory that it was necessary for him to thereafter keep such tender good. In his complaint he not only alleged the tender made when he demanded possession of the ring, but further alleged, "That the plaintiff has offered, as hereinbefore alleged, does now offer and tender to pay the sum of seventy-five dollars ($75) in discharge of said pledge aforesaid, and does now tender and pay into court the sum of seventy-five dollars ($75) the amount thereof." This allegation was denied by the answer, and in our opinion on the appeal of the defendant corporation, we found that it was not sustained by the evidence. Proceeding upon the theory of the respondent, we then said: "Respondent's right to maintain the suit, and obtain the judgment, depended upon whether he had tendered the $75, and had at all times kept the tender good. Appellant argues, with apparent seriousness, that the judgment is against it for the return of the ring or its value, and that respondent retains the $75. Such a result would be manifestly wrong, and the condition of the record

is such that we cannot tell whether the tender has been kept good so that it has at all times been available to appellant or not: Andrews v. Uncle Joe Diamond Broker, 44 Wash. 668, 87 Pac. 947.

Notwithstanding this language, we do not wish to be understood as holding that, under the facts of this case, the respondent was under any legal obligation to bring the tender into court with the filing of his complaint, and keep it there at all times until final judgment. It may be seriously questioned whether appellant's lien on the ring was not discharged by the tender made prior to the suit: Jones on Pledges and Collateral Securities, 2d ed., sec. 542; Helphrey v. Strobach, 13 Wash. 128, 42 Pac. 537. If his lien was then discharged it might be further questioned whether it would have been necessary for the respondent to keep his tender good at the time of filing his complaint, and at all times thereafter: [226] Weeks v. Baker, 152 Mass. 20, 24 N. E. 905; Hyams v. Bamberger, 10 Utah, 3, 36 Pac. 202. The respondent, however, assumed by the allegations of his complaint that he should keep the tender good. In other words, he did not plead or rely upon any claim that the lien had been discharged, but prosecuted this action upon the theory that to discharge the lien he must continue his offer to keep the tender good as a condition precedent to the recovery of the possession of the ring.

On the former appeal a reversal was granted because it neither appeared that the $75 remained in the registry of the court at the time of final judgment nor that the final judgment protected the appellant corporation in all of its rights. The record here shows beyond question that before service of summons was made upon the present appellant, Joseph Hoeslich, the $75 tender was deposited in the registry of the court, that it has since remained there, and that the trial court has in the final judgment fully protected the appellant. This being true, he is now in no position to complain of the respondent's failure to deposit the $75 at the time he filed his complaint. The evidence now before us establishes the fact that the respondent has fully complied with every reasonable requirement that could be made of him in the matter of tender.

The judgment is affirmed.

Hadley, C. J., Root, Fullerton, Mount, Dunbar, and Rudkin, JJ., concur.

Replevin Against One Who has Lost Possession of the chattel is discussed in Sinnott v. Feiock, 165 N. Y. 444, 80 Am. St. Rep. 736, and note.

The Lien of a Pledgee is Extinguished by a Valid Tender to him of the amount due and his refusal to accept it: Loughborough v. McNevin, 74 Cal. 250, 5 Am. St. Rep. 435. And where goods are sold under a chattel mortgage after tender of the amount due, they may be recovered in replevin although the tender was not kept good nor the money brought into court: Thomas v. Seattle Brewing etc. Co., 48 Wash. 500, post, p. 945.

COLUMBIA CANAL COMPANY v. BENHAM.

[47 Wash. 249, 91 Pac. 961.]

JURISDICTION—Public Lands.—State Courts are without jurisdiction to adjudge the equities of claimants to public lands by enjoining the prosecution of a claim before the United States land department, or requiring the relinquishment of such claim, when the title to the land is still in the United States. (p. 902.)

J. A. Frye, for the appellant.

Shank & Smith, for the respondent.

240 RUDKIN, J. This is an appeal by the defendant from the following decree entered against him in the court below:

"It is hereby ordered, adjudged and decreed that the defendant be and he hereby is restrained and enjoined from proceeding further in any manner whatever, in person or by agent or attorney, to obtain title to the northwest quarter (NW. ¼) of section ten (10), in township seven (7) north, range thirty-one (31) east, in Walla Walla county, Washington, whether under his entry of the said land as desert land filed in the United States Land Office at Walla Walla, Washington, on, to wit, August 2, 1906, or otherwise; and that defendant, his agents or attorneys, and each of them, be and they hereby are forbidden and enjoined from taking any steps in the matter of the said entry or any other proceedings in the land office of the United States in connection with the said land, save and except only as hereinafter directed.

250 "And it is further ordered and decreed that the defendant do forthwith file, or cause to be filed, in the United States Land Office at Walla Walla, Washington, a relinquishment of all claims to said land the whole thereof, and that in the event of his failure so to do within twenty (20) days from this date, Heber M. Hoyt, Esquire, a member of the bar of this court, who is hereby appointed commissioner for

the purpose, shall forthwith, in the name and as the act of said defendant, execute such relinquishment in due and proper form, and cause the same to be filed in said land office, with certified copies of the findings, conclusions and decree. But such relinquishment by the commissioner shall not of itself relieve the defendant from making relinquishment in person as hereinabove ordered."

In view of the conclusion we have reached on the question of the court's authority to enter such a decree, we deem it unnecessary to make a further statement of the case, except to say that the lands described in the decree are public lands of the United States, and the appellant has made entry thereof under the provisions of the desert land act, in the proper land office. Notwithstanding the innumerable attempts that have been made through the courts to control the action of the land department in disposing of the public domain, the respondent has been unable to cite a single precedent for such a decree; and after an exhaustive examination of the authorities, this court has been equally unsuccessful. We are satisfied, however, that the authority to enter the decree has been repeatedly denied by the supreme court of the United States in analogous cases. In Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800, the court, speaking through Mr. Justice Miller, said: "It plainly appears from this, first, that the defendants had not the legal title; second, that it was in the United States; and, third, that the matter was still in fieri, and under the control of the land officers. Nothing in record of the case before us gives evidence that any further steps in that department have been taken in the case. We have repeatedly held that the courts will not interfere with the officers of the government while in the discharge of their duty in disposing of the public [251] lands, either by injunction or mandamus: Litchfield v. Register and Receiver, 9 Wall. 575, 19 L. ed. 681; Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62; The Secretary v. McGarrahan, 9 Wall. 298, 10 L. ed. 579. And we think it would be quite as objectionable to permit a state court, while such a question was under the consideration and within the control of the executive departments, to take jurisdiction of the case by reason of their control of the parties concerned, and render decree in advance of the action of the government, which would render its patents a nullity when issued. After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before: Johnson v. Tows-

ley, 13 Wall. 72, 20 L. ed. 485; Shepley v. Cowan, 91 U. S. 300, 23 L. ed. 424."

The doctrine of this case has been reaffirmed in many subsequent cases in the same court: United States v. Schurz, 102 U. S. 378, 26 L. ed. 167; Carrick v. Lamar, 116 U. S. 423, 6 Sup. Ct. Rep. 424, 29 L. ed. 677; Cruickshank v. Bidwell, 176 U. S. 73, 20 Sup. Ct. Rep. 280, 44 L. ed. 377; Kirwan v. Murphy, 189 U. S. 35, 23 Sup. Ct. Rep. 599, 47 L. ed. 698; Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 23 Sup. Ct. Rep. 692, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064; Humbird v. Avery, 195 U. S. 480, 25 Sup. Ct. Rep. 123, 49 L. ed. 286; Oregon v. Hitchcock, 202 U. S. 60, 26 Sup. Ct. Rep. 568, 50 L. ed. 935. To the same effect, see, also, Casey v. Vassor, 50 Fed. 258; Forbes v. Driscoll, 4 Dak. 336, 31 N. W. 633; Vantongeren v. Heffernan, 5 Dak. 180, 38 N. W. 52; Hays v. Parker, 2 Wash. Ter. 198, 3 Pac. 901.

In McCord v. Hill, 104 Wis. 457, 80 N. W. 735, the court said: "It is only after the United States has parted with its title, and the individual has become vested with it that the equities on which he holds it may be enforced, and not before. Such being the law, a complaint which seeks to have the court adjust equities between rival claimants to government land is fatally defective if it fails to show that the title has become vested in the individual against whom it is sought to enforce supposed equities."

252 In Sims v. Morrison, 92 Minn. 341, 100 N. W. 88, the court said: "The rule applies with greater force to the case at bar, for here the legal title to the land is in the general government, with no certainty that it will ever become vested in defendants, and the rights of both are purely equitable. The government has the paramount and sole authority to dispose of its lands, and until it parts with and conveys its title, the courts are powerless to aid litigants in controversies affecting or involving individual claims thereto."

So far as we have been able to discover, there is no dissent from these views. The right of the respondent to maintain this action must rest upon some equity it has or claims in the land sought to be entered, which is now public land of the United States. If it has such an equity—and upon that question we express no opinion—the courts are powerless to grant relief until the title passes from the general government. The respondent cites the case of Rader v. Stubblefield from this court, reported in 43 Wash. 334, 86 Pac. 560, in support of its contention. The difference between enjoining the prosecution of an action inter partes in another court,

and enjoining the prosecution of a claim for public land before the special tribunal charged with the administration of the public land laws is apparent.

The judgment appealed from was in excess of the jurisdiction of the court, and is without warrant or authority in law. Reversed and remanded.

Hadley, C. J., Fullerton, Crow, Dunbar and Root, JJ., concur.

All Matters Affecting the Disposition of Government Public Lands, the adjusting of all private claims thereto, and grants thereof under congressional legislation, are, in the absence of some specific provision of law to the contrary, committed to the general land office, under the supervision of the Secretary of the Interior; and while such matters are pending in such department, the courts have no jurisdiction thereof: St. Paul etc. Ry. Co. v. Olson, 87 Minn. 117, 94 Am. St. Rep. 693. As to the conclusiveness on courts of the decisions of the land department, see Diana Shooting Club v. Lamoreux, 114 Wis. 44, 91 Am. St. Rep. 898, and cases cited in the cross-reference note thereto.

The Right of State Courts to Determine State Law in respect to the owners of lands on meandered lakes under government patents is superior to the right of the federal courts to construe them: Fuller v. Shedd, 161 Ill. 462, 52 Am. St. Rep. 380.

IN RE MILLER'S ESTATE.

[47 Wash. 253, 91 Pac. 967.]

WILLS, NUNCUPATIVE—Amendments.—Upon the probate of a nuncupative will, the court may, in the exercise of a sound discretion, permit the alleged will and its records to be amended to conform to the facts proved. (p. 905.)

WILLS, NUNCUPATIVE, at What Time may be Made.—If a person in his last sickness, of which he subsequently dies, while impressed with the probability of his impending death, makes a nuncupative will, it is valid, though he had time and opportunity to reduce it to writing. (pp. 905, 906.)

WILLS, NUNCUPATIVE—Last Sickness.—If the last sickness of one has progressed so far that he expects and is liable to die, and in view of death, and as preparatory thereto, he makes a verbal will, and thereafter dies of such last sickness, neither prior preparation to make such will nor opportunity to make a written will at the time, or thereafter affects the validity of the nuncupation. (p. 906.)

W. H. Fouts and G. W. Jewett, for the appellant.

M. M. Godman, for the respondents.

253 RUDKIN, J. This is an appeal from an order establishing a nuncupative will and admitting the same to probate. Upon the hearing of the petition for probate, the

court found, "That the instrument filed herein and alleged to be the will of said Miller is not the entire or all the will made by him as shown from the evidence taken herein"; and granted "leave to reduce or have reduced to writing and file herein the nuncupative will of said William A. Miller, as shown from the evidence to have been made by him, and upon the filing of the same such proceedings be had and as the law may warrant in the premises." Thereafter the will, "as shown from the evidence to have been made," was reduced to writing and filed with the clerk; whereupon the court entered an order establishing the will and admitting the same to probate.

254 The appellant seems to contend that as soon as it appeared that the entire will of the testator was not in form and substance as reduced to writing and set forth in the petition for probate, the court had no alternative but to dismiss the petition. This contention is unsound. In the exercise of a sound discretion, the court might well permit the alleged will and its records to be amended to conform to the facts proved, and such discretion was properly exercised in this case. Again, it is contended that the evidence failed to show either the animus testandi or the animus nuncupandi; or that the testator called upon any person present to bear witness that such was his will. Without discussing the testimony in detail, we think it clearly appears that the testator was strongly impressed with the probability of impending death, that he intended to make a will, and that his word should stand as his will; and that he called upon those present to witness that such was his will, or to that effect, as our statute provides.

It is next contended that the will was not made "at the time of the last sickness" of the testator: Bal. Code, sec. 4609 (P. C., sec. 2355). This presents the most serious question in the case. In the leading American case, construing the term "last sickness," in statutes of wills, the opinion was written by Chancellor Kent: Prince v. Hazleton, 20 Johns. 502, 11 Am. Dec. 307. It was there held, by a divided court, that the term "last sickness" means where the testator is in extremis, or overtaken by sudden and violent sickness, and has not time or opportunity to make a written will. This construction of the statute has been adopted and followed in Georgia, Maryland, Mississippi, New Jersey, New York, Pennsylvania, Texas, and Virginia: 30 Am. & Eng. Ency. of Law, 2d ed., p. 568. A different rule prevails in Alabama, Illinois, Kansas, Nebraska, and Tennessee. In Johnston v. Glasscock,

2 Ala. 218, the court said: "If a person in his last sickness—that sickness of which he subsequently dies—impressed with the probability of approaching death, deliberately makes his will, conforming to the statute, we do not feel authorized to say that it will be [255] invalid, because, in point of fact, he had time and opportunity to reduce it to writing."

In Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 290, the court said: "At common law, it was not essential to the validity of a nuncupative will that the testator should have been ill at all. The statute is, in this regard, a limitation of the common-law powers. The words 'in the time of the last sickness' had no technical signification at the time of the passage of the statute. These words must be taken in their ordinary signification. The courts have no power to take from or add to the statute. It is their duty to carry out the will of the legislature as found in the words of the statute, and the necessary and reasonable implications arising from these words. The statute requires it to be proven that the will was made 'in the last sickness.' It is a reasonable and necessary implication that it must also appear that the testator, at the time of making the will, supposed that his then sickness would prove his last sickness—in other words, that he should be impressed with the probability that he would never recover." To the same effect, see Nolan v. Gardner, 7 Heisk. (Tenn.) 215.

In Baird v. Baird, 70 Kan. 564, 79 Pac. 163, 68 L. R. A. 627, after referring to the two extreme views that might be adopted, the court said: "We cannot believe that either of these extreme claims are founded in reason, but rather prefer to hold that the proper interpretation of the statute is that where the 'last sickness' of one has progressed to such a point that the deceased expects, and is liable to die at any time, and in view of its occurrence and as preparatory thereto a verbal will is made, and he does thereafter die of such disease, such will is valid and is 'made in the last sickness'; that neither prior preparation to make such verbal will nor opportunity to make a written will at the time or thereafter would necessarily be determinative against the validity of the nuncupation."

This rule is approved and followed in Godfrey v. Smith, 73 Neb. 756, 103 N. W. 450. The proof clearly shows that the [256] will in question was made "at the time of the last sickness," as that term is construed in these decisions, and we feel constrained to follow them. Nuncupative wills are not favored in law, but it seems to us that the earlier cases not

only place a strict construction upon statutes authorizing them, but go further, and add very materially to the statutes themselves. We think the construction given in the later cases is more in harmony with the language and purpose of the statute; and the requirement that such wills must be strictly proved is a sufficient guaranty against fraud, at least until the legislature otherwise provides.

It is lastly contended that the testator lacked testamentary capacity, and was unduly influenced in the making of the will. These charges find no support in the evidence. We find no error in the record and the judgment is affirmed.

Hadley, C. J., Fullerton, Crow, Dunbar and Root, JJ., concur.

Nuncupative Wills are discussed in the notes to Wiley's Estate, 67 Am. St. Rep. 572; Sykes v. Sykes, 20 Am. Dec. 44; Arnett v. Arnett, 81 Am. Dec. 230.

HOFFMAN v. DICKSON.

[47 Wash. 431, 92 Pac. 272, 93 Pac. 523.]

PARTY-WALL AGREEMENTS—Liability Under.—If the covenants of a party-wall agreement are clearly made binding on the heirs and assigns of the respective parties, they run with the land, and if there is a covenant by one party to pay one-half of the cost of the party-wall erected by the other before using it, the subsequent owner of the vacant lot who makes use of the wall must make payment to the person who owns the lot upon which the first building was erected. (p. 911.)

PARTY-WALL AGREEMENTS—Vendor and Purchaser—Specific Performance.—If, under a party-wall agreement the owner of a vacant lot agrees to pay one-half the cost of the wall before using it, and such agreement expressly runs with the land, and purports to bind the heirs and assigns of the parties, and a subsequent owner of the vacant lot agrees to convey it by warranty deed, the grantee is not entitled to a conveyance free from the encumbrance of the party-wall agreement as the encumbrance cannot at the time of demanding the conveyance be removed by the grantor, because neither the time for payment, nor the person authorized to receive it and discharge the lien can at that time be ascertained. (p. 912.)

PARTY-WALL AGREEMENTS—Vendor and Purchaser.—Under an agreement to convey by warranty a vacant lot subject to a party-wall agreement that the owner of the property making use of the wall shall pay one-half of the cost thereof to the owner of the adjoining lot before using the wall, the grantor cannot be compelled before making the conveyance to deposit one-half of the cost of the wall in court to await the uncertain time of payment. (p. 913.)

PARTY-WALL AGREEMENTS—Specific Performance—Modification of Trial Decree.—If an agreement calls for a warranty deed to a certain vacant lot, and in an action for specific performance it is found that one-half the cost of certain party-walls is an encumbrance thereon which cannot then be removed, and the trial court orders specific performance, but the decree by inadvertence recites that the grantee is entitled to a deed of warranty, "subject to the liens for one-half of the cost of constructing both of said party-walls," the decree will be modified on appeal by striking out the words quoted. (p. 914.)

Campbell & Powell, for the appellants.

H. H. Johnston and J. A. Shackleford, for the respondents.

[431] HADLEY, C. J. This is an action for the specific performance of a contract to sell real estate. The written evidence of the contract is as follows:

"Tacoma, Wash., Feb. 28, 1906.

"Received of A. J. Weisbach, trustee, five hundred dollars earnest money on purchase of lots 21 and 22, block 1104, Tacoma, purchase price $75,000. $39,500 cash on delivery of warranty deed, $35,000 on or before five years. Interest 6 per cent, payable annually, secured by first mortgage on [432] this property. Purchaser to have five days to examine abstract to be furnished by me.

"GEO. L. DICKSON.
"MINNIE DICKSON."

The person named in the receipt as trustee acted for, and in behalf of, the plaintiffs in this action, and paid to the defendants the five hundred dollars earnest-money. Plaintiffs subsequently discovered the existence of two party-wall agreements affecting the lots mentioned, one agreement affecting lot 21 and the other lot 22. Lot 21 is joined by lot 20, and on the twentieth day of May, 1890, William R. Hawks and the Tacoma Land Company were the respective owners thereof. On that day said owners entered into a party-wall agreement providing that Hawks, as the owner of lot 20, might erect a four-story brick building on his lot, and place the wall thereof one-half on each of said lots; that Hawks should furnish the materials, construct the wall, and keep a true account of the cost thereof; that before the said adjoining owner of lot 21, its successors or assigns, shall use the wall, it or they shall first pay one-half the cost thereof. It was also provided that the benefits and burdens of the covenants contained in the agreement shall annex to and run with the land, so long as the wall continues to exist, and shall bind the heirs, legal representatives, and assigns of the respective parties. The wall was built. The ownership of both lots had since

changed, but the wall has neither been used nor has payment been made therefor by the owner of lot 21. Said lot 22 is adjoined by lot 23, and on the twenty-eighth day of February, 1889, Samuel Isaacs, with his co-owners and the Tacoma Land Company, were the respective owners of said lots. On that day said owners entered into a party-wall agreement, by the terms of which Isaacs and his co-owners might erect a three-story brick building on their lot, and place the wall thereof one-half on each lot. The other material terms of the agreement are substantially the same as those of the other agreement above mentioned, and in addition to what was recited in the other, it was expressly stated in this that [433] a lien shall exist against lot 22 for one-half the cost of the wall. This wall was also built, and the owner of lot 22 has neither used the wall nor paid therefor. By mesne conveyances the defendants are now the owners of lots 21 and 22, which they agreed to sell to the plaintiffs as above stated.

On the discovery of the party-wall agreements, the plaintiffs, as the purchasers of said lots under said contract, demanded that the lots should be conveyed to them free from the encumbrance existing by reason of the agreements. The demand was refused, and this suit was then brought. The cause was tried by the court without a jury, and the court found that encumbrances exist for the amounts of one-half the cost of the walls respectively, but held that the encumbrances are such that they cannot now be removed by the defendants, but that the plaintiffs are entitled to a deed of general warranty as against all encumbrances, including these. Both parties have appealed, the defendants claiming that plaintiffs are entitled to no relief except the return of the five hundred dollars paid by them; and the plaintiffs contending that they are entitled to a decree requiring a conveyance with the liens removed, or that upon payment of the stipulated purchase price less the amount of one-half the cost of the walls, a conveyance shall be made.

The court found that the evidence was insufficient and too indefinite to support a finding of the cost of the party-walls, so that one-half thereof might have been deducted from the amount of the purchase price, even if the authority to require the deduction existed. In view of the determination we have decided must be made in the case, we find it unnecessary to discuss the evidence or to review the action of the court with reference to the cost of the walls.

The appellants, plaintiffs, in their brief say they are unable to understand what the trial court meant when it said

that liens exist by reason of the party-wall agreement, but that the respondents, defendants, cannot now remove them. The writer of this opinion confesses that he was at first surprised [434] at this somewhat anomalous statement of the court. As a matter of first impression it appeared to be a simple thing to ascertain the cost of the walls, to pay one-half thereof to the respective wall owners and to procure releases of the liens. An examination of the authorities submitted, however, convinces us that the statement of the learned trial court presents a real paradox. Appellants view the court's statement as embodying an absurdity, but in the light of many authorities it becomes a true statement. There is undoubtedly much conflict in the authorities upon the subject of party-wall agreements. Possibly the conflict is often more apparent than real, arising out of the manifold differences in the contract provisions and the consequent attempt of the courts to give proper effect to all the provisions.

It is the contention of respondents that the payment by them to the then owners of the adjoining lots of one-half the cost of the walls would not have removed the liens. It will be remembered that the contracts both provide that the benefits and burdens of the covenants contained in them shall annex to and run with the land so long as the respective walls continue to exist, and shall bind the heirs, legal representatives, and assigns of the respective parties. Respondents urge that, under the authorities, when such contracts are made so as to require the benefits and burdens created thereby to annex to and run with the land, the right to receive payment for the one-half of the cost of the party-wall belongs only to the owner of the wall at the time it is used by the adjoining owner, at which time only can payment be made. If that theory of the law applicable to these contracts is correct, then the holding of the trial court is correct. These walls have not been used by the adjoining owner. If these appellants become the adjoining owners, it is not known when they or their grantees will use the walls, if ever. It cannot now be known whether the present owners of the walls will be the owners when the walls shall be used. If they shall not, and if the lien can be satisfied [435] by payment only to those who shall then own the walls, it is manifest that the respondents cannot now remove the liens.

Our attention is called by respondents to a well-considered opinion of the supreme court of Kansas (Southworth v. Perring, 71 Kan. 755, 114 Am. St. Rep. 327, 81 Pac. 481, 2 L. R. A., N. S., 87, and also to the opinion on rehearing in the

same case, reported in 71 Kan. 761, 82 Pac. 785. After reviewing a number of authorities, it was held that when the covenants of a party-wall agreement are clearly made binding on the heirs and assigns of the respective parties, they create benefits and burdens which run with the land, and where there is a covenant by one party to pay one-half the cost of a wall erected by the other, then if conveyances of each lot are made after the building is erected, the subsequent owner of the vacant lot who makes use of the party-wall must make payment to the then owner of the lot upon which the first building was erected. The court concluded its arguments as follows: "Without attempting to declare what general principles relating to the question presented are sustained by the greater number of decisions, we shall decide it upon these considerations: We regard contracts of the character of that here involved as in their nature so related to the real property affected, and so adapted to impose their obligations and bestow their benefits upon the successors in title of the land owners by whom they are made, that the purpose that they shall have that effect is readily to be inferred from the employment of language having any substantial tendency in that direction. In the present case we hold that the use of the clause making the terms of the contract binding upon the heirs, executors, administrators and assigns of the parties sufficiently indicates that intention. What the effect of the omission of that provision might have been we do not now determine."

Again, in the opinion on rehearing, the court further said: "It must be conceded also that none of the cases, in which the right to receive compensation from one using a party-wall already built is held to pass to the grantee of the builder, arose upon a contract precisely like the one here involved. [436] Nevertheless the fact remains that the weight of authority supports the view that party-wall contracts may be so drawn as to have their effect, and that in each case the question is whether such is the intention of the parties, as shown by the language used. Moreover, there is abundant authority for the proposition that this intention may be inferred from a provision that the money shall be paid to the first builder or his assigns."

It will thus be seen that the Kansas court declared the weight of authority to be in favor of the rule which it followed, when party-wall agreements contain such provisions as are found in those now before us, requiring that the covenants shall run with the land and be binding upon the heirs and as-

signs of the parties. The same was held by the supreme court of Nebraska in Loyal Mystic Legion v. Jones, 73 Neb. 342, 102 N. W. 621, where a former decision of the same court (Cook v. Paul, 4 Neb. (Unof.) 93, 93 N. W. 430, 66 L. R. A. 673) was criticised as being "unofficial." There is undoubtedly much conflict of authority upon party-wall subjects. Indeed, such agreements seem to have been a prolific source for a variety of judicial views. But the views of the Kansas and Nebraska courts, as applied to such provisions as are above discussed, are sustained by the following further authorities: Adams v. Noble, 120 Mich. 545, 79 N. W. 810; King v. Wight, 155 Mass. 144, 29 N. E. 644; Platt v. Eggleston, 20 Ohio St. 414; National Life Ins. Co. v. Lee, 75 Minn. 157, 77 N. W. 794; Mott v. Oppenheimer, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409; Keating v. Korfhage, 88 Mo. 524; Thomson v. Curtis, 28 Iowa, 229. See, also, 22 Am. & Eng. Ency. of Law, 2d ed., 256, and note 9:

Thomson v. Curtis, 28 Iowa, 229, is based upon a statute in Iowa, but the statute merely emphasizes the principle held by the above authorities, that when heirs, grantees and assigns are in express terms of the contract mutually bound, the intention is clear that the covenants shall run with the land, and shall be [437] given effect accordingy. In commenting upon the authorities, the opinion in Adams v. Noble, 120 Mich. 545, 79 N. W. 810, says: "It is difficult to harmonize all the authorities, but we think they may fairly be divided into two classes—one class holding that the covenant for payment is personal, and does not run with the land, when it is apparent from the contract that the payment should be made to the party building the wall, and there are no words indicating that the right to receive payment shall pass to his assigns; the second class holding that the covenant runs with the land, and passes to the purchaser or assignee, when the contract evinces such intention, and where the language used is between the parties and their assigns, and the contract declares the covenant shall be perpetual, and binding upon the parties and their heirs and assigns."

The contracts involved in the case at bar belong to the second class as the classification is made in the above quotation, and, in view of the above authorities, we therefore find that the holding of the trial court that the encumbrance cannot now be removed by respondents is true, because neither the time for payment nor the person authorized to receive payment and discharge the lien can now be ascertained.

Appellants insist that the cost of the walls should have been ascertained by the court and the respondents required to deposit one-half the amount thereof in the registry of the court to await the time for payment. Such a course would have been inequitable and impracticable. Respondents would have been required to deposit their money and appellants or their grantees might not for twenty years, and possibly never, have used the wall. The money would thus have been idle for an indefinite time. Moreover, the persons who shall ultimately be entitled to receive the payment will be entitled to be heard as to the amount when the same shall be determined. He was not present before the court, and even his identity could not then be known. In so far as there exists an encumbrance against the property, respondents under the contract might now be required to discharge it, if they could do so. But that being impossible, the decree requires them to deliver their deed [438] with covenants of general warranty. That is exactly what their contract in express words requires, as follows: "Purchase price $75,000. $39,500 cash on delivery of warranty deed," etc. The covenants of warranty will continue against any real encumbrance. The decree provides that the rents which have meanwhile accrued from the purchased property shall go to appellants, and that respondents shall have six per cent per annum interest for the same time upon the delayed cash payment, together with an antedated note and mortgage for the deferred payment on the terms as originally agreed. We think the decree calls for substantial performance of the contract, and that from the record before us it does justice between the parties. What has been said makes it unnecessary to discuss the cross-appeal.

The judgment is affirmed.

Rudkin, Root, Dunbar, Crow, and Mount, JJ., concur.

ON REHEARING.

PER CURIAM. Since the opinion was filed in this cause, and pending a petition for rehearing, we have discovered certain words used by the trial court in its decree which were not observed by us before the opinion was filed. The decree recites that appellants are entitled to a deed of general warranty "subject to the liens for one-half of the cost of constructing both of said party-walls." In affirming the judgment the possible legal effect of the quoted words was overlooked by us since the matter had not been called to our attention.

We stated in our opinion that appellants are entitled to a deed with covenants of general warranty, that being what was specified in the contract. Such should unmistakably be the provision of the decree. The quoted words must have been used in the decree by a mere inadvertence, inasmuch as the record shows that the trial court found one-half the cost of the party walls to be encumbrances. The contract does not [439] call for a warranty deed subject to any encumbrances. The reason the trial court did not require the present removal of the liens was because, for reasons stated in the main opinion, they are not now removable. The persons who may be entitled to the payment when the walls shall be used, if they are ever used, cannot now be ascertained. Respondents must, therefore, comply with their contract and deliver a general warranty deed; but they cannot comply with the contract by delivering a warranty deed which is expressly made subject to the encumbrances. We do not believe that the trial court intended the legal effect which the words used may import, and we have not understood that respondents so contend. But that no controversy may arise as to the true meaning of the decree, it should be modified by striking out the words above quoted. In all other respects the judgment is affirmed, the petition for rehearing is denied, and the cause is remanded for the purpose of said modification.

An Agreement Between Adjoining Owners to Pay for the Building of a party-wall is generally regarded as a covenant running with the land: See Rugg v. Lemley, 78 Ark. 65, 115 Am. St. Rep. 17; notes to Dunscomb v. Randolph, 89 Am. St. Rep. 941; Geiszler v. De Graaf, 82 Am. St. Rep. 679. If the respective owners of two adjoining lots enter into an agreement, expressly binding their heirs and assigns, which provides that the wall of a building one of them is about to erect shall be placed upon the dividing line, and that when the other builds he shall use it as a party-wall and pay the first party one-half its value, and after the building is erected both lots are conveyed, the grantee of the vacant lot who builds thereon and makes use of the wall must make payment therefor to the grantee of the improved lot: Southworth v. Perring, 71 Kan. 755, 114 Am. St. Rep. 527.

JONES v. HOGE.

[47 Wash. 663, 92 Pac. 433.]

AUTOMOBILES—Chauffeur, Owner's Liability for Acts of.—An automobile is not a machine of such danger as to render its owner liable for injuries to a person caused thereby, while operated by his chauffeur, not engaged directly in the line of his employment, even though the master has made it possible for him to take out and operate such machine at pleasure, and for his own purpose. (p. 916.)

AUTOMOBILES—Negligence of Chauffeur—Scope of Employment.—An automobile owner is not liable to one who is injured by the incompetency or recklessness of his chauffeur, who is operating the machine without the knowledge of such owner and not to carry out any purpose for which he was employed, but on an errand personal to himself. (p. 916.)

Kerr & McCord, for the appellant.

J. F. McElroy and A. A. Booth, for the respondent.

664 ROOT, J. Respondent commenced this action to recover damages for personal injuries sustained by reason of being run over by defendant's automobile, operated by one Barnes as chauffeur. The evidence showed that Barnes was employed by defendant to operate and care for his automobile, and to take the same to and from defendant's home whenever ordered so to do by himself or wife. The machine was kept at a public garage, and Barnes was authorized to take the same therefrom whenever appellant or wife so directed, and to do so without making any request of the owners of the garage. At the time of respondent's injury, Barnes had taken out the automobile without the knowledge or permission of either defendant or his wife, and was using the machine on an errand personal to himself. He had been advised that neither the defendant nor his wife required the machine that evening, and his errand was one with which his employer was in no manner concerned. At the close of the evidence at the trial, a challenge to the sufficiency of the evidence and a motion to withdraw the case from the jury and enter judgment for defendant was made and sustained by the court. Thereafter a motion for new trial was granted by the court solely upon the ground that the evidence tended to show that Barnes was not a competent and careful operator of an automobile, and was intrusted with its care, and having by his negligence injured an innocent person, his employer was liable for damages.

665 It is contended by respondent that an automobile is a machine of such danger as to render the owner thereof liable

We stated in our opinion that appellants are entitled to a deed with covenants of general warranty, that being what was specified in the contract. Such should unmistakably be the provision of the decree. The quoted words must have been used in the decree by a mere inadvertence, inasmuch as the record shows that the trial court found one-half the cost of the party walls to be encumbrances. The contract does not [439] call for a warranty deed subject to any encumbrances. The reason the trial court did not require the present removal of the liens was because, for reasons stated in the main opinion, they are not now removable. The persons who may be entitled to the payment when the walls shall be used, if they are ever used, cannot now be ascertained. Respondents must, therefore, comply with their contract and deliver a general warranty deed; but they cannot comply with the contract by delivering a warranty deed which is expressly made subject to the encumbrances. We do not believe that the trial court intended the legal effect which the words used may import, and we have not understood that respondents so contend. But that no controversy may arise as to the true meaning of the decree, it should be modified by striking out the words above quoted. In all other respects the judgment is affirmed, the petition for rehearing is denied, and the cause is remanded for the purpose of said modification.

An Agreement Between Adjoining Owners to Pay for the Building of a party-wall is generally regarded as a covenant running with the land: See Rugg v. Lemley, 78 Ark. 65, 115 Am. St. Rep. 17; notes to Dunscomb v. Randolph, 89 Am. St. Rep. 941; Geiszler v. De Graaf, 82 Am. St. Rep. 679. If the respective owners of two adjoining lots enter into an agreement, expressly binding their heirs and assigns, which provides that the wall of a building one of them is about to erect shall be placed upon the dividing line, and that when the other builds he shall use it as a party-wall and pay the first party one-half its value, and after the building is erected both lots are conveyed, the grantee of the vacant lot who builds thereon and makes use of the wall must make payment therefor to the grantee of the improved lot: Southworth v. Perring, 71 Kan. 755, 114 Am. St. Rep. 527.

JONES v. HOGE.

[47 Wash. 663, 92 Pac. 433.]

AUTOMOBILES—Chauffeur, Owner's Liability for Acts of.—An automobile is not a machine of such danger as to render its owner liable for injuries to a person caused thereby, while operated by his chauffeur, not engaged directly in the line of his employment, even though the master has made it possible for him to take out and operate such machine at pleasure, and for his own purpose. (p. 916.)

AUTOMOBILES—Negligence of Chauffeur—Scope of Employment.—An automobile owner is not liable to one who is injured by the incompetency or recklessness of his chauffeur, who is operating the machine without the knowledge of such owner and not to carry out any purpose for which he was employed, but on an errand personal to himself. (p. 916.)

Kerr & McCord, for the appellant.

J. F. McElroy and A. A. Booth, for the respondent.

664 ROOT, J. Respondent commenced this action to recover damages for personal injuries sustained by reason of being run over by defendant's automobile, operated by one Barnes as chauffeur. The evidence showed that Barnes was employed by defendant to operate and care for his automobile, and to take the same to and from defendant's home whenever ordered so to do by himself or wife. The machine was kept at a public garage, and Barnes was authorized to take the same therefrom whenever appellant or wife so directed, and to do so without making any request of the owners of the garage. At the time of respondent's injury, Barnes had taken out the automobile without the knowledge or permission of either defendant or his wife, and was using the machine on an errand personal to himself. He had been advised that neither the defendant nor his wife required the machine that evening, and his errand was one with which his employer was in no manner concerned. At the close of the evidence at the trial, a challenge to the sufficiency of the evidence and a motion to withdraw the case from the jury and enter judgment for defendant was made and sustained by the court. Thereafter a motion for new trial was granted by the court solely upon the ground that the evidence tended to show that Barnes was not a competent and careful operator of an automobile, and was intrusted with its care, and having by his negligence injured an innocent person, his employer was liable for damages.

665 It is contended by respondent that an automobile is a machine of such danger as to render the owner thereof liable

for injuries caused thereby, while operated by his chauffeur, and even though not engaged directly in his line of employment, if the master has made it possible for the chauffeur to take out and operate such machine at pleasure; that the master is holden to employ only such chauffeurs as are competent and careful, and must be holden for damages occasioned by their incompetency or recklessness when making use of the machine, even though out of the line of employment; and also that in this case Barnes was within the apparent scope of his authority. We do not think the contentions can be upheld. Barnes was not using the machine to carry out any purpose for which he was employed. We do not think that an automobile can be placed in the same category as locomotives, gunpowder, dynamite, and similarly dangerous machines or agencies. It is true that the operation of this machine is attended with some dangers not common to the use of the ordinary vehicle, and we believe and have already held that those who operate these machines must be held to that degree of care which is commensurate with the dangers naturally incident to their use: Lampe v. Jacobsen, 46 Wash. 533, 90 Pac. 654. But we do not believe that the law would charge the owner of an automobile with a liability for damages caused by the operator thereof under the circumstances found here.

In the case of Robinson v. McNeil, 18 Wash. 163, 51 Pac. 355, this court held that, where a section foreman, who had charge of a hand-car which he used to travel over the road, loaned the same to some boys, one of whom was thereby injured, the railway company was not liable, as the foreman was not authorized to permit the hand-car to be used for such a purpose.

Huddy, on the Law of Automobiles, page 15, says this: "The motor carriage is not to be classed with railroads, which, owing to their peculiar and dangerous character, are [666] subject to the legislation imposing many obligations on them which attach to no others. Certainly a motor vehicle is not a machine of danger when controlled by an intelligent, prudent driver. As bearing on this question, it has been stated by authority that out of a total of three thousand four hundred and eighty-two deaths reported to the coroner's office in the city of Chicago for the year 1905, only five were caused by automobiles. For every death caused by an automobile in the city of Chicago there were more than seventy deaths caused by railroad accidents. Twelve people were killed by wagons to everyone who met death at the hands of an automobile."

And at page 95, the same author says: "Where a chauffeur uses his employer's automobile for his own personal pleasure, and contrary to authority, a party negligently injured by the car cannot hold the employer liable, since the operator of the vehicle was not, at the time, acting for his employer and within the scope of his employment; however, the chauffeur is liable in damages."

The case of Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133, 5 L. R. A., N. S., 598, is one exactly in point. There an agent was furnished an automobile to be used in his principal's business whenever he desired. One day he took it out for a purpose personal to himself and distinct from his employer's business, and while so operating it, the horses of the plaintiff were frightened by the agent's negligent management of the machine, and ran away, injuring plaintiff. The supreme court of Minnesota held that the owner of the automobile was not liable. The case is well considered, and many authorities bearing on the question are collated and discussed. Among other things the court said: "It is elementary that the master is not liable for injuries occasioned to a third person by the negligence of his servant, while the latter is engaged in some act beyond the scope of his employment, for his own or the purposes of another, although he may be using the instrumentalities furnished him by the master with which to perform the ordinary duties of his employment, or, as expressed in Shearman and Redfield on Negligence, third edition, section 63, that if the act complained of be committed by the [667] servant while at liberty from the service of the master and while pursuing his own interests exclusively, there can be no question of the master's freedom from liability, even though the injury would not have been committed without the facilities afforded the servant by his relation to the master. The rule of law applicable to the care and protection of dangerous instrumentalities does not apply. That rule requires the master to exercise a proper degree of care to guard, control and protect dangerous instrumentalities owned or operated by him, and, an injury occurring by reason of the improper use of such an instrumentality by a servant, though occasioned while not in the performance of his duty, the master is liable. But the principle on which liability is founded in such cases is the failure of the master to properly keep within his control such dangerous agencies. The rule is illustrated in Mattson v. Minnesota & N. W. R. Co., 95 Minn. 477, 111 Am. St. Rep. 483, 104 N. W. 443, 79 L. R. A. 503. See, also, Bogue v.

Bennett, 156 Ind. 478, 83 Am. St. Rep. 212, 60 N. E. 143; Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522; Mason v. West, 61 App. Div. 40, 70 N. Y. Supp. 478; Oxford v. Peter, 28 Ill. 434; Campbell v. Providence, 9 R. I. 262; Atchison etc. R. Co. v. Randall, 40 Kan. 421, 19 Pac. 783; Brenner v. Ford, 116 La. 550, 40 South. 894; Bowler v. O'Connell, 162 Mass. 319, 44 Am. St. Rep. 359, 38 N. E. 498, 27 L. R. A. 173; Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336; Fairchild v. New Orleans etc. R. Co., 60 Miss. 931, 45 Am. Rep. 427; Patterson v. Kates, 152 Fed. 481; Ware v. Barataria etc. Canal Co., 15 La. 169, 35 Am. Dec. 189; Engel v. Eureka Club, 137 N. Y. 100, 33 Am. St. Rep. 692, 33 N. E. 1052; Higgins v. Western Union Tel. Co., 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500; King v. New York Cent. etc. R. Co., 66 N. Y. 181, 23 Am. Rep. 37; Pittsburgh etc. Ry. Co. v. Shields, 47 Ohio St. 387, 21 Am. St. Rep. 840, 24 N. E. 658, 8 L. R. A. 464; Quigley v. Thompson, 211 Pa. 107, 60 Atl. 506; McCarthy v. Trimmins, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038; 20 Am. & Eng. Ency. of Law, 2d ed., 163; Mechem on Agency, secs. 737, 738; 8 Current Law, 945, 946; Huddy on the Law of Automobiles, pp. 95-98.

[608] In the case of Stewart v. Baruch, 103 App. Div. 577, 93 N. Y. Supp. 161, the syllabus reads as follows: "A chauffeur who in violation of the instructions of his employer takes out the latter's automobile for his own pleasure is not, in so doing, acting within the scope of his employment, and his employer is not responsible to strangers for his negligence."

In the case of Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A., N. S., 238, the court said: "The law does not denounce motor carriages, as such, on the public highways. For so long as they are constructed and propelled in a manner consistent with the use of highways, and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to travelers by ordinary modes, they have an equal right with other vehicles in common use to occupy the streets and roads. Because novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to seeing them, is no reason for prohibiting their use. In all human activities the law keeps up with improvement and progress brought about by discovery and invention, and in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even incidental injury to those using ordinary modes, there can be

no recovery, provided the contrivance is compatible with the general use and safety of the road."

In Morier v. St. Paul etc. R. Co., 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952, the court said: "The universal test of the master's liability is whether there was authority expressed or implied for doing the act; that is, was it one done in the course and within the scope of the servant's employment. If it be done within the course of, and within the scope of, his employment, the master will be liable for the act, whether negligent, fraudulent, deceitful, or an act of positive malfeasance. But a master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the [669] servant steps outside of his employment to do an act for himself not connected with the master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. The master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment, and in determining whether a particular act is done in the course of the servant's employment, it is proper, first, to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself and as his own master pro tempore, the master is not liable."

In the case of Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946, the court used this language: "Conceding for the purposes of this appeal that the son was negligently operating the machine at the time of the accident, was such negligence chargeable to the defendant under the evidence? We are clearly of the opinion that it was not. The direct evidence all shows that his use of the electric automobile was solely for the pleasure and convenience of the young lady and himself, and that it was in no way or sense connected with his employment or the defendant's business. The son had been given a holiday, and was master of his own time on that day. This is conclusively shown. The defendant had

ordered the machine put away and did not know that his son wished or intended to use it. It was taken and used for the son's own pleasure, and we think the verdict was very properly directed for the defendant."

In the case of Berman v. Schultz, 84 N. Y. Supp. 292, where defendant's driver left an automobile temporarily, and a third person started the machine, causing an injury, the court said: "It was not the duty of the defendant to chain the machine to a post or in some way fasten it, so that it was impossible [670] for it to be started by the act of a third person. The law did not impose upon the defendant a degree of care that made the starting of the machine impossible."

In the case of Clark v. Buckmobile Co., 107 App. Div. 120, 94 N. Y. Supp. 771, this was said: "Birdsall was the general manager of defendant while engaged in its business. Davis was an employé of the defendant while engaged in its business, but when not so engaged he did not represent the defendant. These two men were in charge of the machine when the accident occurred. Davis was running it and Birdsall was giving more or less direction with reference to its movements. Neither of them was engaged in defendant's business, however. They did not represent the defendant, and it was not and is not liable for any negligence they were guilty of which caused plaintiff's injuries. Suppose they had taken a day off for pleasure and had borrowed or leased the machine from the defendant to enable them to enjoy their outing; would the defendant be liable for any injuries resulting from their negligence in operating the machine while they were out upon the road? Suppose after business hours any day they had borrowed or leased the machine from the defendant to enjoy a few hours' run across the country for their own pleasure, would the defendant be liable for any injury caused by their negligently operating the machine while they were out? It is quite apparent that in the cases suggested no liability of defendant would result. The reason is, that in order to establish liability, the persons must not only be generally employés of the defendant, but must be employed in the defendant's business, and not merely in their own recreation and pleasure at the time the injuries are caused."

Thompson on the Law of Negligence, volume 2, section 525, employs this language: "The rule, moreover, implies that the master will not in any case be liable for wrongs committed by the servant while not acting about the master's business, or, what is substantially the same thing, while

not acting within the scope of his authority. This rule is so reasonable that the ground on which it rests need scarcely be suggested. In all the affairs of life men are constantly obliged to act by others, but no [671] one would venture so to act, if the mere circumstance that he employed another to act for him about any general or particular business made him an insurer against a wrong which such person might possibly commit during the period of such employment. The law does not even put a father under such onerous responsibility in respect of torts of his minor children. But in other cases, where the relation of master and servant subsists by virtue of a contract, and the servant instead of doing that which he is employed to do does something which he is not employed to do at all, the master cannot be said to do it by his servant; and the maxim, 'Qui facit per alium facit per se,' does not apply. In other words, if the servant steps aside from his master's business for how short a time soever, to commit a wrong not connected with such business, the relation of master and servant will be taken to have been for the time suspended, and the act will not be treated as the personal act of the servant, and he alone will be responsible for it."

We think an examination of these and other authorities shows that the defendant in this case was not liable, that the motion for judgment was properly granted, and that it was error to set the same aside and grant a new trial.

The judgment of the honorable superior court is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Hadley, C. J., Rudkin, Crow, Mount, and Dunbar, JJ., concur.

The Owner of an Automobile is not, Where the Person in Charge was not using it in the course of his employment and in the owner's business, answerable for injuries inflicted by it on a person on the highway: Lotz v. Hanlon, 217 Pa. 339, 118 Am. St. Rep. 922.

The Law of the Automobiles See note to Christy v. Elliott, 108 Am. St. Rep. 212.

PEDERSON v. LEASE.

[48 Wash. 253, 93 Pac. 439.]

EXECUTIONS—Defect in not Running in Name of State.—An execution commencing, "State of Washington, Clallam County, ss: To the sheriff of Clallam County, Greeting," will not be held void, when no objection was made to the confirmation of the sale, because it does not run in the name of the state. (p. 923.)

EXECUTIONS—Doctrine of Idem Sonans.—Where one is sued as "Peter Pederson," but execution is issued against "Peter Peterson," by which latter name he is well known in the community, the case is controlled by the rule of idem sonans, and the execution sale will be upheld. (p. 923.)

EXECUTIONS.—The Fact that an Execution does not State the amount actually due and does not command the sheriff to levy on real property upon which the judgment is a lien will not invalidate the sale if no objection to confirmation was made and the purchaser has held possession and paid taxes upon the property for over twelve years. (p. 923.)

Trumbull & Trumbull, for the appellant.

A. A. Richardson, for the respondent.

254 ROOT, J. Plaintiff brought this action to quiet title to certain lots in Port Angeles, Clallam county, alleging ownership and that the real estate was unoccupied. From the judgment in defendant's favor plaintiff appeals.

It appears that plaintiff owned this property in 1895, at a time when one Fred Lease, father of respondent, obtained judgment against plaintiff in the justice court of Clallam county. The transcript of this judgment was, on the first day of June, 1895, filed and entered in the office of the clerk of the superior court of said county, and on the twenty-sixth day of July, 1895, an execution was issued out of the superior court upon said judgment, and the property in question levied upon and sold to said Fred Lease, and the sale confirmed by order of court on December 19, 1896, no exceptions or objections to the confirmation having been interposed. No redemption has been had. Fred Lease died on the twenty-sixth day of June, 1902, and it is conceded that respondent herein is his sole heir. Taxes have been paid ever since the sale by respondent and his father, a certificate having at one time been issued to appellant and redeemed by respondent.

Appellant contends that the sale of the property was void, first, because the execution did not run in the name of the

state of Washington; second, did not state the amount actually due; third, did not command the sheriff to levy upon the real property upon which the judgment is a lien; fourth, that it was not issued against the property of appellant but against that of one "Peter Peterson."

The execution complained of reads, in the commencement thereof: "State of Washington, Clallam County, ss: To the sheriff of Clallam County, Greeting." And then proceeds in the usual form followed in executions. It may be that this form is not strictly in compliance with the statute and constitution, but we are not prepared to hold that it was fatally defective; [255] and inasmuch as no objections were made to the confirmation of the sale, we cannot hold the sale void by reason of this alleged defect.

As to the error in the name of plaintiff, it appears that he was sued as "Peter Pederson," in the justice court; that he appeared in response to such name at that time, and defended the action in person, testifying therein as a witness. He consequently had personal knowledge of the entry of the judgment and that his name was misspelled in the proceedings. That another error was made in the spelling in the execution was not, in our opinion, sufficient to render the sale thereunder void. The name "Peter Pederson" is the English form of the Danish name "Peder Pederson," and we think the question is controlled by the rule of idem sonans: Schooler v. Asherst, 1 Litt. (Ky.) 216, 13 Am. Dec. 232-324, and notes. It appears from the evidence that appellant was well known in the community under the name of Peter Peterson.

The contentions that the execution does not state the amount actually due and does not command the sheriff to levy upon the "real property upon which the judgment is a lien" we cannot hold, at this late day, sufficient to invalidate the sale, no objections to the confirmation having been made and the purchaser at such sale and his successor in interest having held and paid taxes upon the property for over twelve years: Terry v. Furth, 40 Wash. 493, 82 Pac. 882.

We think the judgment and decree of the trial court should be affirmed, and it is so ordered.

Fullerton, Mount, Dunbar, and Rudkin, JJ., concur.

Hadley, C. J., and Crow, J., took no part.

The Doctrine of Idem Sonans is the subject of a note to Thornily v. Prentice, 100 Am. St. Rep. 322.

MATSON v. JOHNSON.

[48 Wash. 256, 93 Pac. 324.]

AN UNACKNOWLEDGED DEED is Good as between the parties; it conveys at least an equitable title. (p. 925.)

DEEDS.—An Actual Manual Delivery of a Deed is not essential to its execution where there is an intention on the part of the grantor to consummate the conveyance and vest title in the grantee. (pp. 925, 926.)

DEEDS—Absence of Manual Delivery.—A deed executed by a father to his minor children, during his last sickness, may be effective without manual delivery where he intends to convey the property to them. (p. 926.)

EXECUTOR'S SALE.—The Rule of Caveat Emptor applies in all its vigor to sales by executors, and purchasers acquire only the interest of the estate. (p. 926.)

S. S. Langland, for the appellants.

Willett & Willett, for the respondents.

256 RUDKIN, J. F. Lanston died testate in Kitsap county in this state on the fifteen day of June, 1902. During his last illness, and a few days before his death, he called in one of his neighbors and directed him to prepare a deed and will in order that he might execute them. A deed was accordingly prepared purporting to convey the property now in controversy to the three minors who are plaintiffs in this action. The instrument was signed by the grantor in the presence of two witnesses, but was not acknowledged because there was no officer present authorized by law to take the acknowledgment of deeds. The grantor stated to those present that he would 257 appoint Mr. Johnson as his executor, and would instruct him to have the deed acknowledged and properly executed. The property described in the deed was of the value of about one hundred dollars and was the only real property owned by the grantor. At the time of the execution of this deed, and as part of the same transaction, Lanston executed a will making various small bequests which are not material here. The following indorsement was made at the foot of the will by direction of the testator: "Ed Johnson are hereby empowered to appear for the Notary Publich to have inlaid deed executed." What disposition was made of the will and deed after their execution does not appear, but both instruments were delivered to the executor some time after Lanston's death, and were by him filed in the office of the clerk of the superior court, the will under date of June

18th and the deed on June 23d, 1902. The deed was not filed for record in the auditor's office until February 1, 1906. At the time of the execution of the deed and will Lanston was the owner of the real property described in the deed and about five hundred dollars cash in bank. The will was admitted to probate and Johnson appointed executor thereof. On the twenty-fifth day of November, 1905, the real property now in controversy was conveyed to the defendants in this action by the executor of the will, pursuant to an order of the superior court made and entered in the estate matter. The present action was instituted by the grantees named in the above deed, through their guardian ad litem, to quiet their title as against the purchasers at the executor's sale, and from a judgment in favor of the defendants, the present appeal is prosecuted.

Three questions have been presented for the consideration of this court: 1. Was the Lanston deed ineffective for lack of an acknowledgment on the part of the grantor? 2. Was there a delivery of the deed? And 3. Are the defendants bona fide purchasers?

[258] 1. An unacknowledged deed is good as between the parties in this state. Such an instrument conveyed at least an equitable title: Devlin on Deeds, 2d ed., sec. 465; Edson v. Knox, 8 Wash. 642, 36 Pac. 698; Carson v. Thompson, 10 Wash. 295, 38 Pac. 1116; Bloomingdale v. Weil, 29 Wash. 611, 70 Pac. 94.

2. Was there a delivery of the deed?

"Actual manual delivery and change of possession are not required in order to constitute an effectual delivery. But whether there has been a valid delivery or not must be decided by determining what was the intention of the grantor, and by regarding the particular circumstances of the case. Where a father had indicated in various ways that certain property should be bestowed at his death upon his infant son, and for that purpose had executed a deed, of which he, however, retained the possession, effect was given to his intention, despite the fact that there had been no manual delivery of the deed": 1 Devlin on Deeds, 2d ed., sec. 269.

In Atwood v. Atwood, 15 Wash. 285, 46 Pac. 240, this court said: "In coming to these conclusions we have not lost sight of the able argument and large array of authorities contained in the brief of appellant, to the effect that the delivery of a deed does not necessarily require any formal act on the part of the grantor; that it is often a question of intention; that a deed may become operative while the manual

possession is retained by the grantor. But in such cases, before the court can find a delivery, the intention to consummate the transaction so as to fully vest the title in the grantee must be clearly shown, and neither the findings of fact by the referee nor by the superior court, nor the evidence in the case, satisfies us that the grantor in the deed under consideration ever did anything with the intention that by doing it he had so delivered the deed as to make it presently operative."

What was lacking in the Atwood case (15 Wash. 285, 46 Pac. 240), the intention to consummate the transaction so as to fully vest the title in the grantee, was, in our opinion, clearly and unequivocally shown in this case. The will and deed were executed at the same [259] time and as a part of the same transaction. The real property was omitted from the will, no doubt advisedly, and all the surrounding circumstances show conclusively that the grantor intended to convey his real property to these minors, that the deed was executed for that purpose; and in our opinion the mere absence of an acknowledgment is not sufficient to defeat his expressed intentions.

3. The respondents were not bona fide purchasers, as that term is understood in the law. The rule of caveat emptor applies in all its vigor to sales by administrators or executors in this state, and the purchaser acquires only the interest of the estate: Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50, and cases cited.

We are therefore of opinion that the appellants have shown a clear title to the lands in controversy, as against the respondents, and the judgment of the court below is accordingly reversed, with directions to enter judgment as prayed in the complaint.

Hadley, C. J., Fullerton, and Crow, JJ., concur.

Dunbar and Root, JJ., took no part.

Actual Manual Delivery of a Deed is not absolutely necessary in order to consummate the conveyance: Fryer v. Fryer, 77 Neb. 298, 124 Am. St. Rep. 850; Atkins v. Atkins, 195 Mass. 124, 122 Am. St. Rep. 221; Rodemeier v. Brown, 169 Ill. 347, 61 Am. St. Rep. 176; and this rule would seem especially applicable where the grantees are minor children of the grantor: Blankenship v. Hall, 233 Ill. 116, 122 Am. St. Rep. 149.

STATE v. SUPERIOR COURT.

[48 Wash. 277, 93 Pac. 423.]

EMINENT DOMAIN—Insufficiency of Property Condemned.—A condemnation proceeding cannot be resisted on the ground that the rights sought are insufficient to enable the petitioner to transact its public business without using additional property belonging to the defendants. (p. 930.)

EMINENT DOMAIN—Property Subject to Condemnation.—Riparian rights and privileges appurtenant to land bordering on a navigable stream are property which may be condemned without an appropriation of the land itself. (p. 931.)

EMINENT DOMAIN—Description of Property.—If a boom company's plat is made from the government field-notes showing the stream as meandered, and the contiguous lands, it will authorize the condemnation of an unmeandered slough that extends into these lands, within the statutory requirement that the plat or survey actually shows so much of the shore line of the waters and the lands contiguous as are proposed to be appropriated. (p. 932.)

EMINENT DOMAIN—Absence of Attempt to Purchase.—One who institutes proceedings to restrain a corporation from interfering with his property cannot thereafter object to condemnation of the property by the corporation on the ground that it did not first endeavor to obtain by purchase the rights and privileges it seeks to appropriate. (p. 933.)

J. W. Robinson, for the relators.

J. B. Bridges and Ben Sheeks, for the respondents.

278 CROW, J. On March 28, 1907, the Grays Harbor Boom Company, a corporation, instituted in the superior court of Chehalis county three separate proceedings to condemn certain property rights, the first being against O. P. Burrows and wife, the second against J. O. P. Lownsdale and wife, and Ladd & Tilton, and the third against F. K. Hiscock. After preliminary decrees were entered adjudging a public use, all of the defendants, upon stipulation, applied to this court in this one proceeding for a writ of certiorari, and the writ having been issued, the decrees are now before us for final review.

The respondent, the Grays Harbor Boom Company, was incorporated under the laws of Washington in 1893, with authority to conduct a booming business in the Humptulips river and elsewhere. Within the statutory time it filed in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the Humptulips river and lands contiguous thereto as it proposed to appropriate, and without unreasonable delay proceeded to construct and operate a boom. Thereafter the relators, claiming it was interfering

with certain of their private property rights as riparian owners, instituted equitable actions to enjoin such interference. Decrees in their favor were affirmed in Burrows v. Grays Harbor Boom Co., 44 Wash. 630, 87 Pac. 937; Lownsdale v. Grays Harbor Boom Co., 44 Wash. 699, 87 Pac. 943; and Hiscock v. Grays Harbor Boom Co., 44 Wash. 699, 87 Pac. 943. Later this court, upon motion, entered orders staying enforcement of the several decrees until the respondent could institute and prosecute condemnation proceedings.

[279] The Humptulips river, which empties into Grays Harbor, is, for a distance of three miles above its mouth, subject to a tidal flow which reaches and passes the lands of relators. Within the Lownsdale lands is a navigable tide-water slough known as "Jessie's slough," connecting with the river, which the respondent has used, and is now using, in its booming operations. It alleges that its boom commences about the middle of the river near the southern boundary of Lownsdale's land, and extends northerly, occupying that portion of the stream lying between its center and the west bank; that the Jessie slough, which is not meandered, connects with the west side of the river and is practically included in the boom; that the occupancy and use of the slough is necessary for receiving, storing and sorting logs, which will interfere with its navigation; that in so using the slough it will be necessary for servants of the boom company to also use ten feet of its westerly bank by walking thereon when handling, driving, booming and sorting logs, such use of the west bank not to be exclusive, but concurrent with that of the owners of the land.

The evidence shows that, at the time of the hearing, the upper end of the boom as then constructed was immediately below the land of the relators Burrows and wife; that the United States government had granted the respondent permission to extend its boom farther up the river past the Burrows land, leaving for navigation an open channel fifty feet in width on the Hiscock or easterly side of the river; that the respondent was at the time perfecting arrangements to so extend its boom; that the purpose of such extension is to aid navigation; that heretofore logs coming down the river on freshets, in great quantities, not controlled by the respondent, would first fill the boom and then back up and fill the upper channel of the river opposite the lands of Burrows on the west and Hiscock on the east, and that the boom when extended and enlarged will avoid this difficulty, by receiving [280] all logs and timber products and permitting the eastern

channel of the river to remain open for navigation to the width of fifty feet. By these proposed extensions and improvements, respondent is endeavoring to avoid any continuance of the acts enjoined in Burrows v. Grays Harbor Boom Co., 44 Wash. 630, 87 Pac. 937, and the other cases above mentioned, and it contends that such riparian and property rights of the relators as it will hereafter need it is now seeking to condemn.

As against the relators Lownsdale and wife and Ladd & Tilton, respondent asks that it be permitted to condemn and appropriate the right to occupy with sawlogs and other timber products that portion of the river which is between its westerly bank and the boom, also to interfere with the relator's shore rights and right of access to and from their lands, and to appropriate the right to occupy the whole of the waters of the slough within their lands, together with a right of way along its westerly bank as above mentioned.

As against the relators Burrows and wife, respondent asks that it be permitted to appropriate and condemn the right to occupy with sawlogs and other timber products that portion of the Humptulips river opposite their lands, and the right to interfere by so doing with their right of navigation of that portion of the river so occupied, with their right of access to and from their lands, and with their appurtenant shore rights and privileges. As against the relator Hiscock, it asks that it be permitted to appropriate and condemn the right to occupy the waters of the river with logs and other timber products consigned to it where the river borders upon his land, and the right to interfere with his right of navigation and access to and from his lands, and his appurtenant shore rights and privileges.

The relators' first contention is that the preliminary decrees are void, or at least erroneous, for the reason that the descriptions of the property sought to be taken are too indefinite within the requirements of the eminent domain statute: [281] Bal. Code, sec. 5637 (P. C., sec. 5102). The petitions, after alleging the facts as to the present and proposed construction of the boom, further allege that the lands of the several relators are contiguous to the river. They describe the lands by reference to government surveys and public plats now of record, and then allege that it will be necessary for respondent to occupy the river and interfere with shore rights and privileges of the several relators appurtenant to said lands, as above mentioned. Respondent thus

seeks to condemn certain definite rights with which it must necessarily interfere, but asks no other property of the relators Burrows and Hiscock. In other words, it does not seek to take any of their lands by metes and bounds, but only certain private shore rights and privileges appurtenant thereto. As against the Lownsdales, it further seeks to condemn certain rights in the Jessie slough and upon its west bank, which are set forth in the petition and decree. The descriptions are sufficient to identify the property rights sought to be taken and to meet the requirements of the statute.

The relators further contend that the respondent is seeking to condemn limited rights and easements which when taken will be insufficient to enable it to transact its business as a public service corporation without using additional property of the relators not sought to be appropriated. We fail to understand how the respondents' alleged failure to condemn sufficient property for its public needs can afford the relators any ground of complaint. The record shows that the respondent is endeavoring to appropriate such property rights as it thinks it will need in its corporate business, so that it may use the same without disobeying the injunction decrees. That it might do so, the enforcement of those decrees was temporarily suspended by orders of this court, which orders of suspension will become inoperative upon the final determination of these condemnation proceedings. Respondent will then act at its peril if it interferes with any property or rights of [282] the relators protected by the injunctions, but not appropriated. The relators' rights have been heretofore adjudicated in their equitable actions, and upon the final determination of these condemnation proceedings they will be at liberty to immediately enforce and protect such of their property rights as may be thereafter illegally invaded by the respondent. The condemnation will only authorize it to use property legally appropriated.

The injunctions were granted in the equitable actions because it appeared that the respondent was taking and damaging certain private property rights of the relators without just compensation, in direct violation of section 16, article 1, of the state constitution. The respondent contends that it is now endeavoring to proceed in strict compliance with the constitution, the eminent domain statute, and the injunctive decrees, and it should be permitted to do so without being required to condemn, at the relators' instance, lands which it insists it will neither need nor use. If respondent is not

proceeding in good faith—a condition not yet appearing—the relators will be afforded ample protection when its bad faith or wrongful acts shall assume substantial form. The relators' riparian rights and interests here involved have been adjudicated to be property rights, which we now hold to be subject to condemnation for public use. This holding is in harmony with principles announced in the following cases pertaining to rights of a somewhat kindred nature: Hatch v. Tacoma etc. R. Co., 6 Wash. 1, 32 Pac. 1063; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; State v. Superior Court, 26 Wash. 278, 66 Pac. 385; Seattle Transfer Co. v. Seattle, 27 Wash. 520, 68 Pac. 90; State v. Superior Court, 30 Wash. 219, 70 Pac. 484.

Mr. Lewis, in the second edition of his work on Eminent Domain, at section 56, says: "If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, [283] it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation."

If riparian rights, right of access, right of light and air, and other kindred, intangible rights appurtenant to real estate, are property, they are certainly such property and such an interest in real estate as an owner would be entitled to alienate, thereby conveying an easement. If such rights may be conveyed, we see no reason why they may not, under the right of eminent domain, be condemned when necessary for public use, without an appropriation of the actual land itself.

The relators further contend that the respondent is not seeking to condemn the westerly bank of the river, although it will necessarily be used as a retaining wall for the boom, and that for this reason it should not be permitted to proceed unless it seeks to appropriate the bank and a portion of their lands also. The respondent insists that it does not intend to use any private property of relators in the banks of the river, that although the banks may at times hold logs in the boom, they also hold the water in the river which floats the logs;

that such use of the banks and the water is a necessary incident to the public rights of navigation to which respondent is entitled under the statutes of this state, and that it will only use the banks in the same manner that any other person will use them in navigation. As heretofore suggested, the relators will sustain no loss if the respondent fails to condemn sufficient property rights for its public use.

As to the relators Lownsdale and wife and Ladd & Tilton, it is contended that the map of location filed by the respondent [284] with the Secretary of State does not show the Jessie slough as being within the property which it then intended to appropriate, and that it cannot now condemn the same, or any rights therein. The map was made from the government field-notes taken from the office of the surveyor general. These field-notes do not, nor does the government survey, show the existence of the slough. The evidence shows that the slough was not meandered, and that the present physical location of the river itself does not exactly correspond with the government field-notes and survey which have been made for more than fifty years. Ballinger's Code, section 4379 (P. C., section 7112), requires a boom company, within ninety days after its articles of incorporation have been filed, to file in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated, such plat to be made from the records in the United States surveyor general's office of this state, or by a competent surveyor subsequent to an actual survey. This plat was made from the records in the surveyor general's office. It not only shows the stream as meandered by the original field-notes, but also shows the relators' and other lands contiguous thereto. If it be conceded that the slough is not a part of the river as meandered, and shown by the original government survey and field-notes, it is as shown by the evidence actually within the lands of Lownsdale and wife, which are included in the plat, and are therefore subject to condemnation.

The relators contend that, by these condemnation proceedings, as prosecuted, the respondent is endeavoring to entirely close the river from navigation, in violation of the statutes of the United States and the permit granted to respondent by the United States government, that the appropriation thus attempted should not be decreed by the courts of this state; and that any such judicial action would constitute an attempted grant of judicial authority to respondent, permitting

285 it to maintain a public nuisance in the navigable waters of the state. The evidence does not sustain the contention. It has been shown that the respondent by the extension of its boom now being made under permission of the United States government, will be enabled to, and will, keep open for navigation a channel fifty feet in width on the easterly side of the river, and that it is now seeking to appropriate property rights of the relators as above mentioned, to aid it in carrying out that purpose.

There is no merit in another suggestion made by the relators that the respondent cannot condemn because it did not, prior to the commencement of these proceedings, endeavor to obtain by purchase the rights and privileges it now seeks to appropriate. The evidence shows that such endeavors were made by respondent, but even though the contrary appeared, yet the position of the relators in this proceeding will not permit them to now present any such objection: State v. Superior Court, 47 Wash. 166, 91 Pac. 637.

Relators further contend that the respondent is not seeking to condemn for a public use, but for a private purpose. They base this contention on the proposition that no logging is being done upon the stream except by a certain other corporation in which the stockholders are identical with those of the respondent corporation. The evidence does not sustain this contention, which, in any event, is without merit, as shown by the opinion in State v. Superior Court, 47 Wash. 397, 92 Pac. 269, recently rendered by this court.

The relators further contend that no public necessity for the condemnation has been shown. Without discussing the evidence in detail, all of which we have carefully read and considered, we will state that it is amply sufficient to sustain the finding of the trial court that such public necessity does exist. The foregoing discussion substantially covers all controlling points presented by the relators. We will, however, 286 state that, having examined the entire record together with all the assignments of error made and discussed in the briefs, we are unable to find that the trial court has committed any prejudicial error. The judgments are affirmed.

Hadley, C. J., Mount, Root, Fullerton, Rudkin, and Dunbar, JJ., concur.

Riparian Rights Would Seem to be Property within the rule that private property cannot be condemned for public use without just compensation: Crawford Co. v. Hathaway, 67 Neb. 325, 108 Am. St. Rep. 647. That the use of land for storage basins and the improvement of

the floatability of streams is a public use within the law of eminent domain, see Potlach Lumber Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 233; Kalama Electric etc. Co. v. Kalama Driving Co., 48 Wash. 612, post, p. 948. The uses for which the power of eminent domain cannot be exercised are discussed in the note to Zircle v. Southern Ry. Co., 102 Am. St. Rep. 809.

STURGEON v. TACOMA EASTERN RAILROAD COMPANY.

[48 Wash. 366, 93 Pac. 526.]

EMPLOYERS' LIABILITY—Defective Device Intended for Other Purposes.—A railroad company with notice of a custom of brakemen to use a portion of a wood rack on a car in boarding it is bound to keep the rack reasonably safe for such use, regardless of the purpose it was originally intended to subserve. (p. 935.)

EMPLOYERS' LIABILITY.—For a Brakeman to Attempt to Board a Moving Car is not contributory negligence as a matter of law. (p. 936.)

EMPLOYERS' LIABILITY.—A Railroad Company cannot Avoid Liability by Imposing the Duty of Inspection, where its employés have no reasonable opportunity therefor, as when boarding a car on a dark morning. (p. 936.)

Burkey, O'Brien & Burkey, for the appellant.

E. M. Hayden and John A. Shackleford, for the respondent.

367 RUDKIN, J. On, and for some time prior to, the twenty-seventh day of January, 1906, the plaintiff was in the employ of the defendant as a brakeman on one of its logging trains. Between the hours of 4 and 6 o'clock of the morning of the above date, the train on which the plaintiff was employed stopped at Nelson's Siding, on the line of the defendant's road, to take up some empty cars on a side track. There was a flatcar partly loaded with wood in front of the empties which the train was about to pick up, and in order to reach the empties the engine was backed up and attached to this wood-car. The wood-car was next attached to the empties and the train drawn forward on to the main track. The empties were then kicked back on to the main track and the plaintiff turned the switch in order that the wood-car might be returned to its original position on the sidetrack. As he turned the switch the plaintiff signaled the engineer to back the train on to the siding, and, as the train approached him at a speed of from one to four miles an hour, he attempted to board the wood-car for the purpose of set-

ting the brake when the car reached its proper position on the siding, by placing his left hand and left knee on the drawhead and seizing one of the cross-pieces of the wood rack with his right hand. The cross-piece thus seized was defective and gave away. In an effort to save himself the plaintiff attempted to throw himself clear of the train, but his left foot was caught and crushed. This action was brought to recover damages for the injury thus received. At the close of the plaintiff's case the court directed a nonsuit, and from the judgment of nonsuit the present appeal is prosecuted.

Under the facts thus presented two questions arise: 1. Was there testimony tending to show negligence on the part of the respondent? And 2. Was the appellant guilty of contributory [308] negligence as a matter of law? The respondent contends that the wood rack in question was not intended for use as a ladder by trainmen in boarding cars, but there was no testimony on this point. On the other hand, trainmen of years of experience testified that it is customary, not only on respondent's road but on all railroads for brakemen to board cars such as this in the identical manner in which the appellant attempted to board the car in question. If this custom prevailed and was known to the respondent, or should have been known by the exercise of reasonable diligence, it became its duty to make its wood racks reasonably safe for the purpose for which they were habitually used, regardless of the purpose they were originally intended to subserve: Wallace v. Seaboard Air Line R. Co., 141 N. C. 646, 54 S. E. 399, 13 L. R. A., N. S., 384; Dunn v. New York etc. R. Co., 107 Fed. 666, 46 C. C. A. 546; Babcock Brothers Lumber Co. v. Johnson, 120 Ga. 1030, 48 S. E. 438.

There is some controversy between counsel with reference to the testimony relating to the condition of the cross-piece which gave way and caused the appellant's injury. While we must accept the record as certified to this court, we are satisfied that the testimony on this point was not correctly reported. Sometimes counsel and the witness are made to refer to the brake on the car and sometimes to the break in the cross-piece. To a certain extent the testimony is unintelligible, but it is apparent that some of the testimony at least referred to the break in the cross-piece on the wood rack, and that the appellant testified that the break was an old one. From the entire record the jury would have been warranted in finding that it is customary for trainmen to use the cross-pieces on the wood racks in boarding cars such as this in the manner in which the cross-piece in question was used by the

appellant; that this custom was known to the respondent; that the cross-piece or wood rack was not reasonably safe for that purpose, and that its defective and unsafe condition could [369] have been ascertained by the respondent by the exercise of reasonable diligence and proper inspection.

Was the appellant guilty of contributory negligence? The respondent contends that he was, for two reasons: First, in attempting to board a moving train in the manner in which he did; and, second, because he failed to inspect the car as required by the rules of the company. It certainly cannot be said, as a matter of law, that a brakeman is guilty of negligence if he attempts to board a moving train. The testimony shows clearly that such is the common custom, and it is perhaps not going too far to say that the existence of such a custom is a matter of common knowledge: Prosser v. Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814.

The rule of the company which imposed the duty of inspection on the appellant is as follows: "672 (a) Brakemen report to trainmaster, assistant superintendent, or superintendent, and obey the conductor, with whose duties they will become familiar and assist in performing." Other rules impose the duty of inspection on conductors, and it is contended that the above rule imposes a like duty on brakemen. It must be apparent that a brakeman on a dark morning has but little opportunity to inspect cars while engaged in the discharge of his other duties, and a railroad company cannot avoid liability to its employés by imposing upon them the duty of inspection, unless a reasonable opportunity is given for the discharge of that duty.

"A master cannot shift upon his employés his responsibility to them for injuries resulting from defects due to wear and tear, by devolving upon them the duty of inspection, unless they are given time and opportunity to make such inspection, as would reveal the defects. And this may be said to be the effect of the decisions. It is considered that such rules should receive a reasonable interpretation, and that the obligations of the servant should be determined with reference both to the character of the defect and to his ability to make an examination. Upon this basis the validity of rules or agreements of the ordinary tenor by which servants are obligated [370] to examine appliances may often be upheld. But if they are couched in terms which indicate a clear and absolute intention on the employer's part to impose a more extensive obligation upon the servant than is thus declared to

be permissible, they will be treated—by most courts at all events—as an illegal attempt to subject the latter to the duty which is incumbent upon the former, of seeing that the plant is in a reasonably safe condition": 1 Labatt on Master and Servant, p. 1178. See, also, Matchett v. Cincinnati etc. R. Co., 132 Ind. 334, 31 N. E. 792; Strong v. Iowa Central R. Co., 94 Iowa, 380, 62 N. W. 799; Holmes v. Southern Pac. R. Co., 120 Cal. 357, 52 Pac. 652.

On the entire record we are of opinion that the question of negligence on the part of the respondent and of contributory negligence on the part of the appellant should have been submitted to the jury under proper instructions, and for the court's failure so to do the judgment is reversed and a new trial ordered.

Hadley, C. J., Dunbar, and Fullerton, JJ., concur.

The Liability of an Employer to his employé for injuries resulting from defective appliances is discussed in the note to Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289. The doctrine of assumption of the risks and contributory negligence on the part of employés will be found discussed in the note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884.

DONALDSON v. WINNINGHAM.

[48 Wash. 374, 93 Pac. 534.]

GUARDIAN.—The Superior Court has Jurisdiction to Appoint guardians for insane persons wholly independent of its jurisdiction to commit to hospitals for the insane, and the validity of an order appointing a guardian depends in no manner upon the validity of the previous adjudication of insanity. (p. 938.)

JUDICIAL SALE—Direct or Collateral Attack.—Where an action is brought against the former owner to recover property or to quiet a title acquired at a judicial sale, a cross-complaint by him attacking the validity of the judgment under which the sale was made is a direct and not a collateral attack. (pp. 938, 939.)

GUARDIAN.—The Service of Notice of the Application for the Appointment of a guardian of an insane person upon him and upon the person having his custody is jurisdictional, so that in the absence thereof all subsequent proceedings are void. (p. 939.)

HOMESTEAD—Necessity of Declaration.—There is no homestead right in property acquired in Washington since the passage of the act of 1895, unless the declaration of homestead is executed and filed as therein provided. (p. 939.)

J. H. Allen and M. M. Winningham, for the appellants.

H. E. Foster, for the respondents.

[375] RUDKIN, J. The defendants acquired the property in controversy on the second day of January, 1902, and occupied the same as their home until the tenth day of January, 1905. On the latter date the defendant Maggie M. Winningham was adjudged insane by the superior court of King county and committed to the Western Washington Hospital for the Insane at Fort Steilacoom. On the second day of March, 1905, the defendant John W. Winningham was appointed guardian of the person and estate of the defendant Maggie M. Winningham, by the same court. On the eighteenth day of May, 1905, the defendant John W. Winningham, for himself and as guardian of the person and estate of his codefendant Maggie M. Winningham, conveyed the property to one William Winningham, pursuant to an order of the superior court made and entered in the guardianship matter, and William Winningham in turn conveyed to the plaintiffs. The present action was instituted by the plaintiffs to quiet their title as against the Winninghams. The court made findings and granted [376] judgment according to the prayer of the complaint, and the defendants have appealed therefrom.

The appellant Maggie M. Winningham, by cross-complaint, attacked the regularity and validity of the insanity proceedings as a result of which she was adjudged insane and committed to the hospital for the insane, the regularity and validity of the guardianship proceedings, and the regularity and validity of the order of sale, on the above grounds, and on the further ground that the property was a homestead. The respondents contend that the cross-complaint was a collateral attack on the orders or judgment in the insanity and guardianship proceedings. We may say here that the insanity proceedings have no place in this record. The superior court has jurisdiction to appoint guardians for insane persons wholly independent of its jurisdiction to commit to hospitals for the insane, and the validity of the order appointing the guardian depends in no manner upon the validity of the previous adjudication of insanity. If fraud or conspiracy were charged a different rule might apply, but no such claim is advanced here. Is this a collateral attack on the guardianship proceedings? We think it is settled by the decisions of this court that where an action is brought against the former owner, to recover property or quiet a title acquired at a

judicial sale, a cross-complaint by such former owner attacking the validity of the order or judgment under which the sale was made is a direct and not a collateral attack on such order or judgment: Christofferson v. Pfennig, 16 Wash. 491, 48 Pac. 264; Krutz v. Isaacs, 25 Wash. 566, 66 Pac. 141; Northwestern etc. Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139.

We do not mean by this that mere errors or irregularities not going to the jurisdiction of the court may be inquired into under such a cross-complaint, for these can only be corrected on a direct appeal, or in a case such as this by an appropriate proceeding instituted by the insane person within [377] one year after the disability is removed. But the jurisdiction of the court to make the order under which the sale was made may be inquired into, and the service of notice of the application for the appointment of a guardian upon the insane person, and upon the person having the care, custody and control of such insane person, as required by the act of March 16, 1903, Laws of 1903, page 242, is jurisdictional, and if no such notice was served all subsequent proceedings are null and void: State v. Superior Court, 41 Wash. 450, 83 Pac. 726.

This, in our opinion, is the only jurisdictional question raised by the cross-complaint or the offer of proof. The question of the sale of a homestead does not arise in this case. While it was held in Curry v. Wilson, 45 Wash. 19, 87 Pac. 1065, that there was no authority in law for the sale or mortgage of the homestead of an insane person in this state prior to the passage of the homestead act of March 30, 1895, Laws of 1895, page 109—and there is no pretense that the provisions of that act were complied with here—yet in the case of Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046, it was held that there is no homestead right in property acquired since the passage of the act of 1895, supra, unless the declaration of homestead is executed and filed as therein provided. The property in controversy was acquired since the passage of that act, and the appellants concede that no declaration of homestead was executed or filed. This disposes of all of the assignments of error, and for the error in excluding testimony tending to show that no notice of the application for the appointment of a guardian was given or served, the judgment is reversed and a new trial ordered.

If on a retrial it should appear that no such notice was given or served, the court will take an accounting between the parties and enter judgment quieting title in the appellants

on such terms as may be equitable. If it shall appear that [378] such notice was in fact given, judgment will go for the respondents.

Hadley, C. J., Fullerton, Dunbar, Mount, Crow and Root, JJ., concur.

When an Application is Made for the Appointment of a Guardian for an incompetent person, he must be served with notice of the time and place of hearing, in order to give the court jurisdiction. It is doubtful whether the presence of the incompetent at the hearing can supply the statutory requirement that he should be served with the notice: McGee v. Hayes, 127 Cal. 536, 78 Am. St. Rep. 57.

VAN HORN v. VAN HORN.

[48 Wash. 388, 93 Pac. 670.]

ALIMONY—Enforcement in Another State.—An order awarding temporary alimony and suit money, which is subject to modification in the discretion of the court, cannot be enforced by action in another state. (p. 942.)

William B. Allison, for the appellant.

Bamford A. Robb, for the respondent.

[388] RUDKIN, J. This action was instituted in the court below on an interlocutory order of the superior court of Alameda county, in the state of California, awarding temporary alimony and suit money to the plaintiff herein, in an action for divorce pending in that court. A demurrer interposed to the amended complaint was sustained, and the plaintiff electing to stand on her complaint and refusing to plead further, a [389] judgment of dismissal was entered. From that judgment the present appeal is prosecuted.

The order on which the action is based was made under section 137 of the Civil Code of California, which reads as follows: "When an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself and her children, or prosecute or defend the action."

The authorities very generally agree that an action will not lie in another court or in the courts of another state on an order or judgment such as this: Baugh v. Baugh, 4 Bibb. (Ky.) 556; Ledyard v. Brown, 39 Tex. 402; Vine v. Vine,

21 R. I. 190, 42 Atl. 871; Cutler v. Cutler, 88 Ill. App. 464; Webb v. Buckelew, 82 N. Y. 555; Lynde v. Lynde, 162 N. Y. 405, 76 Am. St. Rep. 332, 56 N. E. 979, 48 L. R. A. 679, 181 U. S. 183, 21 Sup. Ct. Rep. 555, 45 L. ed. 810; Freund v. Freund (N. J.), 63 Atl. 756; Israel v. Israel, 148 Fed. 576; Hunt v. Monroe, 32 Utah, 428, 91 Pac. 269, 1 L. R. A., N. S., 249; Sistare v. Sistare, 80 Conn. 1, ante, p. 102, 66 Atl. 772; Geisler v. Geisler, 30 Ky. Law. Rep. 430, 98 S. W. 1023; Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351.

The reason for the rule is thus stated in Israel v. Israel, 148 Fed. 576: "The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. The peculiar character of the obligation is such that it is always subject to modification by the court in which the decree was entered according to the varying circumstances of the parties, and no other court could undertake to administer the relief to which the parties are entitled except that having jurisdiction in the original suit. An attempt to do so by such other court would bring about a conflict of authority and a condition of chaos with reference to questions of this character, because no other court would have before it the facts with reference to such [390] change in conditions and as to such original right of the parties": Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351.

Without questioning the rule announced in these cases, counsel for the appellant earnestly insists that the order in question is a final one under the decisions of the supreme court of the state of California, and must be so considered here. In support of this contention he cites: Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; Hite v. Hite, 124 Cal. 389, 71 Am. St. Rep. 82, 57 Pac. 227, 45 L. R. A. 793; Baker v. Baker, 136 Cal. 302, 68 Pac. 971.

While the supreme court of California holds in the cases cited that an order such as this is a final order from which an appeal will lie under its statutes, it does not hold, and has not held to our knowledge, that such an order is not subject to change or modification in the discretion of the court in which it was made, and this is the principal objection to permitting an action to be maintained on such an order in another jurisdiction. It is a significant fact that while the supreme court of California cites Lochnane v. Lochnane, 78

Ky. 467, and Blake v. Blake, 80 Ill. 523, in support of the right of appeal in the Sharon case, the courts of both of these states hold that an action will not lie on such an order: Cutler v. Cutler, 88 Ill. App. 464, and Geisler v. Geisler, 30 Ky. Law. Rep. 430, 98 S. W. 1023.

Finding no error in the record, the judgment is affirmed.

Hadley, C. J., Fullerton, Mount, Crow and Dunbar, JJ., concur.

A Decree for the Payment of Future Alimony or Maintenance which is inconclusive in its character by reason of the reservation to the court which made it of the unrestricted right to change or annul it at discretion, and which is not enforceable in the state of its origin otherwise than by special processes exclusive of execution, and of judgment thereon and execution, is not one creating such a debt of record as will entitle it to or justify extraterritorial enforcement: Sistare v. Sistare, 80 Conn. 1, ante, p. 102, and see authorities cited in the cross-reference note thereto.

NICHOLS v. DOAK.

[48 Wash. 457, 93 Pac. 919.]

BANKRUPTCY—Conclusiveness of Recital of Fraud in Judgment.—Recitals in a judgment that recovery against the defendant was because of fraud in obtaining goods and failing to return them is conclusive on that point in subsequent proceedings by him to restrain an execution sale, on the ground that the judgment has been satisfied by his discharge in bankruptcy. (p. 944.)

BANKRUPTCY—Judgment of Fraud in Obtaining Goods.—Where a judgment against a bankrupt recites that recovery was because of his fraud in obtaining goods, and orders a recovery of damages on account of the fraud, it will be presumed on collateral attack that the court found that a return of the property was impossible or impracticable, and, the judgment will not be held defective in form because not in the alternative. (p. 944.)

BANKRUPTCY.—A Judgment for Damages Because of Fraud in obtaining goods is not affected by bankruptcy proceedings, and becomes a lien on the property thereafter acquired by the bankrupt. (p. 945.)

James Dawson and R. E. Porterfield, for the appellant.

Samuel R. Stern, for the respondents.

458 HADLEY C. J. This is an action to enjoin the sheriff of Spokane county from selling certain real estate under execution. In two previous causes in the superior court of Spokane county, in each of which the plaintiff in this action

was the defendant, judgment were rendered against him as such defendant. Thereafter he was adjudged a bankrupt, and was discharged as such. Following the date of his said discharge he inherited from his mother the real estate above mentioned. The judgments have never been paid. The holders of them in no way participated in the bankruptcy proceedings, and unless the discharge in bankruptcy had the legal effect to satisfy the judgments, they are upon their face liens upon the real estate. Proceeding upon the theory that the judgments are liens, the holders of them caused executions to issue, and directed the sheriff to levy upon said land and sell it to satisfy the judgments. This the sheriff was about to do when the judgment debtor brought actions to enjoin the sale, and incidentally to have the judgments canceled. The two actions were heard together, with the same testimony applying to each, and the court denied the relief asked in each case. Judgment was entered dismissing the actions, and the plaintiff has appealed from both judgments.

The two cases will be treated on appeal as a consolidated cause, as they were treated by the trial court. Appellant contends that his discharge in bankruptcy had the effect to satisfy the judgments and that they do not now constitute enforceable liens. Respondents, upon the other hand, maintain that the judgments were taken against appellant because of his fraud in obtaining certain property, and that by the terms [459] of section 17 of the bankruptcy act, appellant's discharge in bankruptcy did not release him from judgments or liabilities of that character. Appellant assigns as error the refusal of the court to permit him, at the trial of this cause, to introduce testimony to show that he did not fraudulently obtain and retain the goods for which said former suits were brought. The judgments themselves were in evidence, and they recited that the recovery against appellant was because of fraud in obtaining goods and the failure to return them, as alleged in the complaint. We think these recitals were conclusive against appellant. The judgment had stood for years unattacked by appeal or otherwise. To have admitted the testimony offered would have allowed the contradiction of the terms of the judgments, and would have permitted in this action a trial of the former actions upon their merits. Such would have amounted to a collateral attack on the judgments. The relief sought was the restraint of execution sales, and in order to effect that end, it was sought by the testimony to impeach the judgments which supported the executions in

a particular wherein they were fair upon their face. It was not error to reject the testimony.

It is further contended, however, that the judgments were void for lack of jurisdiction, it being urged that there was no service of process upon appellant and no authorized appearance in his behalf. The court found in this action that service was made upon this appellant as a defendant in the former actions; that the complaint and summons and the affidavit and bond for the return of the property were served upon him, and that he thereafter duly appeared in the actions by Henley, Kellam & Lindsley, his attorneys; that said firm of attorneys, in pursuance of being retained by appellant to defend in said causes, filed motions to make the complaints more definite and certain, which motions were denied by the court; that they also made motion to strike certain interrogatories which had been filed, and thereafter admitted service [460] of notes of issue of said motions; that motions for default on account of failure to further appear and plead in the actions were made, and service thereof admitted by said attorneys; that said attorneys appeared no further in the actions because of a direction to that effect given to them by appellant. We think the above findings are all justified by the evidence. Particularly do we think the finding with reference to the authoritative appearance of appellant through counsel is abundantly supported by the testimony. The court, therefore, had jurisdiction of the person of appellant in the actions, and inasmuch as it had undoubted jurisdiction of the subject matter, it was authorized to proceed, and the judgments are not void.

Objection is made to the sufficiency of the form of the judgments entered in the former actions. The judgments definitely recited that it appeared from proof adduced to the satisfaction of the court that the defendant, this appellant, was guilty of false and fraudulent representations in the procurement of the goods described, and that the title never passed to him as against the plaintiffs in this action. It was ordered that the plaintiff should recover specified amounts of damages on account of the fraud and the failure to return the property. The judgments are not in the best form with respect to the alternative feature of requiring the return of the property or the recovery of damages. But in this hearing they are entitled to full credit, and it should be presumed that the court must have found the return of the property impossible or impracticable and therefore entered its judgments for damages.

It follows from what has been said that the judgments are liens upon appellant's real estate, unless they have been discharged from the bankruptcy proceedings. Section 17 of the bankruptcy act provides, among other things, as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as are judgments in actions for frauds, or obtaining property by false [461] pretenses or false representations": 30 U. S. Stats. at Large, p. 550, sec. 17.

It is manifest that these judgments come within the above exception, and that they were not affected by the bankruptcy proceedings. They were in full force when appellant acquired the land in question, and they became liens thereon. The court did not err in refusing to enjoin the execution sales, and the judgment is affirmed.

Fullerton, Mount, Crow, Dunbar, and Root, JJ., concur.

As to What Judgments are Immune from Discharge in Bankruptcy because founded on torts, see Bond v. Milliken, 134 Iowa, 447, 120 Am. St. Rep. 440; Colwell v. Tinker, 169 N. Y. 531, 98 Am. St. Rep. 587; McDonald v. Brown, 23 R. I. 546, 91 Am. St. Rep. 659; Berry v. Jackson, 115 Ga. 196, 90 Am. St. Rep. 102.

THOMAS v. SEATTLE BREWING AND MALTING COMPANY.

[48 Wash. 560, 94 Pac. 116.]

CHATTEL MORTGAGE—Discharge by Tender.—The tender of the amount due under a chattel mortgage prior to foreclosure discharges the lien. (p. 946.)

CHATTEL MORTGAGE—Tender of Amount Due.—Where goods are sold under a chattel mortgage after tender of the amount due, they may be recovered in replevin, although the tender was not kept good nor the money brought into court. (p. 947.)

CHATTEL MORTGAGE.—A Tender of the Amount Due under a chattel mortgage, in order to discharge the lien, must be fairly made and intentionally refused. (p. 947.)

CHATTEL MORTGAGE—A Tender of the Amount Due on a Chattel Mortgage may be made by a person to whom the mortgagor has sold the property. (p. 947.)

Moore & Park, for the appellant.

Wilson R. Gay, for the respondent.

[562] RUDKIN, J. On the fifth day of March, 1904, W. M. Hart mortgaged certain personal property to the Seattle

Brewing and Malting Company, to secure the payment of the sum of one thousand dollars, payable in installments of fifty dollars per month. Hart made default in his payments, and the mortgagee proceeded to foreclose its mortgage by notice and sale under Ballinger's Code, section 5870 et seq. (P. C., sec. 6536). The date of sale was fixed for January 8, 1907. On the day preceding, Hart transferred the mortgaged property, or at least the greater portion of it, to the plaintiff in this action. On the eighth day of January, and prior to the sale, the full amount of the mortgage debt, with interest and accrued costs, was tendered to the sheriff and mortgagee, but the tender was refused and the property was thereafter sold and bid in by the defendant brewing company. This action was thereupon brought in claim and delivery, against the sheriff and the purchaser, for a return of the property and damages, or for judgment for the value in case a return could not be had. From a judgment in favor of the plaintiff, the defendants have appealed, and the following questions are presented for the consideration of this court: 1. Does a tender of the amount due under a chattel mortgage before sale discharge the mortgage lien? 2. If so, in an action of claim and delivery to recover the mortgaged property, must the tender be kept good? And 3. Was a sufficient tender shown in this case?

"At common law a tender of the mortgage debt on the law-day satisfies the condition of the mortgage, and discharges [563] the property from the encumbrance as effectually as payment; but the debt remains, and its payment may be enforced by an action at law against the mortgagor. And in pleading a tender on the law-day in discharge of the condition of the mortgage, the mortgagor is not required to allege continued readiness to pay, nor need he bring the money into court. The tender, when made, discharges the encumbrance, not conditionally, but absolutely and forever": Mitchell v. Roberts, 5 McCrary, 425, 17 Fed. 776. See, also, Jones on Mortgages, 6th ed., sec. 891; Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145; Moore v. Norman, 43 Minn. 428, 19 Am. St. Rep. 247, 45 N. W. 857, 9 L. R. A. 55.

This was the established rule at common law when tender was made on the law-day, and also in case of pledges of personal property where title did not pass until after sale. In the states where both real and chattel mortgages have been converted into mere liens, it has very generally been held that a tender at any time before foreclosure and sale has the same effect as a tender on law-day at common law, and there

would seem to be no sound reason why the rule should be otherwise: Bartel v. Lope, 6 Or. 321; Moynahan v. Moore, 9 Mich. 9, 77 Am. Dec. 468; Flanders v. Chamberlain, 24 Mich. 306; Loughborough v. McNevin, 74 Cal. 250, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773. Nor is it necessary that the tender should be kept good or the money brought into court: Moore v. Norman, 43 Minn. 428, 19 Am. St. Rep. 247, 45 N. W. 857, 9 L. R. A. 55; Flanders v. Chamberlain, 24 Mich. 305; Mitchell v. Roberts, 5 McCrary, 425, 17 Fed. 776. In Weeks v. Baker, 152 Mass. 20, 24 N. E. 905, the court said: "We have been referred to no precedent for holding, in accordance with the defendant's contention, that a plaintiff, before bringing his suit, should carry into court the money tendered or that, having brought a suit which he had a right to bring, his right to maintain it will be forfeited unless he makes profert of money at the time of entering his writ. The rights of the parties to an action are ordinarily to be determined as of the time of bringing the suit. This is always so unless something that has afterward occurred which may properly be pleaded is shown in defence."

564 In order that a tender may have the effect of discharging a mortgage lien, the proof must be clear that the tender was fairly made and deliberately and intentionally refused by the owner of the mortgage or some person duly authorized to act for him. In this case the fact and sufficiency of the tender are conceded in so far as the amount is concerned, but it is contended that the tender was not made by the mortgagor, and that the rights of the parties who made the tender were not disclosed or made known to the officer of the mortgagee. But the jury were fully and fairly instructed on this point, and we are not disposed to interfere with their verdict.

The judgment of the court below is therefore affirmed.

Hadley, C. J., Crow, and Dunbar, JJ., concur.

Root, J., dissents.

MOUNT, J., Dissenting. I think there was no proper tender made prior to the sale, and therefore dissent.

Fullerton, J., concurs with Mount J.

The Lien of a Chattel Mortgage is devested by a tender of the amount due: Knox v. Williams, 24 Neb. 630, 8 Am. St. Rep. 220; and it is perhaps not necessary that the tender, to be availing, should thereafter be kept good: Moore v. Norman, 43 Minn. 428, 19 Am. St. Rep. 247; Andrews v. Hoeslich, 47 Wash. 220, ante, p. 896.

KALAMA ELECTRIC LIGHT AND POWER COMPANY v. KALAMA DRIVING COMPANY.

[48 Wash. 612, 94 Pac. 469.]

RIPARIAN RIGHTS—Enjoining Log-driving Company.—A riparian proprietor may enjoin log-driving companies from retarding the flow of water in order to create artificial freshets for floating logs, where such interruption in the natural flow of the stream deprives him of water with which to operate his electric plant. (p. 952.)

EMINENT DOMAIN—Floatage of Logs as Public Use.—The right of log-driving companies to erect splash dams in a stream to create artificial freshets, thereby injuring the property and shore rights of riparian owners, may be acquired by condemnation proceedings under the power of eminent domain. (p. 953.)

Coovert & Stapleton, for the appellant.

A. L. Miller and W. F. Magill, for the respondent.

612 CROW, J. This action was commenced by the Kalama Light and Power Company, a corporation, against the Kalama Driving Company, a corporation, to enjoin the defendant from interfering with the natural flow of the waters of the Kalama river. An agreed statement of facts was filed, upon 613 which the trial court made findings and entered a decree enjoining and restraining the defendant from interfering with the usual and natural flow of water in the Kalama river through, upon and by the plaintiff's land, and from using artificial dams for storing water and creating artificial freshets. The defendant has appealed.

The only question presented is whether this decree is supported by the findings. The findings of fact material to this question, in substance, show that the respondent, Kalama Light and Power Company, is a corporation organized under the laws of this state for the purpose of manufacturing and dealing in electric light and power; that it owns real estate on which its electric power plant, headgates, flumes and other structures are located; that the Kalama river, which passes over and through its lands, and from which it takes water for power purposes, is a swift, mountainous stream about sixty miles in length of sufficient width, depth and capacity to be floatable for logs and other timber products during natural annual freshets of the fall, winter and spring; that respondent's intake and headgates are located at low-water mark; that the river at all seasons, by its natural flow, furnishes water in sufficient quantities for the operation of the light

and power plant; that after diverting the water through the intake and flumes, the respondent returns it to the bed of the river, on its own premises; that respondent's plant is extensive and valuable, furnishing light and power to inhabitants of Kalama and Woodland; that the Kalama Driving Company is organized for the purpose of clearing and improving navigable streams, especially the Kalama river, and driving, sorting and delivering timber products; that it has complied with all the requirements of the laws of this state under which it is incorporated; that after respondent had installed its light and power plant and had appropriated water for power, the appellant entered upon the river and commenced to improve the same by removing boulders, timbers and other obstructions, [614] by building wing dams, splash dams and other structures, by creating artificial freshets upon which to drive logs, during seasons when they could not be driven for the want of natural freshets; that an enormous amount of timber tributary to the river can be profitably driven to market upon the streams, but that all of it cannot be transported on the natural freshets, or without the aid of artificial freshets; that the appellant, in conducting its business as a driving company, is about to construct a large splash dam, one-half mile above respondent's light and power plant, intending thereby to collect and store water for creating artificial freshets at seasons when no natural freshets occur; that at all times when the water is being collected by this dam, its flow past respondent's land will temporarily cease; that it will require at least nine hours to collect and store the water each time the dam is closed, which will be a number of times each week; that while the dam is thus closed, the respondent's plant will be compelled to remain idle for want of sufficient water to create power; that respondent is a riparian owner of land abutting upon the stream, being the land upon which its plant is located, and that it will be irreparably damaged if the appellant is permitted to continue its interference with the natural flow of the water.

The Kalama river is a navigable stream, being useful for the profitable floating of timber products at seasons when natural freshets occur. The appellant has, under the laws of this state, authority to improve the river, to clear it from obstructions, to construct wing dams, splash dams and other improvements, and to collect and store water for artificial freshets thereby extending the navigability of the stream for driving purposes. Appellant contends that in making such

improvements, it has the right to retard the natural flow of the water whenever necessary for the creation of artificial freshets, and to do so without interference from the respondent. It insists that the state itself has the right, in the absence of congressional interference or control, to improve all navigable [615] streams for the purpose of securing better transportation facilities to the public; that it may do so without interference or protest from riparian owners whose land is not actually taken, destroyed or submerged; that when it, by statute, authorized appellant and kindred corporations to make such improvements, it delegated its own power and authority to them; that such delegation of authority is valid; that floatable streams are navigable public highways, and that the statutory right of driving companies to erect dams and other improvements, and to create artificial freshets on such floatable streams, thereby improving and extending their navigability for public use, has been sustained by this court; citing East Hoquiam Boom & Logging Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001; Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; Lownsdale v. Grays Harbor Boom Co., 36 Wash. 198, 78 Pac. 904; Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807.

Having made the above contention, the appellant further insists that, as long as it does not trespass upon or take physical possession of respondent's lands, does not flood or destroy any portion thereof, and is not guilty of negligence while driving timber products or creating artificial freshets, but confines its operations to the bed of the river, it will not be unlawfully interfering with any of respondent's riparian rights. In effect, it contends that any incidental damage resulting to respondent from its operations upon the river will be damnum absque injuria. In support of these contentions appellant cites numerous authorities, including the following cases from the states of Wisconsin, Maine and Oregon, upon which it predicates its principal arguments: Falls Mfg. Co. v. Oconto River Imp. Co., 87 Wis. 134, 58 N. W. 257; Black River Imp. Co. v. La Crosse Booming & Transp. Co., 54 Wis. 659, 41 Am. Rep. 66, 11 N. W. 443; Cohn v. Wausau Boom Co. 47 Wis. 314, 2 N. W. 546; Brooks v. Cedar Brook & S. C. R. Imp. Co., 82 Me. 17, 17 Am. St. Rep. 459, 19 Atl. 87, 7 [616] L. R. A. 460; Weise v. Smith, 3 Or. 445, 8 Am. Rep. 621; Felger v. Robinson, 3 Or. 455. These authorities, which to some extent sustain appellant's position, cannot be followed or approved by us if we are to continue in harmony with our previous holdings in Washington cases hereinafter mentioned.

The respondent, being a riparian owner upon the Kalama river, has, as such, valuable property rights which cannot be taken or damaged for the public use without compensation. One of these is its right to a continuance of the natural and ordinary flow of the water over, across, and past its lands: Gould on Waters, 3d ed., sec. 204. This riparian right, guaranteed by the common law, has been repeatedly recognized and protected by this court. In Monroe Mill Co. v. Menzel, 35 Wash. 487, 102 Am. St. Rep. 905, 77 Pac. 813, 70 L. R. A. 272, we said: "It being established that the stream is a navigable one, and that appellant shall not interfere with respondent's navigation of it, we must next inquire as to the methods and limitations of that navigation. The court refused to grant appellant an injunction preventing respondent from continuing the storage of water in Lake Roesiger, and the periodic flushing of the stream. We think this was error. Under well-established principles, appellant is entitled to the natural flow of the water across his land: Crook v. Hewitt, 4 Wash. 749, 31 Pac. 28; Rigney v. Tacoma Light & W. Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190. It is said that, although language used in the above cases declares the general principle, yet there was an actual threatened diversion of a substantial portion of the water in each case, while, in the case at bar there is no diversion, but simply a detention, followed by a restoration of all the water before it reaches appellant's lands. This detention, however, amounts practically to a total detention for irregular periods, and at times unknown to appellant, without warning, it is released in such quantities as to greatly increase the natural flow and, according to testimony in the record, actually causes an overflow of his lands."

In this case damages sustained by the respondent do not result from irregular and unexpected freshets created by the 617 sudden release of water through splash dams, but they are caused by an interruption of the natural flow of the river, depriving respondent of necessary water which, as a riparian owner, it is entitled to use in producing electric power. In Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 Pac. 1046, we said: "The next contention is that the court erred in enjoining the appellant from floating logs down the stream by means of artificial freshets and splashes. The argument is that the stream is a navigable one, and that it has the right to use it for the purpose of floating logs, and is liable only for a misuse or abuse of the privilege, and that the evidence

fails to show that there was any abuse or misuse in the present case. The stream in question is undoubtedly navigable for floating logs for a part of the year, and during that time the appellant, as well as others, may use it for that purpose. But that is not the case before us. The appellant was not attempting to float logs during the navigable season of the year, but was attempting to do so when the stream in its natural state would not float them. It sought to remedy this by creating unnatural conditions—by the creation of artificial freshets—which conditions damaged and destroyed the respondent's property. This was an abuse of the right of navigation, and for that an injunction would properly lie": See, also, White v. Codd, 39 Wash. 14, 80 Pac. 836.

The storing of water by the appellant's splash dams will so frequently and continuously retard the natural flow of the stream as to seriously interfere with and damage valuable riparian rights of the respondent. The operation of its light and power plant will be entirely obstructed while the water is being detained and stored by the dam. We are therefore compelled to hold that the appellant cannot thus damage or interfere with respondent's riparian rights, which are property rights, without first making full compensation. The power of appropriation by condemnation has been conferred upon appellant so that it may, by an exercise of the right of eminent domain, take or damage the property and shore rights of riparian owners in a lawful manner, making full compensation [618] therefor. The legislature, in conferring authority to improve the river and create artificial freshets, did not delegate to appellant the right to take or damage the respondent's property and shore rights without compensation. Any statute having such a purpose in contemplation would be in contravention of article 1, section 16, of the state constitution and void. That the legislature never intended to violate the constitution by attempting to confer such authority is disclosed by Ballinger's Code, section 4388 (P. C., sec. 7121), which authorizes driving companies to appropriate, in proper condemnation proceedings, such property and shore rights of riparian owners, as it may need for its use as a public service corporation. The recent case of Kamm v. Normand, 50 Or. 9, 91 Pac. 448, 11 L. R. A., N. S., 290, is directly in point on the question of law here involved. In that case the supreme court of Oregon uses the following language: "Nor can a stream, navigable in its natural condition at certain stages of the water, be made so at other times by artificial means, such as flooding and the like. No one has a

right to store water, and then suddenly release the accumulation, and thus increase the natural volume of the stream, and overflow, injure or wash the adjoining banks, or otherwise interfere with the rights of riparian owners. The riparian proprietor is entitled to the enjoyment of the natural flow of the stream with no burden or hindrance imposed by artificial means."

In support of the above statement, the court cites and discusses a number of authorities, including Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 Pac. 1046, and Monroe Mill Co. v. Menzel, 35 Wash. 487, 102 Am. St. Rep. 905, 77 Pac. 813, 70 L. R. A. 272, decided by this court. It also distinguishes cases from Maine, Minnesota and Wisconsin some of which are cited by appellant.

The recent case of Burrows v. Grays Harbor Boom Co., 44 Wash. 630, 87 Pac. 937, is in direct harmony with the views herein expressed. In State v. Superior Court, 48 Wash. 286, 93 Pac. 426, we, in certiorari proceedings, afterward sustained the holding of the trial judge that an appropriation of the right to erect splash dams and [619] create artificial freshets past lands of a riparian owner was an appropriation of private property for public use. There is no doubt but that all the rights and powers for which appellant contends have been conferred on it by statute, subject, however, to the condition that in the exercise of such rights and powers it cannot damage or take any of the property of riparian owners. If it wishes to damage or take such riparian rights for the public use, it is entitled to do so under an exercise of the power of eminent domain, unless such rights have been devoted to a prior public use.

The judgment is affirmed.

Hadley, C. J., Mount and Fullerton, JJ. concur.

Dunbar and Root, JJ., took no part.

A Stream may be Used in a Proper and Reasonable Manner for Floating Logs, although such use may interfere with other uses of the water by lower or adjacent proprietors; but if one exercises the right to float logs in an unwarranted and unreasonable manner, he will be answerable for resulting damages: See Pickens v. Coal River Boom etc. Co., 51 W. Va. 445, 90 Am. St. Rep. 819, and cases cited in the cross-reference note thereto.

The Right to Use a Stream for Navigation in Floating Timber extends only to the bed thereof, and not to a use or an appropriation of the banks: Smith v. Atkins, 110 Ky. 119, 96 Am. St. Rep. 424; Monroe Mill Co. v. Menzel, 35 Wash. 487, 102 Am. St. Rep. 905; Martin v. District Court, 37 Colo. 110, 123 Am. St. Rep. 262.

CASES

IN THE

SUPREME COURT

OF

WEST VIRGINIA.

HUNTINGTON EASY PAYMENT COMPANY v. PARSONS.

[62 W. Va. 26, 57 S. E. 253.]

LANDLORD AND TENANT—Breach by Landlord—Measure of Damages.—If a lessor fails to give possession at the commencement of the term, the measure of damages is founded upon equitable considerations, and the lessor can recover only such damages as have directly and necessarily been caused by the defendant's wrongful act, and if the plaintiff by reasonable exertion on his part, could have prevented such damages, he is bound to do so, and, failing in this, he cannot recover them. (p. 958.)

LANDLORD AND TENANT—Waiver.—Acceptance of the Leased Property After the Time When the Landlord was Bound to Deliver Possession under the terms of the lease is no waiver of the tenant's right to damages suffered by him prior to the acceptance. (p. 958.)

LANDLORD AND TENANT—Breach by Landlord—Tender of Possession—Damages.—If a tender of leased property is made by a landlord to his tenant a short time after the tenant was entitled to possession, he can recover damages only for the time he was kept out of possession, if, at the time of the tender he was in a position to accept it. (p. 958.)

DAMAGES—Burden of Proof to Mitigate.—The burden of proving omission of duty, on the part of the plaintiff, to mitigate the damages, rests upon the defendant. (p. 960.)

DAMAGES—Mitigation—Burden and Sufficiency of Proof.—Evidence offered to establish a defense, operating to mitigate damages, must tend to prove all the essential facts, or it is properly excluded. (p. 960.)

Vinson & Thompson, for the plaintiff in error.

G. J. McComas, for the defendant in error.

[27] POFFENBARGER, J. For damages, general and special, for breach of a covenant in a lease of business rooms, for the period of five years, the Huntington Easy Payment Company obtained a verdict in the circuit court of Cabell county, against W. E. Parsons and Harriett Parsons, his wife, for the sum of $1,200. Under the impression that an

error had been committed in respect to three items of special damages, namely, $200 for goods damaged, $80 for removing goods from one place to another in Huntington, and $16.75 for loss of time by employés, due to the greater time required for removing to Eighth avenue than would have been required for removal to the leased premises, the court, on a motion to set aside the verdict, reduced it to the extent of the aggregate of said three items, overruled the motion as to the residue of the verdict, and rendered judgment thereon for $903.25, to which the defendants obtained a writ of error.

[28] The contract of lease made on the twenty-fifth day of June, 1903, leased the property for the term of sixty months, in consideration of $75 a month. It contained the following clause: "It is further covenanted and agreed by said parties of the first part that at the signing and ensealing of these presents the said parties of the first part shall give immediate notice to E. W. Chase to vacate said room and obtain possession thereof as soon as possible, not later than the fourteenth day of September, 1903, and the rent for said premises not to commence until the possession thereof is delivered to said party of the second part." The lessee did not obtain possession of the property within the time stipulated. Chase did not vacate the premises until the fourteenth day of December, 1903. A dispute arose between him and the lessor as to whether his contract was one of rental by the month or by the year. The evidence discloses that the lessors demanded of him the premises, but instituted no proceedings for ousting him. After the institution of this action and Chase's vacation of the premises, possession thereof was tendered to the lessee, but it declined to accept the same, and also refused a tender of the one month's rent which had been paid in advance. This occurred late in December, 1903, or very early in January, 1904.

The nature and extent of damages sued for are very fully disclosed by the bill of particulars, filed with the declaration which, in all material respects, reads as follows:

"Difference between value of the lease for the term of five years in excess of the contract price, 60 months at $50.00.....	$3,000.00
Extra expense of moving stock of goods from Third Avenue, between 10th and 11th streets of Huntington, to 8th Avenue, rather moving to building leased.....	150.00
Cost of removing stock back to Third Avenue....	80.00

Value of time of managers and employés, lost by reason of the greater time it took to remove stock to 8th Avenue, than required to remove it to the house contracted for	16.75
Loss on sales of articles forced to be sold at a reduced price by reason of location of stock on 8th Avenue	2,701.50
[29] Value of articles destroyed by sleet on night of removal for want of room to put them inside	200.00
Loss resulting from decrease of volume of business	3,774.50
Rent paid in advance not returned and with interest	77.75"

The instructions given by the court are not complained of. The principal contention is that the verdict is contrary to the instructions, as well as to the law which determines the measure of damages. For the plaintiff in error, it is argued that, as in January, 1904, less than four months from the date on which the lessee was, by the terms of the contract, entitled to the possession, a tender thereof was made, there was no right to recover for the whole term of sixty months, but only for such portion of the term as had been lost; and, assuming that the value of the premises, according to the testimony, was $150 a month, instead of $75, the difference of $75 for the four months would be the utmost amount that could have been recovered, on account of general damages for breach of the contract. On the other hand, for the defendant in error, the right to recover, as general damages, for the whole period of sixty months, the difference between the rent agreed to be paid and the actual rental value of the property, is insisted upon. Both parties rely upon the rule declared in Robrecht v. Marling's Admr., 29 W. Va. 765, 2 S. E. 827, and stated in point 4 of the syllabus as follows: "In an action of damage for the failure of the landlord to give possession of property, which has been leased, or from which he has ejected the tenant, where the gist of the action is the deprivation of the benefit of the lease, whether the action be covenant or tort the general rule is, that the plaintiff is entitled as the measure of his damages to the difference between the rent reserved and the value of the premises for the term. He may also recover such special damages as have been directly and necessarily occasioned by the defendant's wrongful act or default but cannot recover what he might have made on the premises during the lease, nor for loss sus-

tained by the selling of his stock, agricultural implements, etc., for less than their value."

Measure of damages, the rule underlying the matter in controversy must not be confused with the legal principles which determine the right to possession of the premises and the right to recover damages for breach of the contract. [30] Failure of the lessor to give possession, or eviction of the lessee after he has taken possession, confers upon the latter the right to treat the contract as rescinded and refuse to take the premises or pay the rent. The lessor's breach unless waived in some way, will defeat any remedy he may invoke for the enforcement of his contract. But the lessee is not bound to take possession. He may stand upon his contract and recover damages for the breach. He may demand so much of the land, or all of it, for so much of the term as the lessor is able to yield to him, and damages for what he has not or cannot give. He has a right of election. He cannot be compelled to take and pay for less than he contracted for, but he may take less, if he sees fit to do so, and recover damages by way of compensation for what he cannot get. Here, rigid, positive legal principles govern. The right of action and title to damages are fixed by law and are not subject to the control of courts and juries. But the measure of damages in such a case, the amount of the recovery, is quite another matter. Equitable considerations enter into it, although the right of recovery is founded in the law and the remedy is a legal one. The amount to be recovered must be proportionate to the extent of the injury, and, when the injured party has failed or refused to lessen his injury by such prudent action and reasonable exertion as were in his power, recovery will be denied to him to the extent of his failure of duty. This is a general rule, applicable, when the circumstances warrant it, on the adjustment of a great many classes of demands: Sutherland on Damages, sec. 88. This author says: "The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or willfulness he allows the damage to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him." It is applicable between vendor and vendee and lessor and lessee: Sutherland on Damages, secs. 89, 90. This court recognizes and enforces the principle: Griffith v. Blackwater Boom & Lumber Co., 55 W. Va. 604, 48 S. E. 442, 69 L. R. A. 124;

Hurxthal v. St. Lawrence Boom Co., 53 W. Va. 87, 97 Am. St. Rep. 954, 44 S. E. 520. There are some exceptions to, and qualifications of, the rule, but it operates in the determination of [31] the amount of the recovery for general damages for breach of a contract of lease: Adair v. Bogle, 20 Iowa, 238, the opinion in which was written by Judge Dillon, and is quoted with approval by this court in Robrecht v. Marling's Admr., 29 W. Va. 765, 2 S. E. 827, cited. This eminent jurist said: "Two principles should, in cases like the present, be impressed upon juries: 1. The plaintiff should recover only such damages as have directly and necessarily been occasioned by the defendant's wrongful act or default; and 2. That if the plaintiff by reasonable exertions or care on his part could have prevented such damages, he is bound to do so; and so far as he could have thus prevented them, he cannot recover therefor. The injured party is entitled to recover only such sum as will make him whole. This he is entitled to recover, so far as his injury has been the direct or natural cause of the wrongful act of the other party."

To have obtained the benefit of its entire contract for sixty months, five years, with the exception of only four or five months, it would have cost the lessee nothing more than the mere acceptance of the tender of possession and use, made by the lessors. Its acceptance of this would not have been a waiver of any right of action it had for general or special damages. By accepting, at the time the offer was made, it would have taken from the lessors nothing more than it was entitled to have, not even all it was entitled to have. The rendition by the lessee of this portion of what they had bound themselves for would have constituted no consideration for a release or waiver on the part of the lessee; nor could it have in any sense constituted an estoppel. What element of injury or deception could have been involved in the acceptance of what the lessors tendered? The tender was accompanied by no demand for a waiver or release of damages. The lessee was simply notified that the property had been vacated by the former tenant and that the lessors then desired it to take possession under its contract. The argument, therefore, that the tender was insufficient and justified an award of general damages for the whole term is obviously fallacious and unsound.

No reason is shown why the lessee could not then have accepted the possession. The premises were vacant and open for occupancy by it not later than January 4, 1904. On December [32] 14, 1903, less than one month before, it had tempo-

rarily moved into another building, without any view to remaining there permanently or for a considerable length of time. It had no business room that it expected or was bound to hold. It was then in the market, according to its contention, for just such a property as the lessors offered. If the testimony had shown something peculiar in their situation, rendering the acceptance of the offered premises at that time burdensome and oppressive, and, therefore, sufficient, in equity and conscience, to absolve from the duty to take them, it might constitute a ground for another element or item of damages, general or special, but as the evidence disclosed nothing of the kind, it is unnecessary to consider it.

As the highest estimate of the rental value of the property was $150, and the contract rental $75 a month, the difference could not have exceeded four or five times said sum, which would have been less than $400 and, together with all that could have been recovered as special damages, would not have exceeded $600 or $650. As the verdict, after amendment by the court, exceeded this sum by more than $100, a principle declared in Robrecht v. Marling's Admr., 29 W. Va. 765, 2 S. E. 827, made it the duty of the court to set aside the verdict, because it exceeded in amount the sum which might have been found upon the evidence, after giving it all the weight and probative value that it was entitled to. In the case referred to, the court held: "If it clearly appear to the court that the verdict was made excessive by the admission of such illegal evidence, the court should set aside the verdict and grant a new trial; and if the evidence or facts are certified on writ of error, and the verdict clearly appears to the appellate court to be excessive because of the admission of such illegal evidence, said court will disregard such evidence, reverse the judgment and set aside the verdict." Since there is not here even illegal evidence as a basis for the excessive amount of this verdict, the case is much stronger. As to two or three hundred dollars of the amount, there is no evidence at all.

An assignment of error goes to the action of the court in refusing to allow a witness to testify that certain business [33] rooms, located in the same section of the city in which the leased property is situated, and not far distant from it, were completed and ready for occupancy in November, 1903. This evidence was offered for the purpose of rebutting evidence introduced by the plaintiff to the effect that diligent, but fruitless, effort had been made to obtain a storeroom in that portion of the city. The court excluded it on the ground of

the want of any evidence tending to show that the plaintiff or any of its officers or agents had any knowledge of the vacancy of said rooms. The burden of proving omission of duty, on the part of the plaintiff, to mitigate the damages rests upon the defendant: 13 Cyc. 192; James v. Kibler's Admr., 94 Va. 165, 26 S. E. 417. Evidence offered to establish a defense, operating to mitigate damages, ought to be sufficient in law to sustain a finding. It must extend to all the elements of such defense, which may include a number of connected facts, and usually does include two or more. The evidence offered must tend to prove all the essential facts, for the admission of only partial proof would confuse and mislead the jury. The evidence offered here fails to show that the rooms in question could have been rented by the plaintiff. The proposal was to prove only that they were completed and ready for occupancy. In excluding it, the court ruled properly.

For the error noted, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

The Measure of Damages for Breach of a Covenant for quiet enjoyment is discussed in the note to Chestnut v. Tyson, 53 Am. St. Rep. 113; and the measure of damages for breach of a covenant of seisin is discussed in the note to Eames v. Armstrong, ante, p. 436.

HAGAN v. HOLDERBY.

[62 W. Va. 106, 57 S. E. 289.]

EJECTMENT—Right to Maintain.—Plaintiff to maintain the action of ejectment must have the legal title to the property sought to be recovered, and he must recover upon the strength of his own title, and not upon the weakness of the title of his adversary. (p. 962.)

JUDICIAL SALES—Receiver—Deeds—Evidence of Authority. A recital in a deed that it was made by a certain person as a receiver in a certain cause, and that he had authority to make it, is not sufficient to show authority for its execution. (p. 963.)

JUDICIAL SALES—Evidence to Show Authority to Exclude Deeds.—If a deed claimed to be executed by a receiver is offered in evidence, it is necessary to its admission that enough of the record of the court appointing the receiver appear to show that the court did authorize the conveyance of the particular property and that it had jurisdiction of the person whose property was directed to be conveyed, and that it also had jurisdiction of the subject matter. (p. 963.)

JUDICIAL SALES—Evidence of Giving of Receiver's Bond.—If a deed executed by a receiver is offered in evidence, it is neces-

sary to show by the record of the court wherein the cause was pending that the receiver qualified by giving a bond as required by the court. (p. 964.)

EVIDENCE—Certificate of Clerk of Court.—A certificate of a clerk of court that the record of his court will show certain facts cannot be received as evidence of such facts. (p. 964.)

TRUSTS—Power of Sale When Created.—A will devising property to certain persons and appointing another to sell and dispose of it as to him seemed best for the interest of such heirs, and to invest or dispose of the proceeds for their best interests, clothes him with the absolute power of disposal of the property in fee. (p. 965.)

Williams, Scott & Lovett and Switzer & Wiatt, for the plaintiff in error.

R. L. Blackwood and G. O'Bierne, for the defendants in error.

[107] SANDERS, P. The plaintiff in error, Susan Holderby, claims to be aggrieved by a judgment of the circuit court of Cabell county, rendered in an action of ejectment brought against her by Cornelius B. Hagan and others, heirs at law of Mary C. Hagan, deceased.

We find from the record that many years ago the Central Land Company of West Virginia, a corporation, by an executory contract in writing, sold and agreed to convey to Barbara Hylton a lot of land in the city of Huntington. Barbara Hylton later assigned all her right, title and interest in and to said contract to Mary C. Hagan, and directed the Central Land Company to execute a deed to her for the property therein described. Afterward, on the twenty-eighth day of August, 1886, Mary C. Hagan made and executed her last will and testament, which is herein incorporated in extenso and is as follows:

"Know all Men by these Presents: That I, Mary C. Hagan, wife of Bernard Hagan, of Huntington, County of Cabell, State of West Virginia, being of ill health but of sound and disposing of mind and memory, do make and publish [108] this my last will and testament. I give and bequeath all my property, both real and personal, to my children, Charles E., Cornelius B., Mary V., George V., Clarissa V. and Annie B., to be equally divided among them; share and share alike. I do hereby nominate and appoint my husband, Bernard Hagan, to be the executor of this my last will and testament without bond; and I further will, that should my said husband, Bernard Hagan, desire to dispose of said property above bequeathed in any manner he may deem best for the interests of my said children, or shall desire to invest the proceeds of the sale of said property in other property or securities for

the benefit of my said children, he is hereby empowered to do so; and I further will that the said Bernard Hagan, my husband, shall have full and entire control of said property hereby bequeathed, or any other property or securities into which he may by powers herein granted convert it.

"In testimony whereof, I, the said Mary C. Hagan, have to this my last will and testament subscribed my name and affixed my seal this 28th day of August, 1886.

"MARY C. HAGAN. (Seal.)"

Later Mary C. Hagan departed this life, leaving surviving her six children and her husband, Bernard Hagan, seised of the equitable title to said lot of land, the legal title thereto still remaining in the Central Land Company. The will above copied was probated on the third day of July, 1889, and on the tenth day of May, 1893, C. P. Huntington, as special receiver of the Central Land Company, made a deed for said lot to the heirs of Mary C. Hagan, deceased, subject to the life estate of her husband, Bernard Hagan. Later Bernard Hagan, in his own right and as executor of the last will and testament of his wife, Mary C. Hagan, deceased, conveyed this lot to B. B. Harding, and Harding afterward reconveyed the same to Bernard Hagan. On the eleventh day of July, 1893, Bernard Hagan and wife conveyed the lot to Jas. K. Oney and Geo. E. McDonald, trustees, to secure the payment of the sum of twelve hundred dollars to the Huntington National Building and Loan Association, and default having been made in the payment of the loan, the property was sold under the deed of trust and conveyed to the Huntington Loan and Investment Company, which company later conveyed the same to the defendant.

[109] The defendant assigns many reasons why the judgment of the circuit court should be reversed, but we need only consider the one relating to the action of the court in refusing to instruct the jury to find a verdict in her favor. There is no legal principle more firmly and better established than that the plaintiff, to maintain the action of ejectment, must have the legal title to the property sought to be recovered, and that he must recover upon the strength of his own title and not upon the weakness of the title of his adversary, and this being the established rule of law, to which there are no exceptions, we will look to see if the plaintiffs have shown title.

The defendant contends that the plaintiffs have not done so, first, because under the will of Mary C. Hagan, her husband, Bernard Hagan, was empowered to sell and dispose of

the property for the benefit and interest of the children and heirs, as to him seemed best, and that, acting under this authority, he did sell and convey the same to B. B. Harding, under whom the defendant holds; and second, if the will is not susceptible of this construction, that still from the properly admitted testimony it does not appear that the legal title to this property has ever vested in the heirs, but that the same remains in the Central Land Company, and the ground relied upon to support this contention is that the deed from C. P. Huntington, special receiver, to the heirs, was improperly admitted in evidence. It is true this deed recites the fact that it was made by Huntington as receiver in a certain cause, and that he had authority to make the same, but this is not sufficient. Bare recitals in a deed will not suffice to show authority for its execution: Mordecai v. Beal, 8 Port. (Ala.) 529; Soukup v. Union Inv. Co., 84 Iowa, 448, 35 Am. St. Rep. 317, 51 N. W. 167; Jones v. Sherman, 56 Miss. 559; Crump v. Thompson, 31 N. C. (9 Ired.) 491; Smith v. Webster, 2 Watts (Pa.), 478.

Where it is claimed that a deed is executed by a receiver or one appointed by the court to convey the title to another, there must be enough in the record vouched to show that the court did authorize the conveyance of the particular property, that it had jurisdiction of the person whose property was directed to be sold and conveyed, and that it also had jurisdiction of the subject matter. "Where a deed made under a 110 decree by a commissioner or other authority is offered in evidence as a connecting link of the party's chain of title to land, it is necessary to introduce with it so much of the record of the suit, in which such decree was made, as will satisfactorily show that the persons having the legal title to the land conveyed were parties to the suit, and as will identify the land": Waggoner v. Wolf, 28 W. Va. 820; Guinn v. Bowers, 44 W. Va. 507, 29 S. E. 1027.

It appears, however, from a certified copy of a decree of the circuit court of the United States for the district of West Virginia, entered in the chancery cause of C. P. Huntington et al. v. Central Land Company on the sixteenth day of December, 1890, that the court did appoint C. P. Huntington as special receiver, and authorized him to carry out and complete by proper deeds of conveyance all contracts of the Central Land Company for the sale of real estate. There certainly can be no question as to the receiver's powers in this respect, as the terms of the decree are broad, and unquestionably confer upon him such powers, and we think it abun-

dantly appears from the record that the court had jurisdiction of the Central Land Company, the property of which was ordered to be conveyed, and also of the subject matter of the litigation. While, however, these facts unquestionably appear, yet the receiver was required, before proceeding to exercise the powers conferred upon him, to execute, acknowledge and have approved a bond as therein required for the faithful discharge of his duties. This requirement was a condition precedent to the right of the receiver to act in the premises. He had only such powers as were conferred upon him by the decree, and of course was subject to all the limitations thereby imposed upon him, and until he complied with its terms he was entirely without authority to execute any of its requirements. Therefore, we must look to see if he gave the bond as required. There appears at the foot of the decree introduced a certificate of the clerk that the receiver had given bond, and that the same had been approved and his appointment confirmed, but the defendant objected to the introduction of this certificate as evidence, and unless it can be considered as proof of the fact that the receiver did qualify by giving bond, there is no evidence to show that he did so. Can we consider it for the purpose of [111] establishing this fact? It is not more than the bare statement of the clerk that this is so—a statement by him that the record will show certain facts. This certificate amounts to no more than would the testimony of the clerk if he were called as a witness. We know of no provision allowing proof of a record of a court in this way. If the receiver qualified, the record would show it, and is the best evidence and must be produced. "Clerks of religious and other corporations, and other recording officers, may make and verify copies of their records, and in so doing act under the obligation of their oath of office. Of the verity of such copies the certificates are evidence. But it is no part of their duty to certify facts, nor can their certificates be received as evidence of such facts": Oakes v. Hill, 14 Pick. 442; Greene v. Durfee, 6 Cush. 362; Wayland v. Ware, 109 Mass. 248; Wood v. Knapp, 10 N. Y. 109, 2 N. E. 632; Wigmore on Evidence, sec. 1678.

Without the establishment of this fact there was no foundation for the introduction of this deed, and when it is excluded, there is a missing link in the plaintiff's chain of title, which will defeat their recovering.

Then the other reason urged by the defendant is sufficient to defeat the plaintiffs in this action. The will authorized

Bernard Hagan to sell and dispose of the property as to him seemed best for the interest of the heirs. This will unquestionably clothed him with the absolute power of disposal of this property. It is hardly necessary, in dealing with this question, to say that in construing a will we must do so by taking it by its four corners, and thereby ascertain the real intention of the testator, and when this intention is ascertained, to carry it into effect. The language of the will is plain and unambiguous, and it is easy to determine the intention of the testator, as it plainly and unmistakably authorizes Bernard Hagan, who was thereby appointed for the purpose, to sell or otherwise dispose of the property, and to invest or dispose of the proceeds thereof as to him seemed best for the interest of the heirs.

The sale and conveyance of this property by Bernard Hagan to B. B. Harding, and the reconveyance thereof by the latter to Bernard Hagan, and the conveyance by him to the trustees of the Huntington National Building and Loan [112] Association, the sale under this latter conveyance to the Huntington Loan and Investment Company, and the sale and conveyance by the last named company to the defendant, vested in her the fee simple title to the property in controversy.

Therefore, the instruction directing the jury to find for the defendant should have been given, there being no evidence upon which a verdict in favor of the plaintiffs could possibly be predicated, and as the record discloses that it would be entirely unnecessary to remand the case for a new trial, the judgment of the circuit court is reversed, the verdict of the jury set aside, and judgment entered for the defendant.

Recitals in a Deed as Evidence are discussed in the note to Jackson v. Shepard, 17 Am. Dec. 505. Ordinarily they are evidence only against the party executing the instrument: Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372; Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111. It is said that recitals in a sheriff's deed as to his acts are prima facie evidence of the facts recited: Farrior v. Houston, 100 N. C. 369, 6 Am. St. Rep. 597. See, also, Owen v. Baker, 101 Mo. 407, 20 Am. St. Rep. 618. In some states, by statute, tax deeds are prima facie evidence of the regularity of the proceedings leading up to the sale: Powers v. Bank of Bottineau, 15 N. D. 466, 109 N. W. 361; Grand Forks v. Frederick, 16 N. D. 118, ante, p. 621.

A Deed in Which the Grantee Describes Herself as the widow and sole heir of B does not prove, nor tend to prove, that she is such widow or heir: Soukup v. Union Investment Co., 84 Iowa, 448, 35 Am. St. Rep. 317.

HENCH v. PRITT.

[62 W. Va. 270, 57 S. E. 808.]

CONSTITUTIONAL LAW.—Private Property cannot be Taken for a Private Use, either with or without compensation. (p. 970.)

EMINENT DOMAIN—Public Use—Question of Law.—The question of what is a public use is always one of law, and though deference will be paid to the legislative judgment, as expressed in enactments providing for an appropriation of property, it will not be conclusive. (p. 972.)

CONSTITUTIONAL LAW—Taking Private Property for Private Use.—A statute, in so far as it attempts to confer the power and right of eminent domain upon the owners, or lessees of timber or timber lands, to be exercised by them in the condemnation of lands for rights of way for their private benefit and not for the public use is unconstitutional, null and void. (p. 973.)

Dailey & Bowers and Harding & Harding, for the defendants in error.

W. B. Maxwell and Talbot & Hoover, for the plaintiffs in error.

271 McWHORTER. J. Hench, Dromgold and Shull, a partnership doing business under the firm name of Hench, Dromgold and Shull, claiming to be the owners of a large sawmill plant at the town of Mill Creek, in Randolph county, on the Valley river, a station on the line of the Huttonville Branch of the Western Maryland Railroad, filed their petition in the circuit court of Randolph county under section 2370, etc., Code of 1906 (section 69a and its subdivisions, chapter 54), setting forth that they were the owners of large bodies of timber and timber lands in said county in the vicinity of said railroad in and on the waters tributary to said Valley river, none of which timber was more than twelve miles distant from said Mill Creek station. That aside from the timber owned by the petitioners there were other parties owning large bodies of timber and timber lands along and upon the said waters, all of which timber would have to be hauled, by wagon at enormous cost, to the railroad and there manufactured or manufactured where it was situated, and the lumber produced therefrom transported at an equally great cost by wagons to said railroad in order to market the same; that petitioners proposed and desired to construct of steel rails and wooden ties, and maintain and operate by steam locomotives, a railroad from their sawmill at Mill Creek with an intersection at said town with the railroad and extending across the intervening lands to their said timber; that they had 272 employed a competent engineer and had caused him to

enter upon the intervening lands to survey, locate, mark and map the route of said proposed railroad between said points, and filing a copy of said map showing the total length of said road to be ten and forty-one hundredths miles; that the same would cross the lands of Asbury Pritt and Virginia Pritt, Charles C. Channel, Eugenia Ward and J. W. Cleavenger, said right of way over said lands being fully described on said map; that they had been wholly unable to agree with said owners, or any one of them, for the compensation to be paid to them for the use of said land which they averred to be an easement or right of way for a period of ten years, and stating the amount they had offered to pay the several parties respectively for such compensation; averring that said right of way was needful and useful for the transportation of timber to market, including as well the timber belonging to petitioners as other timber not owned by them along said route and accessible thereto, and as to which timber and all other timber and manufactured products thereof situated along said route they would be common carriers, prepared to haul for others many other things necessary and useful upon the farm and in the houses of residents along said route; that the condemnation of said right of way was necessary and of public utility, that no other route would serve the purpose of the one described in the proceedings, and that if the same was condemned, petitioners would use the same for railroad purposes and in accordance with the laws of the state; and prayed for the appointment of commissioners to view the said lands and proposed route for the railroad and examine the same, and if they should deem the same needful and useful for the transportation of timber to market, and that the condemnation thereof was necessary and of public utility, that no other practicable route would subserve the purpose of the parties, then the commissioners should report in writing what damages would be sustained by the owners; and filed their notice of such condemnation proceedings served upon the said owners.

On the fourteenth day of September, 1906, the petition was presented together with a notice of the filing thereof, and the same was ordered filed and the cause docketed, whereupon the owners of the land appeared by counsel and demurred [273] to said petition, in which demurrer the plaintiff joined, and the demurrer, being considered by the court, was overruled, to which ruling of the court defendants excepted. The demurrer alleges the following grounds and reasons: "First: Because this is an effort to take private property for pri-

vate purposes. Secondly: Because the act of the legislature, viz., chapter 12 of the acts of 1885, under which petitioners are attempting to proceed, is unconstitutional in so far as the same authorizes the taking of private property for private purposes: Third: Because said petition shows upon its face that this is an effort to take private property for private use. Fourth: Because said petition does not make such showing or contain such allegations as would, in any event, entitle the petitioners to take private property for their use. Fifth: Because, especially, the said petition does not show that there is no other practicable way over which they could remove their timber, it being a fact that said petitioners now have, and have had for years, a private railroad, or tramroad upon which they have been running locomotives and hauling timber, which is parallel with the road they now propose to build and but a short distance therefrom, and, further, it is a fact that from the town of Huttonville to the town of Mill Creek, where petitioner's mill is located, the said proposed railroad will parallel the line of the Western Maryland Railroad (formerly the West Virginia Central and Pittsburg Railway), a common carrier, engaged in transporting all kinds of freight and passengers, so that there is no necessity for paralleling the same by petitioners for their private purposes and the petition."

Defendants also tendered their joint answer, to the filing of which plaintiffs objected and the objection was sustained. The court then appointed commissioners as provided by said section. The commissioners made a separate report as to each of said tracts of land, ascertaining the amount to be paid to the owners respectively as compensation for the land proposed to be taken and damages to the residue, and reported that they deemed the said route for railroad needful and useful for the transportation of timber to market, and that the condemnation of the property described in said petition sought to be condemned belonging to each of said owners was necessary and of public utility, and that no other [274] practicable route would subserve the purposes, and the court confirmed the said reports. To which judgments of the court the owners of the lands proposed to be taken, excepted, and obtained a writ of error and supersedeas.

The answer and plea of the defendants sought to raise the question as to the necessity and public utility of the proposed road and of the right of the petitioners to condemn the property for the purposes set out, but which plea and answer were rejected and not permitted to be filed. It is conceded

that the question of the constitutionality of section 69a and its subdivisions, chapter 54, Code of 1899, providing for the condemnation and taking of private property for private use, is the principal, if not the only question to be decided in this case. Section 9, article 3 of our constitution provides: "Private property shall not be taken or damaged for public use without just compensation; nor shall the same be taken by any company, incorporated for the purpose of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders."

There is no provision in the constitution authorizing the legislature to provide for the taking of private property for private use, and there is no provision in our constitution, nor in the constitutions of any other of the states of the Union, expressly forbidding the legislature to pass laws whereby the private property of one citizen may be taken and transferred to another for his private use. As was well said by Judge Green in Varner v. Martin, 21 W. Va. 534, at page 548: "It was doubtless regarded as unnecessary to insert such a provision in the constitution or Bill of Rights, as the exercise of such an arbitrary power of transferring by legislation the property of one person to another, without his consent, was contrary to the fundamental principles of every republican government; and in a Republican government neither the legislature, executive or judicial department can possess unlimited power. Such a power as that of taking [275] the private property of one and transferring to another for his own use is not in its nature legislative, and it is only legislative power, which by the constitution is conferred on the legislature. Such an act, if passed by the legislature, would not in its nature be a law but would really be an act of robbery; the exercise of an arbitrary power not conferred on the legislature." And at page 549 he further says: "There is an entire concurrence of all the authorities in the proposition, that private property cannot be taken for private use, either with or without compensation. A few of the many authorities in which this proposition is laid down as unquestionable law are here cited: See In the Matter of Albany Street, 11 Wend. 149, 25 Am. Dec. 618; Embury v. Conner, 3 Comst. 511; Tay-

lor v. Porter, 4 Hill, 140, 401 Am. Dec. 274; Beekman v. Saratoga & S. R. R. Co., 3 Paige, 45, 22 Am. Dec. 679; Concord R. R. Co. v. Greely, 17 N. H. 47; Dunn v. Charleston, Harp. (S. C.) 189; Bankhead v. Brown, 25 Iowa, 540; Wilkison v. Leland, 2 Pet. 627, 7 L. ed. 542; Robinson v. Swope, 12 Bush, 21; Blood v. Nashua & L. R. Corp., 2 Gray, 137, 61 Am. Dec. 444; Ten Eyck v. Delaware & R. C. Co., 18 N. J. L. (3 Har.) 200, 37 Am. Dec. 233; Varick v. Smith, 5 Paige, 137, 28 Am. Dec. 417; Parham v. Justices, etc., 9 Ga. 341; Hall v. Boyd, 14 Ga. 1; Clack v. White, 2 Swan, 540; Bangor R. R. v. McComb, 60 Me. 290; Hepurn's Case, 3 Bland, 95; West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; Sadler v. Langham, 34 Ala. 311; Pittsburg v. Scott, 1 Pa. 309; Matter of John and Cherry Street, 19 Wend. 659; Cooper v. Williams, 4 Ohio, 253, 22 Am. Dec. 745; Buckingham v. Smith, 10 Ohio, 288; Reeves v. Treasurer of Wood County, 8 Ohio St. 333; Bloodgood v. Mohawk & Hudson R. R. Co., 18 Wend. 9, 31 Am. Dec. 313; Pratt v. Brown, 3 Wis. 603; New York etc. R. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; Nesbit v. Trumbo, 39 Ill. 110, 89 Am. Dec. 290; Osborn v. Hart, 24 Wis. 89, 1 Am. Rep. 161; and Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398." The first point of the syllabus in Varner v. Martin, 21 W. Va. 534, holds: "Under our constitution private property cannot be taken with or without compensation for private use." In Fallsburg P. & M. Co. v. Alexander, 101 Va. 98, 99 Am. St. Rep. 855, 43 S. E. 194, 61 L. R. A. 129, the first point of the syllabus is: "Although not forbidden by the constitution of this state, the legislature cannot authorize the taking of private property for private use, as it is contrary to the fundamental principles of a republican government." And point 2 of the syllabus is: "A use to be public must be fixed and definite. It [276] must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the state, independent of the rights of the private owner of the property appropriated to the use. The use of property cannot be said to be public if it can be gainsaid, denied, or withdrawn by the owner. The public interest must dominate the private gain."

In Cemetery Assn. v. Redd, 33 W. Va. 262, 10 S. E. 405, it is held that: "An application to condemn land for public use must distinctly state that the land is needed for public use, and will, when condemned, be devoted to such public use." In said case, at page 263, it is said: "Ownership and enjoyment of private property are sacred in the eye of the law.

The owner's right yields only to public necessity. The great power of eminent domain does overcome this right of private property, but never for public use, under our constitution": Citing Varner v. Martin, 21 W. Va. 534; Baltimore & O. R. R. Co. v. Pittsburg etc. R. R. Co., 17 W. Va. 812. The use which the public is to have of the property condemned must be fixed and definite, and the general public must have a right to the definite and certain use thereof. A supposed indirect advantage to the public is not, in contemplation of law, a public use. It is not sufficient to say that the general prosperity of a community will be promoted by the taking. The use must be needful for the public to have, and which it cannot do without except by suffering great loss. The petition in case at bar clearly shows that the plaintiffs are seeking to obtain this right of way in order to enable themselves to transport their timber from their land to their mill, clearly showing that it is for their private use and benefit, and in order to give it the semblance of being for public use, they show that the other owners of timber along the route may be enabled also to market their timber over the same road. It in no way appears that the general public will derive any benefit from it other than the development of private property and interests. The proposed road is not to be a common carrier nor one which will be of use to the community at large, to be used by the public in general, but simply a private way for the convenience of the projectors and builders thereof for the shipment of their logs and timber to market.

277 It is contended here by petitioners that for certain purposes their road will be a common carrier, and yet it is proposed to equip the road when built for the purposes of shipping timber and logs alone. It is not proposed to have the equipment of a common carrier, and it is only for the private interests of those who would secure the right of way: In Pittsburg etc. R. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680, it is held: "Evidence that all who wish to avail themselves of the proposed switch, branch road or lateral work can do so, is not sufficient to show that the use of the work will be for the benefit of the public." This road, if built as proposed, would accommodate only its builders and the other parties mentioned who have timber in the same section, if, indeed, it should accommodate the latter. In the case just cited, at page 718: "The question here is not one of compensation, but it is whether the petitioner had a right to take the property. It of course has no

right to take private property for private use, but it has the right to take private property for public use on paying a just compensation therefor. The right to take, which depends upon whether it is to be taken for public or private use, is a judicial question, and the decision of the circuit court on that question is subject to review: Baltimore & O. R. R. Co. v. Pittsburg etc. R. R. Co., 17 W. Va. 812."

Section 69a and its subdivisions, chapter 54, Code of 1899, provides for giving a right to the owners or lessees of timber or timber lands, quarries, mills, oil and salt wells, coal mines, lime-kilns or other real estate in the vicinity of any common carrier, not more than twelve miles therefrom, to build lateral railroads for the purpose of transporting their private products, in the absence of any constitutional provisions authorizing any such legislation. In Sholl v. German Coal Co., 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199, it is held: "Land belonging to a private individual is not subject to condemnation for the extension of a tramway belonging to a corporation, organized for the purpose of mining and selling coal, so as to connect the way with a railroad, and thus secure to the company railroad facilities for the transportation of its coal; the use to which the land would be put not being a public use": Amador Queen Min. Co. v. Dewitt, 73 Cal. 482, 15 Pac. 74. In Healy Lumber Co. v. Morris, 33 Wash. 490, 99 Am. St. Rep. 964, 74 [278] Pac. 681, 63 L. R. A. 820, it is held that whether a contemplated use is public shall be a judicial question, to be determined without regard to any legislative assertion that the use is public, the fact that a statute authorizes the condemnation of land for a particular purpose does not raise a presumption that such purpose is a public use. It is also held to be a judicial question in Great Western etc. Gas & O. Co. v. Hawkins, 30 Ind. App. 557, 66 N. E. 765. In Weidenfeld v. Sugar Run Co., 48 Fed. 615, at page 618, it is said: "Whether the use is a public one, for which private property may be taken, is a judicial question. If the use itself is found to be only private, or, further, if the use, being public, the appropriation can in no respect be subservient thereto, it is the duty of the judicial department to protect the citizens by proper remedies from the taking of his property, whether attempted in open disregard of or under color of law": Citing Mississippi etc. Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206. Edgewood R. R. Co.'s Appeal, 79 Pa. 257, was a case in which a number of persons had procured a charter for a railroad company, and under cover of constructing a railroad for public use were engaged

in the construction of a railroad from a tract of coal land owned by themselves to the Pennsylvania Railroad. A bill was filed by a property holder to restrain the condemnation of his property by virtue of the power of eminent domain conferred upon the railroad company over a portion of his property for its uses. The supreme court of Pennsylvania, finding the facts to be that the railroad was constructed with the primary object of connecting the coal mines with the Pennsylvania Railroad, held that the road was being constructed for private purposes under the cover of a power obtained under the general railroad laws of the state, that there appeared a perversion of an enactment passed for one purpose in order to subserve other and inconsistent purposes, that the charter of the company did not warrant the appropriation of the land of the plaintiff for the purpose for which the defendant had applied, and that it did not possess the right or franchise to do the acts which had resulted in the injury of which plaintiff complained.

Cooley on Constitutional Limitations, 774, says: "The question what is a public use is always one of law. Deference will be paid to the legislative judgment, as expressed [279] in enactments providing for an appropriation of property, but it will not be conclusive": Citing a long list of authorities.

Zircle v. Southern Ry. Co., 102 Va. 17, 102 Am. St. Rep. 805, 45 S. E. 802, cited by defendants in error was a case of a railway company for the condemnation of a way for a branch road or spur track a distance of two-thirds of a mile to Manor Mills, a private industrial enterprise, and it was there held that the company had a right to condemn if the track was to be used by the company in furtherance of its public business. In Charleston Nat. Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 410, it said: "It is the province of the legislature to declare the public uses for which private property may be taken, but the power of the legislature in this respect is limited by the constitution, and it remains with the courts to say whether the legislative enactment making such declaration and appropriation is in conflict with the constitutional limitation, and if so, to declare it unconstitutional and void": Citing Baltimore & O. R. R. Co. v. Pittsburg etc. R. R. Co., 17 W. Va. 812; Varner v. Martin, 21 W. Va. 534; Mississippi Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206.

From what has been said it follows that section 69a and its subdivisions, chapter 54, Code of 1899, in so far as it attempts to confer the power and right of eminent domain upon the owner or owners, lessee or lessees of timber or timber lands,

etc., to be exercised by them in the condemnation of lands for rights of way for their private benefit and not for the public use, is unconstitutional, null and void. Therefore, the judgment of the circuit court of Randolph county is reversed and annulled, and this court proceeding to render such judgment as the circuit court should have rendered, the demurrer to the petition of the plaintiffs is sustained and the petition and notice dismissed.

In Scott Lumber Co. v. Wolford, 62 W. Va. 555, 59 S. E. 516, the principles announced in the principal case, ante, p. 966, are reaffirmed and applied.

The Term "Public Use" as Employed in the Law of Eminent Domain is flexible, and necessarily has been of constant growth as new public uses have developed. What is a public use will depend somewhat upon the nature and wants of the community for the time being: Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 233. Whether a use is public is, as a rule, ultimately a question for the decision of the courts: Cozard v. Kanawha Hardwood Co., 139 N. C. 283, 111 Am. St. Rep. 779; Riley v. Charleston Union Station Co., 71 S. C. 457, 110 Am. St. Rep. 579; Brown v. Gerald, 100 Me. 351, 109 Am. St. Rep. 526; Albright v. Sussex County etc. Commission, 71 N. J. L. 303, 108 Am. St. Rep. 749; Borden v. Trespalacios Rice etc. Co., 98 Tex. 494, 107 Am. St. Rep. 640; note to Chicago etc. Ry. Co. v. Morehouse, 88 Am. St. Rep. 926; but if a use is public, the expediency or necessity for establishing it is for the legislature to determine: Cozard v. Kanawha Hardwood Co., 139 N. C. 283, 111 Am. St. Rep. 779; Brown v. Gerald, 100 Me. 351, 109 Am. St. Rep. 526; Zircle v. Southern Ry. Co., 102 Va. 17, 102 Am. St. Rep. 805.

The Purposes for Which Private Property may be Condemned under the power of eminent domain are discussed in the note to Zircle v. Southern Ry. Co., 102 Am. St. Rep. 809. As to whether private property may be condemned in order to promote lumber and timber enterprises, see Cozard v. Kanawha Hardwood Co., 139 N. C. 283, 111 Am. St. Rep. 779; Healy Lumber Co. v. Morris, 33 Wash. 490, 99 Am. St. Rep. 964; and as to whether it may be condemned in order to promote mining operations, see Highland Boy etc. Min. Co. v. Strickley, 28 Utah, 215, 107 Am. St. Rep. 711. The power of eminent domain has been successfully invoked to condemn property for use in the generation of electricity: Brown v. Gerald, 100 Me. 351, 109 Am. St. Rep. 526. See, however, Fallsburg etc. Mfg. Co. v. Alexander, 101 Va. 98, 99 Am. St. Rep. 855.

BOARD OF EDUCATION v. BERRY.

[62 W. Va. 433, 59 S. E. 169.]

EQUITY—Pleading—Exhibits.—Documents made exhibits with a bill in chancery and as parts thereof are of controlling force in case of a variance between them and such bill. (p. 977.)

JUDICIAL SALES—Notice to Purchaser.—The purchaser at a judicial sale is charged with notice of every fact appearing upon the face of the record affecting the title acquired by him. (p. 978.)

EVIDENCE—Judicial Notice—Public Law.—The courts of the state will take judicial notice of a public law, and it need not be put in evidence. (p. 979.)

CORPORATIONS, DE FACTO—Right to Attack Existence.—If there has been a bona fide effort to comply with the law to effectuate an incorporation, and the persons affected thereby have acquiesced therein, and have exercised all of the functions pertaining to the corporation, it becomes a de facto corporation, whose corporate existence cannot be litigated in actions between private individuals, nor between private individuals and the assumed corporation. (pp. 981, 982.)

CORPORATIONS, DE FACTO—Existence of, How Shown.—To establish the existence of a de facto corporation only a charter or law authorizing the existence of the corporation must be shown and used under such authority. (p. 982.)

CORPORATIONS, DE FACTO—Existence—Right to Question. If a corporation exists de facto, it may exercise the powers assumed, and the question of its having a right to exercise them will be deemed one which can be raised only by the state. (p. 982.)

CORPORATIONS, DE FACTO—Municipalities.—If the inquiry into the existence of a municipality is merely collateral, the fact that the municipality exists de facto is all that need be proved. (p. 982.)

Hines & Kelly, for the plaintiff in error.

Haymond & Fox and J. Fisher, for the defendant in error

434 MILLER, P. In an action of unlawful entry and detainer in the circuit court, the defendant, besides the general issue, by plea put in issue the corporate existence of the plaintiff. In a trial before a jury, after the plaintiff had introduced all its evidence, the circuit court sustained the defendant's motion to exclude such evidence, and directed a verdict for defendant, which the jury returned accordingly. The subsequent motion of the plaintiff to set aside the verdict and award a new trial did not prevail, and judgment was rendered dismissing the plaintiff's summons. It does not distinctly appear from the record upon what particular ground this action of the court was founded.

The property sued for was a lot of one and one-half acres, with a schoolhouse thereon, conveyed to the board of education of Salt Lick district by W. F. Morrison and L. J. Berry, October 14, 1897, to which the plaintiff succeeded by virtue of its incorporation as the board of education of Flatwoods

[435] district. This lot was part of fifty-four acres conveyed to Morrison and Berry by W. E. Haymond, special commissioner, September 7, 1893. On October 14, 1897, Morrison and Berry conveyed the lot sued for to the board of education of Salt Lick district, and later on the same day to H. P. Pierce one acre out of the fifty-four acres; and on December 13, 1897, they conveyed to W. S. Stump forty acres, more or less, described as being a part of the fifty-four acre tract. On February 21, 1899, the board of education of Salt Lick district conveyed to W. S. Stump one hundred and thirty-eight and one-half square rods and fifty-eight square feet, part of the lot so conveyed to it by Morrison and Berry. The plaintiff, therefore, if entitled to recover, was entitled to recover only that part of the property described in the summons exclusive of the portion thereof convened to Stump.

The defendant offered no evidence except in connection with the cross-examination of the plaintiff's witnesses. The material parts of the record of the chancery cause of the Merchants' National Bank against J. W. Morrison and others were put in evidence, consisting of the summons, extracts from the bill, the deeds from Morrison and Berry to Pierce and Stump and from Haymond to Morrison and Berry, abstracts from the commissioners' reports and of the decrees of sale and confirmation pronounced therein, and the notice of sale by the commissioners appointed to make sale of the lands decreed to be sold. This record shows that the defendant, William H. Berry, on November 23, 1903, became the purchaser of the residue of the fifty-four acres conveyed to W. S. Stump by the said Morrison and Berry, and was awarded a writ of possession. The final decree of confirmation was entered December 4, 1903. Neither his deed nor the writ of possession was put in evidence; but the deputy sheriff who executed the writ testifies that when he put Berry in possession thereunder in June or July, 1904, the board of education of Flatwoods district was in possession of the property.

The defendant makes no claim of title, or right to possession of the property sued for, except by virtue of the judicial proceedings referred to. This suit of the Merchants' National Bank was a suit instituted February 11, 1898, to enforce the liens of sundry judgment creditors of the plaintiffs [436] therein. The deed from Morrison and Berry to the board of education of Salt Lick district was not recorded until November 25, 1903, two days after the purchase by William H. Berry but before the decree of confirmation. These judgments, recovered and docketed in April, 1897, were undoubt-

edly liens upon the whole tract of fifty-four acres which the creditors had the right to enforce. But the question is not what they had the right to do, but what their suit accomplished, and whether the defendant acquired title therein to the lot of ground in controversy. The plaintiff was no party to that suit; nor was it a pendente lite purchaser, for the deed was made to its predecessor prior to the institution of the suit. True, the liens of the judgments accrued prior to the deed; but unless the lot in controversy was sold and purchased by the defendant, he acquired no title thereto or right to possession thereof. We must then look to the bill and proceedings in that suit to determine what was actually sold and purchased. The bill alleged that Berry and Morrison acquired title to the fifty-four acres from Haymond, commissioner; by deed of September 7, 1893, "a part of which they conveyed to H. P. Pierce the 14th of October, 1897, and the residue thereof to W. S. Stump on the 13th of December, 1897," and copies of these three deeds were exhibited with the bill. The deeds from Berry and Morrison to Pierce and Stump, however, by the very words of description, exclude therefrom the schoolhouse lot conveyed to Salt Lick district; and, although the bill perhaps intended to charge that the deed to Stump conveyed all of the fifty-four acres, except that part conveyed to Pierce, yet the Stump deed itself, being exhibited with the bill, is of controlling force. Richardson v. Ebert, 61 W. Va. 523, 56 S. E. 887, recently decided by this court. The first commissioner found that the judgments were liens only upon the one acre conveyed to Pierce and the forty acres conveyed to Stump; the second, that Morrison and Berry conveyed the one acre tract to Pierce as part of the fifty-four acres, and subsequently the residue thereof to Stump, and these two deeds are vouched for this finding; but, as we have seen, these deeds exclude the schoolhouse lot. The decree of sale adjudged that Haymond, commissioner, conveyed to Morrison and Berry a tract of fifty-four acres; that Morrison and Berry, October 14, 1897, conveyed one [437] acre thereof to Pierce, and on December 13, 1897, conveyed the residue of said fifty-four acres to Stump, and that the judgments were liens thereon, and directed sale thereof. The notice of sale described the land as "one acre of land at Shaverville conveyed to H. P. Pierce by W. F. Morrison and L. J. Berry, and the residue of fifty-four acres at Shaverville conveyed to W. S. Stump by said Morrison and Berry." The decree of confirmation refers to this land as

"the residue of fifty-four acres at Shaverville to W. S. Stump by W. F. Morrison and L. J. Berry," no reference being made in this decree to the one acre conveyed to Pierce. If we include the Pierce lot, however, how can we say that the court sold, or intended to sell, any of the fifty-four acres except the one acre conveyed to Pierce and the residue of the fifty-four acres conveyed to Stump? By its terms the Stump deed bounds and describes forty acres more or less, and by its description excludes the schoolhouse lot; and any deed which the commissioners were authorized to make, and the writ of possession, were limited to the land described in these two deeds. We must presume, in the absence of the writ, that the writ of possession ran with the provisions of the decree. Moreover, not having been a party to the suit, the plaintiff should, before the writ issued, have been summoned to show cause why it should not surrender possession: Trimble v. Patton, 5 W. Va. 432; Paxton v. Rucker, 15 W. Va. 547; Williamson v. Russell, 18 W. Va. 612. A member of the board of education, who was present when the officer arrived and who had the key to the schoolhouse, stated to the officer that before surrendering the key he wished to see the president of the board, and, while he was absent for that purpose, the officer by force put the defendant in possession of the schoolhouse. This was an unauthorized and unlawful act, for which chapter 89 of the code gives the summary remedy here sought to the one so turned out of possession, no matter what right or title he had. The purchaser at a judicial sale is charged with notice of every fact appearing upon the face of the record affecting the title acquired by him: Calvert v. Ash, 47 W. Va. 480, 35 S. E. 887; Williamson v. Jones, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694; Hoback v. Miller, 44 W. Va. 635, 29 N. E. 1014; First Nat. Bank v. Hyer, 46 W. Va. 13, 32 S. E. 1000. The parties had the right to exclude from these proceedings the schoohouse [438] lot, and the proceedings effectually did so. The record does not disclose whether all the judgments were satisfied out of the land sold. The rule in such cases is that the lands of a judgment debtor shall be sold in the inverse order of their alienation. Hence it would have been error to have sold the schoolhouse lot, first conveyed, if the other lands of the judgment debtors subsequently aliened and decreed to be sold were sufficient to satisfy the liens: McClaskey v. O'Brien, 16 W. Va. 791; Payne v. Webb, 23 W. Va. 558; McClung v. Beirne, 10 Leigh, 394, 34 Am. Dec. 739.

Was the plaintiff competent to sue? This is the important and only other question fairly arising upon the record. The plaintiff was created into a corporation by the name of the "Board of Education of Flatwoods District" by an act of the legislature, chapter 134, acts of 1891, entitled "An act to establish the Independent School District of Flatwoods," which became effective ninety days from passage. It provided that, in the event of the majority of the votes cast at an election to be held on the fourth Tuesday in May following should be in favor thereof, "the town of Shaverville and Flatwoods and territory adjacent" (described by metes and bounds) should, after the result of the election should be ascertained and declared, constitute the "Independent School District of Flatwoods"; that the board of education, consisting of three members elected by the qualified voters resident therein, should be a corporation, and should be vested with the same rights, exercise the same powers, perform the same duties, and be governed by the same laws as boards of education elsewhere in the county, except in so far as changed by the provisions of the act, with power to sue and be sued, plead and be impleaded, contract, purchase, hold and grant estate real and personal, etc.; that the election to be held to determine whether said independent district should be established should be superintended, and the result thereof ascertained and declared by election officers appointed by the county court, the election laws of the state to control the election so far as applicable. The act in question was offered in evidence in its entirety, although, being public law, it is one of which the courts of the state would take judicial notice: Farmers' Bank v. Willis, 7 W. Va. 31; Hart v. Baltimore & O. R. R. Co., 6 W. Va. 336; [439] Northwestern Bank v. Machir, 18 W. Va. 271; Hays v. Northwestern Bank, 9 Gratt. 127; Stribbling v. Bank of Valley, 5 Rand. 132; Mason v. Farmers' Bank, 12 Leigh, 84.

It is not denied that this was a valid act of the legislature, or that, subject to the condition upon which it was to become effective, it created into an independent school district the territory therein described. But it is claimed that, on account of alleged irregularities in the election, this public corporation never took life; that the conditions of its existence were never fulfilled; that it was incompetent to sue, or to assume and hold possession of the property sued for; and hence that, as a matter of law, possession cannot be said to have been unlawfully taken or withheld from it. The record shows that on March 6, 1901, the county court by an

order entered directed that the special election provided for by the act should be held at two schoolhouses within the proposed district, one in Salt Lick district near Cold Spring, at which those resident in Salt Lick district should be entitled to vote on the question; the other on the Rhea farm in Flatwoods, at which those resident in Holly District should be entitled to vote. The order also appointed officers to conduct the election, with power to ascertain and declare the result. By a subsequent order of July 9, 1901, it appearing that the election had been held and the result thereof ascertained as provided by law and the former order of the court, and that said independent district had been legally established, the county court declared said Independent School District of Flatwoods established as provided in said act. Following this election, a board of education was elected as prescribed by the act, who entered upon the discharge of its duties, made levies, established schools and employed teachers, and continued to exercise the functions of a corporation up to the time of the institution of this suit. The act of the legislature does not show what part or parts of either of the magisterial districts in said county were covered by the territory described. The proceedings of the county court would indicate that only the districts of Salt Lick and Holly were affected, inasmuch as polling places for voters were established only in those districts. Oral evidence on the trial, however, tends to show that the territory included covered also a part of Otter district, [440] but the extent thereof does not appear; that voters from all three districts voted at the election, a few from Otter district.

So far as the record shows, the state has not, nor has any other person ever before, questioned the corporate existence and capacity of the plaintiff. The defendant relies strongly upon the provisions of section 10, article 12 of the constitution, which provides that "no independent school district or organization shall hereafter be created, except with the consent of the school district or districts out of which the same is to be created, expressed by a majority of the voters voting on the question." It is claimed that this provision was disregarded, not by the act of the legislature, but by the county court and election officers; that the election should have been held in each of the districts affected, at each of the voting places established for general elections; and that the election held at the two voting places within the boundaries of the independent district was not a compliance with the constitutional provision and the election laws of the state. In our

opinion, the provision of the constitution referred to and the general law do contemplate that the election in the several districts affected should be held at all the voting precincts established for general elections. But it is evident that the county court directing the election in question and the election officers did not so construe the law.

Did the irregularity in the election invalidate the same, and render the effort to complete the incorporation abortive? As an original proposition, in any proceeding directly attacking the same we might be forced to hold the incorporation void; but this is not such a proceeding. Here the incorporation was collaterally attacked by a third person, in a suit to defeat the recovery of possession of public property in possession and control of the plaintiff; and we are not bound by the same rule as in direct proceedings to annul or take away corporate rights. The record convinces us that there was a bona fide effort to comply with the law to effectuate the incorporation, and the people affected thereby seem to have acquiesced therein, having elected a board of education, which has exercised all the functions pertaining to the corporation, so as to create a [441] de facto, if not de jure, corporation. A corporation de jure is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in a quo warranto proceeding; a corporation de facto, one where there is a charter or some law under which a corporation with the powers assumed might lawfully be created, and a user of the rights claimed to be conferred by such charter or law, or where there has been a bona fide attempt to organize a corporation under the charter or an enabling statute: 10 Cyc. 252, and authorities cited. To establish the existence of a de facto corporation a charter or law authorizing the existence of the corporation must be shown, and user under such authority: 10 Cyc. 256, note, 26, and authorities cited. In Snider Sons' Co. v. Troy, 91 Ala. 224, 24 Am. St. Rep. 887, 8 So. 658, 11 L. R. A. 515, the court holds that a corporation de facto exists "when, from irregularity or defect in its organization or constitution, or from some omission to comply with the conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by law; or, in other words, when there is an organization with color of law and an exercise of corporate rights and franchises." As a general rule, such corporate existence cannot be litigated

in actions between private individuals, nor between private individuals, and the assumed corporation: 10 Cyc. 256, note 27, and authorities cited. In 1 Thompson on Corporations, section 503, it is said in reference to a de facto corporation that if it appears to be acting under color of law, and is recognized by the state as such, such a question should be raised by the state itself by quo warranto or other direct proceeding, and that the rule would not be different if the constitution itself prescribed the manner of incorporation. Even in such case, proof that the corporation was acting as such under legislative sanction would be sufficient evidence of rights except as against the state, and private persons could not enter upon any question of the irregularity. Where a corporation exists de facto, it may exercise the powers assumed, and the question of its having a right to exercise them will be deemed one which can be raised only [442] by the state: 10 Cyc. 334; Clark & Marshall on Private Corporations, secs. 80, 81, and cases cited. In 1 Beach on Public Corporations, section 76, the author says: "When the inquiry into the corporate existence of a municipality is merely collateral, only that the municipality exists de facto need be proved." In this state causes of forfeiture of corporate franchises and actual expiration thereof by operation of law will not abate a suit by or against such corporation or be cause for dismissal: Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227; Baltimore & O. R. R. Co. v. Supervisors, 3 W. Va. 319; Moore v. Schoppert, 22 W. Va. 282.

These authorities, and the conclusion we have reached with respect to the title of the defendant, require us to reverse the judgment of the circuit court and award the plaintiff a new trial.

What Constitutes a Corporation De Facto is the subject of a note to Marshall v. Keach, 118 Am. St. Rep. 253. Ordinarily, the legal existence of a de facto corporation can be questioned only by the state in a direct proceeding for the purpose: Taylor v. Portsmouth etc. St. Ry. Co., 91 Me. 193, 64 Am. St. Rep. 216; Postal Tel. etc. Co. v. Oregon etc. R. R. Co., 23 Utah, 474, 90 Am. St. Rep. 705; Union Pac. R. R. Co. v. Colorado etc. Co., 30 Colo. 133, 97 Am. St. Rep. 106; Clark v. American Cannel Coal Co., 165 Ind. 213, 112 Am. St. Rep. 217. This rule, however, is inapplicable where the company is only a pretended but not a de facto corporation: Huber v. Martin, 127 Wis. 412, 115 Am. St. Rep. 1023; Clark v. American Cannel Coal Co., 165 Ind. 213, 112 Am. St. Rep. 217.

The Rule of Caveat Emptor Applies to Judicial Sales, and the purchaser acquires only such estate or interest as his debtor possesses: Brady v. Carteret Realty Co., 67 N. J. Eq. 641, 110 Am. St. Rep. 502; Milner & Kettig Co. v. De Loach Co., 139 Ala. 645, 101 Am. St. Rep. 63; Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936.

BOYLAN v. HINES.

[62 W. Va. 486, 59 S. E. 503.]

GARNISHMENT.—Money in the Hands of Special Commissioners arising out of a case in chancery, belonging to a judgment debtor, and which the court has directed such commissioners to pay over to him is subject to garnishment. Such money is not in the custody of the law. (p. 984.)

W. MacDonald, for the plaintiff in error.

T. Morrison, for the defendant in error.

[486] ROBINSON, J. A single question is involved here, and presented by the record squarely. It is this: Are special commissioners in a chancery cause who have in their hands money arising out of said cause, belonging to a judgment debtor, and the amount of which by decree therein has been directed to be paid to the said owner, liable as garnishees of such judgment debtor upon proper suggestion proceedings in the premises?

Thomas Boylan had judgment before a justice of the peace of Mineral county against John Hines, on the eleventh day of February, 1907, for the sum of $231, with interest thereon until paid, and the costs, a transcript of which judgment was filed in the clerk's office of the circuit court of said county, pursuant to section 118, of chaper 50, of the Code, and execution was there issued. Suggestion proceedings thereupon were regularly instituted in the circuit court of said county, and Taylor Morrison, F. C. Reynolds and William MacDonald, special commissioners in the chancery cause of Floyd Knight, administrator of James W. Tasker, deceased, against Sarah J. Tasker and others, were made garnishees. By decree in such chancery cause, in said circuit [487] court, the said Hines was entitled to the sum of $175, in the hands of said special commissioners, and the same had been thereby directed to be paid him by them. This amount was admitted by said special commissioners, garnishees, to belong to him, and it was further admitted by them that they "were authorized and directed by said decree to pay out said money." Hines moved the court to quash the suggestion process upon the ground, as stated in the record, that special commissioners were not liable to such process. This motion was sustained, the suggestion quashed, and judgment given Hines against the plaintiff therein for costs. From this action of the circuit court, the plaintiff Boylan obtained this writ of error.

It is insisted that money so in the hands of special commissioners is in the custody of the law, and therefore not liable to be suggested. The rule that property in the custody of the law cannot be made the subject of attachment or garnishment is practically universal: Brewer v. Hutton, 45 W. Va. 106, 72 Am. St. Rep. 804, 30 S. E. 81. "Any person deriving his authority to receive and hold money or property from the law, and who, is obliged to apply such money or property according to the rules of law, cannot be held liable as a garnishee for such money or property while it is held by him under such authority. Consequently, a public officer of any name or nature is beyond the reach of process of garnishment while he holds the funds or property in his official and public capacity, and is accountable to the public or an individual merely as an officer": Shinn on Attachment and Garnishment, sec. 505.

The reason for such rule is well founded and clearly known. The due and orderly administration of the law is not to be interfered with by such process. But "the reason of the law is the life of the law," and when the reason for a rule ceases, so does the rule. Does an officer hold money in his official capacity after he has been directed by the court whose instrument he is to pay the same to the party to whom it belongs? Is not his legal custody, and through him the custody of the law, then at an end? After such direction of the court and before his payment pursuant thereto, to whom is his liability? The custody then rightfully belongs to the owner. The officer thereafter holds the [488] money for him, not for the law, because the law has done with it and fulfilled its administration.

Under our statute, section 10, chapter 141, of the Code, the suggestion is based on the lien of plaintiff's writ of fieri facias, and to support garnishment there must be liability upon the party suggested in favor of the judgment debtor. It will be readily conceded that such liability must be such as will support an action of law: Swann v. Summers, 19 W. Va. 115. A special commissioner under our law and practice is of practically the same legal status as a receiver: Blair v. Core, 20 W. Va. 265. In Crawford v. Fickey, 41 W. Va. 544, 23 S. E. 662, this court held that "an order that a receiver pay a fixed sum to a certain person is a personal judgment or decree against the receiver," and in Rickard v. Schley, 27 W. Va. 617, the same principle is enunciated. In this light, and upon sound reason, was not the order in said chancery cause directing payment to Hines by said special

commissioners an end of the custody of the law of the money in their hands belonging to him, and did it not have the effect of casting a personal liability upon them in his favor for the amount so belonging to him? We so hold. Such being the case, the money is liable to garnishment.

And in support of this is the great weight of modern authority. In Wade on Attachment, section 424, it is stated: "The authorities seem to concur in holding receivers and similar officers liable to garnishment, when they have in their hands a definite sum to which the defendant or the judgment debtor is clearly entitled, and the officer has nothing more to do with the fund than to pay it over. Some of them may go beyond, but none, so far as they have been examined, fall short of this conclusion"; and a most extensive examination of the books leads us to an approval of the author's statement. The author in the same section tells us that it is held with considerable unanimity that when defendant has a right to a certain distributive share of the funds in the hands of a receiver, master in chancery or trustee of court, such officer may be garnisheed by a creditor of the party so entitled after the court has ordered it to be paid. Mr. Shinn, at section 506, announces the same in the following language: "When the purpose of the legal custody [489] has been accomplished, and the only duty of the officer is to pay the money to the principal defendant in garnishment, the officer may then be held as garnishee." He also says: "Money in the hands of a clerk of the court, which has been ordered to be paid, may be secured by process of garnishment served upon the clerk." And again he says: "Official duty ceases when the court directs the officer to pay over the fund. After the confirmation of a sale by a commissioner, and an order of distribution of the purchase money of the land sold, such commissioner may be held as garnishee."

It follows that the circuit court is in error in sustaining the motion to quash the suggestion, and such judgment of the circuit court is therefore reversed, with costs against the defendant in error, John Hines, upon whose motion the suggestion was quashed; and, this court now proceeding to do what the circuit court should have done in the premises, it will be ordered that the said special commissioners, garnishees, pay the said sum in their hands belonging to the said judgment debtor to the plaintiff in furtherance of his right of garnishment thereof.

Funds in the Custody of the Law are Ordinarily not Subject to Garnishment.—This rule has been applied where the money in question was in the hands of a receiver or of the clerk of court, or of an administrator: Reisner v. Gulf etc. Ry. Co., 89 Tex. 656, 59 Am. St. Rep. 84; Allen v. Gerard, 21 R. I. 467, 79 Am. St. Rep. 816; Slover v. Coal Creek Coal Co., 113 Tenn. 421, 106 Am. St. Rep. 851. But money ceases to be held in the custody of the law when the court makes an order for its distribution to the persons whom it finds entitled thereto, and directs its officer to pay the money to them. This rule has been applied to funds in the hands of a receiver: Dunsmoor v. Furstenfeldt, 88 Cal. 522, 22 Am. St. Rep. 331; and it would be also applicable to an administrator after a decree of distribution has been made: Pugh v. Jones, 134 Iowa, 746, 120 Am. St. Rep. 451; Orlopp v. Schueller, 72 Ohio St. 41, 106 Am. St. Rep. 583.

BICE v. BOOTHSVILLE TELEPHONE COMPANY.

[62 W. Va. 521, 59 S. E. 626.]

JUDGMENTS—Jurisdiction on Dismissing Appeal.—An appellate court in dismissing an appeal for want of jurisdiction has no power to render judgment for costs of suit. (p. 987.)

JUDGMENTS—Power to Award Costs.—A statute authorizing the court to give or refuse costs upon any motion, other than a judgment for money, or upon an interlocutory order or proceeding, empowers the court to render judgment for such costs only as are incident to the motion, if any, and not the costs in the suit. (p. 988.)

JUDGMENTS—Prohibition.—Want of jurisdiction in a court entertaining a cause, or rendering a judgment therein without jurisdiction, subjects it to the writ of prohibition, although there may be other remedies, regardless of the amount involved. (p. 989.)

JUDGMENTS—Prohibition—Discretion.—The rule respecting the giving of opportunity to the inferior court to correct its own error in rendering judgment, before granting a writ of prohibition is one of discretion merely, and the judgment of the lower court will not be reversed on appeal for failure to require such inferior court to require such application before granting the writ. (p. 989.)

H. Shaw, for the plaintiff in error.

W. S. Meredith, for the defendant in error.

522 POFFENBARGER, J. The Boothsville Telephone Company recovered a judgment in a justice's court for the sum of eight dollars, against J. Lee Bice, who took an appeal therefrom to the intermediate court of Marion county, whence the appeal was, on motion, dismissed for want of jurisdiction, the amount in controversy being insufficient. The order of dismissal was accompanied by a judgment for costs, amounting to $17.35, and, denying a lack of jurisdiction in the court to adjudge costs in dismissing an appeal for want of jurisdiction, Bice obtained from the circuit court of said county a writ of prohibition, inhibiting the enforcement of

the judgment. To the judgment of the circuit court, awarding said writ, the telephone company obtained from this court a writ of error.

The federal courts uniformly deny power in the court to award costs on dismissing for want of jurisdiction: Inglee v. Coolidge, 2 Wheat. 363, 4 L. ed. 261; McIver v. Wattles, 9 Wheat. 650, 6 L. ed. 182; Strader v. Graham, 18 How. 602, 15 L. ed. 464; Hornthall v. Keary, 9 Wall. 560, 19 L. ed. 560; Nashville v. Cooper, 6 Wall. 247, 18 L. ed. 851; Citizens Bank v. Cannon, [523] 164 U. S. 319, 17 Sup. Ct. Rep. 89, 41 L. ed. 451. Some of these cases were referred to in the opinion in Nutter v. Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A., N. S., 1083, by way of illustration in the discussion of principles, governing costs generally, as showing a condition under which there might be no discretion in the court respecting the matter, but no intimation was there given as to whether it would be proper to award costs in such case under our practice. That question was neither involved nor discussed; but several decisions, rendered by this court, declare the principle of the federal cases: Ferguson v. Millender, 32 W. Va. 30, 9 S. E. 38; State v. Lambert, 52 W. Va. 248, 43 S. E. 176; Elbon v. Hamrick, 55 W. Va. 236, 46 S. E. 1029; Baker v. Tappan, 56 W. Va. 349, 49 S. E. 447. Some apparent exceptions, as well as some actual ones, are recognized by all courts, and, in some jurisdictions, the rule is not observed at all. The federal supreme court holds that the costs of a motion to dismiss for want of jurisdiction may be allowed, when any expenses incident thereto, such as the printing of the record, have been necessarily incurred for the purposes of the motion, but not costs of the suit, as upon a hearing (Bradstreet Co. v. Higgins, 114 U. S. 262, 5 Sup. Ct. Rep. 880, 28 L. ed. 715); and when the appellate court reverses for want of jurisdiction in the lower court, appellate court costs are allowed: Ferguson v. Millender, 32 W. Va. 30, 9 S. E. 38; Freer v. Davis, 52 W. Va. 1, 94 Am. St. Rep. 895, 43 S. E. 164, 59 L. R. A. 556; Gaylord v. Kelshaw, 1 Wall. (U. S.) 81, 17 L. ed. 612; Mansfield R. R. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. Rep. 510, 28 L. ed. 462; Assessors v. Osborn, 9 Wall. (U. S.) 567, 19 L. ed. 748; Montalet v. Murray, 4 Cranch, 46, 2 L. ed. 545. For cases, wholly denying the rule, inhibiting judgment for costs when the court is without jurisdiction of the case, or awarding costs in such case under special statutes, see 11 Cyc. 211, note 2. On the main question, there is sharp conflict of authority, but this court has undoubtedly adopted the rule adhered to by the

federal courts, and it seems to be sustained by the great weight of authority throughout the country. In doing so, we have necessarily construed the statutes we have as not authorizing costs in such cases, even though they may not have been specially considered. One exception among our own decisions has been observed—Taylor v. Maynor, 46 W. Va. 588, 33 S. E. 260—but the matter of costs was not discussed. It was referred to in Elbon v. Hamrick, 55 W. Va. 236, 46 S. E. 1029, but not followed in respect to costs. These observations apply also to Richmond v. Henderson, 48 W. Va. [524] 389, 37 S. E. 653, in which this court, dismissing a writ of certiorari, on a writ of error, awarded costs in the court below as well as costs in this court. Frye v. Miley, 54 W. Va. 324, 46 S. E. 135, was a different kind of case. There a bill in equity was dismissed, as upon a demurrer, and the statute, section 4, chapter 138, Code, probably warranted the decree for costs. All costs are of a statutory authorization, for the common law gave none in any case: 11 Cyc. 24; 5 Ency. of Pl. & Pr. 110. Statutes relating to costs must be strictly construed: 11 Cyc. 27; 5 Ency. of Pl. & Pr. 111. In England and many of the states of this country, they are regarded as penal statutes (11 Cyc. 27); but our statute declares them not penal: Code, c. 138, sec. 10. The statutory provisions, relied upon as giving jurisdiction, are sections 4, 8 and 11 of chapter 138 of the Code. Section 4 says: "Upon any motion (other than for a judgment for money), or upon an interlocutory order or proceeding, the court may give or refuse costs, at its discretion, unless it be otherwise provided. And when any part of the proceedings is adjudged insufficient, order all costs occasioned by such insufficient pleading, to be paid by him who committed the fault." Section 8 provides as follows: "Except where it is otherwise provided, the party for whom final judgment is given in any action, or in a motion for judgment for money, whether he be plaintiff or defendant, shall recover his costs against the opposite party." Section 11 says: "In every case in an appellate court, costs shall be recovered in such court by the party substantially prevailing." That section 11, expressly made applicable to appellate courts, does not cover the case is manifest from the several decisions in which it has not been so considered. Section 8, as well as section 11, plainly contemplates only final judgments and decrees. Section 4, by the use of the terms "any motion," may seem to cover the case, but the costs to be allowed under that clause would be only those incident

to the motion, if any, and not costs in the suit. This is the construction placed, by the federal supreme court, on one of its rules, couched in terms similar to those of our statute. It does not authorize a judgment for costs generally, including fees and mileage of witnesses, clerk's fees and attorneys' fees. Nothing is suggested or perceived that could afford ground for the taxation [525] of $17.35 as costs incident to the motion to dismiss. That said sum is the cost of the suit is put beyond doubt by the terms of the order under which the taxation was made. It gives to the plaintiff, appellee, a recovery of "its costs by it expended in and about its prosecution of this suit in this court."

Want of jurisdiction in a court, entertaining a cause of action, or rendering a judgment, subjects it to the writ of prohibition, although there may be other remedies: Johnston v. Hunter, 50 W. Va. 52, 40 S. E. 448; Judy v. Lashley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413; State v. Godfrey, 54 W. Va. 54, 46 S. E. 185. That the amount is insufficient to give appellate jurisdiction, if the case were within the jurisdiction, is immaterial. Knight v. Zahnhizer, 53 W. Va. 370, 44 S. E. 778, does not assert the contrary of this proposition. The justice in that case had jurisdiction. Neither prohibition nor mandamus lies to give a right of review, when the legislature has failed to provide for it (Fleshman v. McWhorter, 4 W. Va. 161, 46 S. E. 116), but that is not the matter involved here. Our question is whether prohibition lies against a court acting without jurisdiction, and, in such case, the amount involved is immaterial. The rule respecting the giving of opportunity to the inferior court to correct its own error is one of discretion only. It is not obligatory upon the superior court to refuse the writ until application shall have been made to the court below for correction: Board of Education v. Holt, 51 W. Va. 435, 41 S. E. 337. The circuit court of Marion county having deemed it proper, under the circumstances, to award the writ, without requiring such application to be first made, this court cannot disturb its judgment on that ground. No abuse of its discretion is disclosed by the record, and it is elementary law that the exercise of judicial discretion will not be disturbed so as to reverse a judgment, unless the discretion appears to have been abused.

For the reasons stated, the judgment will be affirmed.

The Right of Litigants to Costs is Wholly Statutory, and for the court to allow or apportion costs it is necessary to point to some specific provision of the statute giving the right: In re Donges' Estate, 103

Wis. 497, 74 Am. St. Rep. 886. Where there is no power in a court to impose payment of costs, a judgment therefor is void: Two Rivers Mfg. Co. v. Beyer, 74 Wis. 210, 17 Am. St. Rep. 131.

The Writ of Prohibition is the subject of a note to State v. Superior Court, 111 Am. St. Rep. 929.

FELLOWS v. CITY OF CHARLESTON.

[62 W. Va. 665, 59 S. E. 623.]

EQUITY JURISDICTION—Injunction—Criminal Proceedings. If a criminal prosecution under an invalid law destroys civil property or property rights and their enjoyment, a court of equity may properly enjoin the criminal prosecution. (p. 991.)

MUNICIPAL ORDINANCES—Building Permits.—A city has no power to require the issuance of a permit to build a house therein, unless authority to do so is given by the legislature. (p. 993.)

MUNICIPAL CORPORATIONS—Building Permits—Constitutional Law.—A municipal ordinance requiring a permit from the city to build a house therein is a valid exercise of the police power, if such power is granted by its charter, and in no sense is it unconstitutional. (p. 993.)

L. E. McWhorter and M. Briggs, for the appellant.

Ferguson & Ellison, for the appellees.

[665] BRANNON, J. Sallie Fellows and A. A. Fellows, her husband, claiming to own a lot of land on the bank of the Kanawha river between its low-water mark and Front or Kanawha street, in the city of Charleston, were proceeding to erect a dwelling-house on the lot, and after they had partly constructed it the city of Charleston caused a warrant to be issued for the arrest of A. A. Fellows on the charge, as the bill says, that the building of "said house was in violation of law and an ordinance of said city," and caused said Fellows to be arrested and stopped him, and forced him and his employés to abandon and quit work and leave the house unfinished, and frightened the employés from work and forbade them thereafter to resume work, threatening them with arrest and criminal prosecution and fine and imprisonment should they do so. The bill says that the police judge of the city, upon said warrant, imposed on Fellows a fine of ten dollars, and that Fellows took an appeal to the criminal court. Fellows and his wife filed a bill in the circuit court of Kanawha [666] county against the city of Charleston, its Mayor and other officers, praying an injunction against them to restrain them from further molesting, arresting, criminally prosecuting and imposing fines

upon the plaintiffs, their employés and servants, for being engaged in the erection of said house and until the final adjudication of the said criminal case on appeal, pending in the criminal court of Kanawha county, and until the completion of their said house on their said lot. The court awarded an injunction commanding the city and its officers to cease and abstain from further molesting, arresting, hindering or in any way interfering with Sallie Fellows and A. A. Fellows, their employés or servants, in the erection of said building. The court overruled a motion to dissolve the injunction, and the city of Charleston took an appeal.

So confused and irregular are the bills and many orders in the case that it is quite difficult to get at the true merits for decision presented by the record. There was a bill filed at rules under the summons, which we should think would be the bill of the record, but before the court another bill was filed, and afterward amended at the bar. It is claimed that the bill is insufficient. Open to criticism it is, but we shall treat it for all that it is worth, and decide the case upon the bill filed in court, though it was not filed as an amended bill. The bill does not say what the offense was on which the warrant of arrest was predicated; but the answer and an exhibit later filed introduce an ordinance of the city, and we gather that the city issued its warrant for a violation of an ordinance requiring that before a building should be erected in the city there should be a permit granted for its erection, and prohibiting its erection without such permit, and imposing a fine for the violation of the ordinance.

The first question arises upon the contention by the city that equity has no jurisdiction of the case because equity will not enjoin a criminal prosecution. For this position we are referred to Flaherty v. Fleming, 58 W. Va. 669, 52 S. E. 857, 3 L. R. A., N. S., 461. It holds the general principle that "It is a rule, subject to few exceptions, that a court of equity will not interfere by an injunction with criminal proceedings." But that case distinctly admits that if criminal prosecution destroys civil property and its enjoyment, in protection of the property right equity may [667] properly enjoin the criminal prosecution. Now, surely, the prosecution of criminal process illegally preventing the construction of a residence on real estate deprives the owner of a very important use of his land, practically taking it from him: 6 Pomeroy's Equity, 3d ed., sec. 644; 22 Cyc. 902; Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct.

Rep. 18, 49 L. ed. 169. Therefore, there is jurisdiction in equity for injunction. And aside from that question, there stands the fact alleged that the city and its constituted officers were hindering and obstructing the erection of the house, and that itself, I think, would sustain the jurisdiction.

The plaintiff's counsel assail the ordinance of the city of Charleston as void. If that be so, there would be no color of jurisdiction for the action of the city authorities. Hence we must inquire whether that ordinance is valid or void. The enactment of an ordinance directing and regulating the construction of buildings in cities, and requiring a permit from the city therefor, is an exercise of that great power called police power. That power is vital and indispensable. Without it cities and towns could not exist. That power is vested in the state; but it being utterly impracticable that the state legislature and executive could regulate by their constant presence all the doings in cities and towns, it became indispensable that the state should delegate the exercise of such power to those petit states, the cities and towns. "Municipal corporations have exercised the police power eo nomine for time out of mind by making regulations to preserve order to promote freedom of communication and to facilitate the transaction of business in crowded communities; and this power of local legislation may be conferred upon the smallest village that the legislature sees fit to incorporate as well as upon the largest city in the state. The extent of their police powers depends upon the limitations of their charters. The power to be exercised is frequently restricted to the one phrase 'police powers,' and the ordinances must then be reasonable regulations upon subjects which are recognized as falling within the scope of such powers. Delegation of police power. The legislature may delegate to a municipality the power to adopt ordinances on matters of local importance although there are general statutes on the same subject. An ordinance [sic] legally referable to any one of several delegated powers is valid": 2 Smith on Municipal Corporations, secs. 1320, 1321. See 22 Am. & Eng. Ency. of Law, 919. But a municipal corporation cannot exercise this police power unless authority to do so is given by the legislature to it: State v. Godfrey, 54 W. Va. 54, 46 S. E. 185; Judy v. Laskley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 113. It can exercise those powers and no others granted expressly in its charter, and those necessarily implied or incident to the powers that are expressly granted, and those essential to the declared purpose

of the corporation and indispensable to it: City of Charleston v. Reed, 27 W. Va. 681, 55 Am. Rep. 336. Turning now to the acts of 1895, chapter 58, amending and re-enacting the charter of Charleston, we find in section 21 that the council is given full power "to control the construction and repair of all houses, ... to provide for the regular building of houses or other structures, and determine the distance that they shall be built from any street or alley; to abate or cause to be abated anything which in the opinion of the council shall be a nuisance." Section 22 gives the council power, in order to carry out the powers enumerated in section 21, and "all others conferred upon the said city or its council expressly or by implication in this or any other acts of the legislature" to "adopt and enforce all needful orders, by-laws and ordinances not contrary to the laws or the constitution of the state, and to prescribe, impose and enforce reasonable fines and penalties, including imprisonments, under judgment and order of the mayor or recorder of said city." Under that statute it is very clear that the city had power to pass the ordinance requiring a permit from it for the construction of the house. The ordinance requires the person proposing to build to lay before the inspector of buildings plans and specifications of every building and obtain the approval of the inspector, and requires that the approval should go before the council and the party obtain its approval and permit. This court has recognized the power of a city to demand such permit and to regulate buildings by laying down principles which would thus empower the city: City of Charleston v. Reed, 27 W. Va. 681, 55 Am. Rep. 336. More particularly as to building permits, though they certainly would be included under such general powers as are spoken in the act above mentioned. We find in McQuillin [669] on Municipal Ordinances, section 471, this: "Where the charter power is ample, the local corporation may require a certificate or permit, issued by the proper official as a condition precedent to the erection of new buildings or the material alterations or additions to buildings already erected; but whether such authority exists and the manner of its exercise depends upon the provisions of the charter and legislative acts applicable. Where the charter power is sufficient, an ordinance requiring a permit in order to alter or repair wooden buildings within the fire limits will be held constitutional." In 2 Smith on Municipal Corporations, section 1331, we find it stated that,

"As a protection against fire a municipality may, as a legitimate exercise of police power, make reasonable regulations in regard to the construction, character and nature of buildings within the corporate limits." And there we further find the statement of this legal proposition: "Thus it was held that such a grant of power would sustain an ordinance prohibiting any person from erecting buildings within the limits of the town without a permit from the governing board." They are required in almost all cities and in many towns. They tend to prevent disease and fires, and this is warranted by Charleston v. Reed, 27 W. Va. 681, 55 Am. Rep. 336. Upon these and many other authorities, we may assert the power of the city of Charleston to demand a permit for the erection of this building. The invalidity of the ordinance cannot be predicated upon general law. No ground is specified to sustain the claim to invalidate this ordinance, except that it is a violation of amendment fourteen of the constitution of the United States, in that the ordinance deprives an owner of his property without due process of law. Can it be thought for a moment that it was the design of that amendment to destroy a vital power vested in the state, and by its delegation vested in a city, a power vastly essential to a city? Let us cite some authorities from the national supreme court on this matter. In Barbier v. Connelly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923, we find the holding that "The fourteenth amendment of the constitution does not impair the police power of a state." So, also, holds the case of Minneapolis R. Co. v. Bechwith, 129 U. S. 26, 9 Sup. Ct. Rep. 207, 32 L. ed. 585. See Brannon's fourteenth amendment, 167. After writing to this point, I meet with the case of Wilson v. Eureka [670] City, 173 U. S. 32, 19 Sup. Ct. Rep. 317, 43 L. ed. 603, in which was involved an ordinance that "No person shall move any building or frame of any building into or upon any of the public streets, lots or squares of the city, or cause the same to be upon or otherwise obstruct the free passage of the street, without the written permission of the mayor or president of the city council. A violation of this section shall, on conviction, subject the offender to a fine of twenty-five dollars." The court held that the ordinance was not in violation of the fourteenth amendment. An ordinance prohibiting the alteration and repair of any wooden building within certain limits without permission of the majority of the firewarden and approved by a majority of the fire department and mayor was held not in violation of the four-

teenth amendment: Ex parte Fiske, 72 Cal. 125, 13 Pac. 310. These cases answer the charge that the federal constitution is violated by the ordinance. And for its validity and reasonableness I add the following authorities: Easton v. Covey, 74 Md. 162, 22 Atl. 266; Hine v. New Haven, 40 Conn. 478; City of Olympia v. Mann, 1 Wash. 389, 25 Pac. 337; Rochester v. West, 164 N. Y. 510, 79 Am. St. Rep. 659, 58 N. E. 673. In Hasty v. City of Huntington, 105 Ind. 540, 5 N. E. 559, an ordinance making it unlawful to erect a building within the city without making application to the clerk of the board of improvements was held valid: See McCloskey v. Kreling, 76 Cal. 511, 18 Pac. 433. See, also, Freund on Police Power, secs. 643, 644, for collection of cases on the subject. Also 34 Am. Dec. 633.

The bill charges that the ordinance was not, during the process of its enactment, published as required by law. The record does not sustain this charge. There is no evidence of it. So we find that the ordinance is valid.

The ordinance being valid, the plaintiffs must show that they had a permit from the city for the building of the house. The bill alleges that they had such permit. I do not think the evidence shows it. But I need not inquire as to that; for the answer flatly denies that there was any such permit, and says that the council refused the permit on consideration of the application. There was no replication to that answer, and, under well-settled principles of equity procedure, where an answer is filed and no replication made, all the allegations therein, whether responsive to the bill or not, must [671] be taken as true: Bierne v. Ray, 37 W. Va. 571, 16 S. E. 804. This ends the case. I will add that the answer denies the ownership of the lot by the plaintiffs. Denies the right to build on it, and thus denies the right to have any relief as to the property. The answer wholly denies all right in the plaintiffs. Though for the decision of the case it is not material, I will add that the answer states that the building in process of erection invaded the street. A survey of it shown by a plat filed shows that it invades the street. This being so, the city had a right to enforce its ordinance by the penal proceedings above referred to: Charleston v. Reed, 27 W. Va. 681, 55 Am. Rep. 336. It is well settled that the building upon a street is a public nuisance: Pence v. Bryant, 54 W. Va. 263, 46 S. E. 275. The town has power to enforce its ordinance, and if necessary for the abatement and removal of the nuisance may remove or destroy the thing creating the

nuisance and it is not a taking of property without due process of law: Brannon's fourteenth amendment 216, citing for authority Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205, and Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385. But the town took no steps to remove the house, but simply the penal proceedings aforesaid.

Upon the principles above stated we must dissolve the injunction and dismiss the bill.

The Constitutionality of Building Regulations is the subject of a note to Bostock v. Sams, 93 Am. St. Rep. 405. An ordinance declaring that if any person shall "erect any structure or building, within the city limits, without the consent of the common council," which will be "greatly injurious to adjacent property, and destroy the comfort, convenience, peace and reasonable enjoyment of adjacent residents, the same shall constitute a nuisance," and he shall be punished by fine, and the structure removed by the police at the cost of the owner, is unconstitutional as conferring arbitrary power upon the city council: Boyd v. Board of Council of Frankfort, 117 Ky. 199, 111 Am. St. Rep. 240.

CASES

IN THE

SUPREME COURT

OF

WYOMING.

FIELD v. LEITER.

[16 Wyo. 1, 90 Pac. 378, 92 Pac. 622.]

APPEAL AND ERROR.—The Death of One of the Parties in Error After the Petition in Error is Filed and summons issued does not abate the proceedings, nor render any other or further assignment of error necessary. (p. 1008.)

APPEAL AND ERROR—Substitution Because of the Death of the Plaintiff in Error.—On the death of a trustee, who is a defendant in the cause and also one of the plaintiffs in error, during the pendency of the proceeding in error, it is proper to substitute his successor in the trust, to have the same rights and liabilities as the decedent. (p. 1008.)

PARTITION IN EQUITY, Limitations upon.—Though equity granted partition in cases incapable of relief at law because of legal objections operating as obstructions to the action of the law court, but which might have been overcome by the remedial processes of courts of equity, it is not to be understood that it would furnish the remedy to estates not entitled to partition at law, unless, perhaps, partition should be found necessary as an incident to complete equitable relief in cases otherwise properly before the court. (p. 1013.)

PARTITION, Estates Subject to.—None but Estates in Possession were bound by a judgment in partition at the common law. (p. 1013.)

PARTITION—Persons Who Could not Sue for.—One Without Possession or Right of Possession cannot compel partition at the common law. (p. 1013.)

PARTITION—Reversioners and Remaindermen.—The partition of estates in remainder without the right of possession was not enforceable at the common law, nor could partition be compelled between a tenant in possession and a mere remainderman. In the absence of a statute authorizing it, partition in equity cannot be awarded any more than at law of an estate in reversion of remainder. (p. 1014.)

PARTITION—Tenants in Possession and Remaindermen and Reversioners.—A partition can be had between tenants for life or for years, and also between the owner of the fee of an undivided part and a tenant for life or years of the other part, without joining the reversioner or the remainderman, though the partition in the absence of the latter is temporary only. (p. 1014.)

PARTITION.—Tenants of Estates not in Possession not Necessary Parties Thereto.—It is no objection to a partition that it does not conclude the interests of all persons, as where there are persons having estates which are not subject to partition who are not made parties to the suit. (p. 1014.)

PARTITION Between Persons One of Whom has an Estate in Possession Only.—A partition may be had between a life tenant of an undivided part and a tenant in fee of the other part at the suit of either. (p. 1015.)

PARTITION Based upon Equitable Title.—One with an equitable right capable of conversion and a present legal title, with a right of possession, may compel partition. (p. 1017.)

PARTITION, Character of Proceeding for Under the Codes.—The action for partition is, under the code of Wyoming, a civil action, and not necessarily purely equitable in character. It may be or not, depending upon the nature of the title asserted and the relief sought. (p. 1017.)

PARTITION.—The Question of Parties in Partition must be settled with regard to the issues in the case and the relief demanded. (p. 1018.)

PARTITION, Defect in Parties, How to be Presented and When Waived.—A defect of parties in partition is a ground for demurrer if it appears on the face of the complaint. Otherwise the objection may be taken by answer, and if not raised by such answer or demurrer must be deemed waived, unless it goes to the jurisdiction of the court. (p. 1019.)

PARTITION Under the Code—Parties Holding Reversionary Interests not Necessary.—The owners of reversionary interests without right of possession are not necessary parties in partition. (p. 1020.)

PARTITION Pending Administration.—Though There is an Executor of a Deceased Tenant, his heirs may maintain a suit for partition where the executor offers no objection and his possession is only for the purposes of administration. (p. 1020.)

PARTITION, When not Void Because of the Absence of a Remainderman.—If the owner in fee of an undivided part obtains a judgment in partition against a tenant for life of the other part without joining a remainderman not in possession, nor entitled thereto, the judgment is not void for want of necessary parties, but is binding between the parties to the suit. (p. 1021.)

PARTITION—Parties Defendant, Statute Requiring Interested Persons to be Made Parties—Remaindermen and Reversioners.—A statute requiring each tenant in common, coparcener, or other interested person to be named as defendants does not change the rule that persons whose estates are not in possession need not be made parties. (p. 1021.)

PARTITION—Interests of Reversioners and Remaindermen, When Need not be Determined.—In a suit by a tenant in fee of an undivided interest in real property against a tenant for life it is not necessary for the court to consider or determine what interests, if any, any persons not parties to the suit have in estates in reversion or remainder, nor whether they are so represented by the parties before the court that the judgment will be binding on them, the property being capable of partition by allotment without resorting to any sale. (pp. 1022, 1028.)

PARTITION—Report of the Commissioners, Form and Contents of.—Where the statute is silent respecting the contents of the report, it will be satisfied by a report showing the general action and determination of the commissioners, without disclosing the facts con-

cerning the situation of the premises or specially stating that the partition has been equitably or advantageously made. This question may be brought before the court upon exceptions to the action of the commissioners. (p. 1022.)

PARTITION—Commissioners, Setting Aside Reports of.—The action of commissioners in partition will not be set aside on the ground of unequal allotments except in extreme cases, as where the partition appears to have been made on wrong principles, or is shown by a very clear and decided preponderance of the evidence to be grossly unequal. (p. 1025.)

PARTITION—Commissioners' Report.—Offer of One of the Parties to Take Lands Awarded to the Other at a Lower Price.—The fact that a party seeking to have a commissioners' report in partition vacated offers to allow for the part awarded his adversary, a sum much greater than its value as reported by the commissioners does not require the vacation of the report, when there is evidence sustaining the action and estimates of the commissioners. Such offer merely proves what is already apparent, namely; that the party excepting to the report honestly believes himself aggrieved thereby, but it does not entitle him to have his judgment substituted for that of the commissioners. (p. 1026.)

PARTITION—Commissioners' Report, Vacating for Undue Influence.—Proceedings by and before commissioners in partition should be fairly conducted with an equal opportunity to all persons to be heard, and the fact that secret or undue influence has been exercised by either party to the suit upon the action of the commissioners requires it to be vacated. (p. 1027.)

PARTITION—Commissioners, Undue and Improper Influence of, When not Made Out.—The fact that the manager of one of the parties to a suit in partition accompanied the commissioners for the purpose of pointing out the property to be partitioned and answered some question relative to the lands does not entitle the other party to have the commissioners' report set aside, where there is no evidence tending to show that such manager influenced, or undertook to influence, the commissioners in the allotments made by them, though he subsequently assisted in obtaining affidavits to sustain their report and himself subscribed an affidavit in which his estimate of the lands and of the several classes thereof substantially agreed with theirs. (p. 1028.)

PARTIES—Omission of Property Held by the Parties, Objection to, When Comes too Late.—Where the answer consents to the partition of the property described in the complaint without suggesting any other property which ought to be included in the partition, it is too late, after the report of the commissioners, to object on the ground of the omission of other tracts. (p. 1028.)

PARTITION—Commissioners, Preparation and Report of by Counsel of One of the Parties.—That counsel of one of the parties prepared the report of the commissioners in partition where the report so prepared conformed to their judgment previously announced does not show action prejudicial to the adverse party, nor entitle him to the vacation of such report. (p. 1029.)

Burke & Clark, Samuel T. Carn and Henry W. Magee, for the plaintiffs in error and intervening petitioner.

Gibson Clark and John W. Lacey, for the defendants in error.

[19] POTTER, C. J. This is an action for partition, and is in this court on error. It was brought in the district court in Laramie county by Mary T. Leiter, Joseph Leiter, and others, trustees and devisees under the last will and testament of Levi Z. Leiter, deceased. The defendants were Marshall Field, trustee; James H. Pratt, and Mary T. Leiter and Joseph Leiter, executors of the last will and testament of Levi Z. Leiter, deceased.

The amended petition upon which the cause was heard alleges in substance that on June 15, 1903, and for many years prior thereto, Levi Z. Leiter and James H. Pratt were tenants in common, seised and possessed of the title in fee simple of the lands, tenements, and hereditaments therein described; that the said Leiter, on that date and at the time of his death, owned an undivided two thousand nine hundred and fourteen four-thousandths part of said lands, tenements and hereditaments, and that the said Pratt owned an undivided one thousand and eighty-six four-thousandths part thereof; that on the date above mentioned the said Pratt conveyed by deed to the defendant Marshall Field all his said undivided part in trust, to pay the income of said property to [20] the said Pratt during his lifetime, and after his death to vest the title thereto in the children of the said Pratt, and thereby authorized the said Field to do all acts necessary to make partition or division of said property or any part thereof with the said Levi Z. Leiter; that said Field accepted said conveyance and thenceforth continued to act as trustee thereunder; that after the execution and delivery of said trust conveyance up to the time of the decease of the said Levi Z. Leiter, the latter and said Field, trustee, held and possessed said real estate as tenants in common, in the proportions above mentioned; that said Levi Z. Leiter died June 9, 1904, seised in fee simple of his said interest, and leaving personal property largely in excess of the amount required to pay all of his indebtedness, including a large amount of personal property situate in this state, and leaving no creditors in this state; that by his said last will and testament which had been duly admitted to probate in said district court, Mary T. Leiter and Joseph Leiter were named and appointed as executors thereof, and that all of his said real estate was bequeathed and devised to the plaintiffs, as trustees, with full power and authority to sell and convey all or any part thereof; that letters testamentary had been duly issued to the executors so named in the will, and as such executors they are entitled to, and are in actual possession of,

all the real estate described in the petition. It is then alleged that the said executors are made parties defendant in order that their possession and their right to the income and profits of said real estate during their period of executorship may properly be protected by the decree, and that their title and possession of such part of said real estate as may be set off to the plaintiffs, or such portions of the proceeds of the sale of any part of the said real estate which may be sold by the order of the court, may be substituted for their possession of the undivided portion of the real estate held by them as tenants in common with the other defendants. It is further alleged that as such trustees and devisees the plaintiffs have a legal right to the said undivided two thousand nine hundred [21] and fourteen four-thousandths part of the said real estate, and that in said premises they are tenants in common with the defendant Marshall Field, trustee, who as such trustee has a legal right to the said undivided one thousand and eighty-six four-thousandths part thereof. The lands, embracing more than twenty thousand acres, are alleged to be situated in the counties of Laramie, Johnson and Sheridan in this state, and are severally described in the petition, together with certain water rights and ditches connected therewith. The prayer of the petition is that the real estate described may be partitioned between the plaintiffs and the defendants under the direction of the court according to their respective rights and interest therein; that the interest of plaintiffs be set off to them; that commissioners be appointed by the court for the purpose of making such partition, or, in case a partition of said premises cannot be made without manifest injury to the value thereof, that then the said premises be sold by and under direction of the court, free of the rights of all the parties to the suit, and that the proceeds of any such sale be distributed to the parties entitled thereto in lieu of their respective parts and proportion in the premises according to their just rights therein; and that plaintiffs have such other and further relief as may be just and equitable.

The defendants, Marshall Field, trustee, and James H. Pratt, filed their separate answer to said petition, the material portion thereof being as follows:

"They admit that the rights and interests of the several parties, plaintiffs and defendants, named in the said amended petition, in and to the several pieces or parcels of land mentioned and described in said amended petition, are truly set forth and stated in said amended petition; and these de-

fendants submit to such decree as this court may make in the premises, either for a partition of the said several pieces or parcels of land, or for a sale thereof, or of such parts thereof as shall be found incapable of partition without material injury to the parties interested therein, [22] and these defendants pray that they may have such other and further relief as may be just and equitable."

The defendants, Mary T. Leiter and Joseph Leiter, as executors, filed their separate answer admitting that the rights and interests of the several parties, plaintiffs and defendants, named in the petition are truly set forth and stated therein, and praying that their rights in the premises as admitted in the petition may be preserved in any decree that may be entered.

Upon the issues thus framed an order of partition was entered by the court, which recited that the cause came on to be heard upon the petition, the answer of the defendants Field and Pratt, and the answer of the defendants Mary T. and Joseph Leiter, as executors, and that it appeared to the satisfaction of the court that each and all of said defendants had been duly notified of the bringing, pendency and demand of said action as required by law, and in their answers had consented to the partition of the premises described in the petition as therein prayed for, and that plaintiffs had a legal right and estate in said premises; and it was ordered, all parties consenting thereto, "That by the oaths of R. S. Van Tassell, Oliver Henry Wallopp and E. W. Whitcomb, judicious disinterested householders of the vicinity, upon actual view of the premises, partition be made of said lands, together with the water rights appurtenant thereto, in the following proportions, to wit: The two thousand nine hundred and fourteen four-thousandths part thereof to the said plaintiffs, as the trustees and devisees under the last will and testament of Levi Z. Leiter, deceased, and the one thousand and eighty-six four-thousandths part thereof to the said Marshall Field, as trustee for the said James H. Pratt, if the same can be done without manifest injury to the value thereof, and if not, that said premises be appraised at the true value thereof in money." (Then follows a detailed description of the various lands and water rights.) It was further ordered that a writ of partition issue to the sheriff of the county of Laramie commanding [23] him to have said partition made accordingly. A writ of partition was thereupon issued, and was subsequently returned by the sheriff as duly executed, accompanied by the report of the commissioners. The con-

test in the court below arose upon exceptions to that report, filed by the defendants Field and Pratt, and an intervening petition also objecting to the report filed by Hattie B. Pratt Magee, a daughter of the defendant Pratt, who asked to be made a party defendant and that all the proceedings following the filing of the petition be vacated.

The lands described in the petition and thus involved in the action compose three separate bodies or groups. About fifteen thousand acres are located in Sheridan and Johnson counties, and are generally referred to in the proceedings as the Powder River ranch or Clear Creek lands, and, for convenience, will be here designated by the latter term. The remaining lands are situated in Laramie county; one group of about two thousand five hundred acres being referred to as the Rawhide ranch or lands, and the other, comprising about two thousand seven hundred acres, as the P F ranch or Platte River lands, with an additional tract of two hundred and eighty acres about four miles distant therefrom. The P F ranch or Platte River lands, with the water rights for their irrigation, and the said two hundred and eighty acre tract were set off and assigned by the commissioners to Marshall Field, as trustee of James H. Pratt. All the other lands and water rights were by the commissioners set off and assigned to the plaintiffs. The several tracts and water rights so set off and assigned to the respective parties are described in detail in the report.

Omitting the description of the lands, the report of the commissioners is as follows:

"We, the undersigned, the commissioners named in the writ of partition issued in this cause, and to which this report is annexed, after being each duly sworn, and after being attended by the respective parties hereto, through their counsel, and having considered such information as [24] was presented to us by said parties and their counsel, and after actually viewing and personally examining the premises in said writ described, and after fully informing ourselves as to the proportionate values of the said several parcels of land described in said writ and in said order, on our oaths do set off and assign to Mary T. Leiter, Joseph Leiter, Nancy Lathrop Carver Leiter, Marguerite Hyde Leiter and Seymour Morris, trustees and devisees under the last will and testament of Levi Z. Leiter, deceased, as such trustees and devisees, as their share of said premises, the following described lands and water rights situate, lying and being in the counties of Laramie, Johnson and Sheridan, in the state of Wyoming, to

wit: [Then follows a description of the lands and water rights so assigned to plaintiffs.] And we do also, on our oaths, set off and assign to Marshall Field, as trustee of James H. Pratt, as his share of said premises, so as aforesaid described in said writ, the following described lands and water rights situate, lying and being in the county of Laramie, in the state of Wyoming, to wit": (Then follows a description of the lands so assigned to the defendant Field as trustee.) The report is signed by each of the commissioners.

The defendants Field, as trustee, and Pratt filed objections and exceptions to the report. Some of the objections were to the form of the report, viz.: That the report fails to show or purport that the estate was set apart in such lots as would be most advantageous and equitable, having due regard to the improvements, situation and equality of the different parts thereof; that it fails to set out the facts upon which the conclusions of the commissioners were based; and that the report furnishes no facts to inform the court so that it may set apart the estate in an advantageous and equitable manner. The other objections go to the substance of the report and question the equality and fairness of the partition as made by the commissioners. In the latter respect it was charged that the partition does not set [25] apart the estate in such lots as would be most advantageous and equitable, having due regard to the improvements, situation and equality of the different parts thereof, as required by statute; that it does not set apart said estate either in quantity or quality in proportion to the several interests of the owners, but is grossly unequal and inequitable between the parties interested; that the portion set out to the complaining defendants is of a value less than one-eighth of the real or total value of said estate purported to be partitioned, much less than should have been set out to them; that neither of the objecting defendants were notified of the time when the commissioners intended to view and examine the estate, nor invited to be present upon such examination, either in person or by representatives, but that the commission was accompanied by William C. Irvine, acting in the interests of the other parties to the action, and that said Irvine made suggestions and directed the movements of said commission in their view and examination of the properties, he being thoroughly familiar with the said estate, which had a large influence upon the commission; that when the examination was made the inclement and stormy weather and the fact that the ground was covered with snow made it impossible for the commission to

fully and fairly view the premises and form an accurate opinion as to the relative values of the several pieces of land involved in the partition; that the lands involved were not of equal value, and those of least value of all the lands were those set aside by said commission to said objecting defendants; that the lands assigned to the defendants are of such a character that their successful irrigation is impossible, and their productiveness less than one-fourth per acre than that of the Rawhide lands assigned to plaintiffs; that scattered throughout the surrounding townships adjacent to the Clear Creek group is a large body of leased lands held by the estate consisting of about sixteen thousand acres, which should have been taken into consideration in connection with said estate and should have [26] been partitioned as a part thereof, whereas they were left to be settled or disposed of as a separate estate, and that such lands are of value only to the parties obtaining the Clear Creek lands, for the reason that the last mentioned lands or ranches, together with the leased lands, constitute a single ranch proposition for the breeding and raising of cattle; that the value which the objecting defendants understood the commissioners had placed upon the various tracts of land in making their award was much less than the real value of the lands assigned to plaintiffs and much more than the real value of the lands assigned to the complaining defendants; and that the objecting defendants prior to the making of the report of the commissioners offered to accept as a just and equitable division of the estate a portion of the Clear Creek lands at a valuation considerably in excess of the valuation placed upon such lands by the commission, which offer, however, was not accepted by said commission.

The plaintiffs filed their reply to the objections denying specifically the various charges of unfairness and inequality in the partition as made by the commissioners, and the charges as to the influence of said Irvine, and the impossibility of there having been a full view of the premises and an accurate estimate of the character and value of the respective groups and tracts of lands.

Thereafter, and before the hearing upon the exceptions, an intervening petition was filed by Hattie B. Pratt Magee, a resident of the state of Illinois, in which she objected and excepted to the report of the commissioners upon the ground of its unfairness and inequality, and also to all the proceedings had subsequent to the filing of the petition upon the ground that, as one of the children of James H. Pratt, she

is an interested person in all of the said lands and property under and by virtue of the trust deed executed by the said Pratt to the said Field as trustee. It was alleged that said petitioner and another daughter of said Pratt, viz., Margaret Pratt Ollson, were cestui que trusts [27] in said trust deed, being then and still the only surviving children of said Pratt; that they ought to have been named as defendants in said action and permitted to answer said petition, in the manner provided by law for nonresident defendants or otherwise; that they were not made defendants nor served with notice of said action by publication or otherwise; that said petitioner had not consented to said proceedings or any part thereof, directly or indirectly, nor authorized the said Pratt or the said Field, or both of them, to consent thereto on her behalf; that the estate of Levi Z. Leiter had not been settled and distributed in accordance with his last will and testament, and that one year not having elapsed since the appointment of the executors, the estate was not in a position for distribution, and said petitioner believed that no partition of said property could then be made for that reason; that the other daughter of said Pratt, a resident of the kingdom of Sweden, was also without due notice of the filing of the petition and of the proceedings in partition, and that her rights in the premises had been wholly excluded in the partition. The intervening petition prayed that the petitioner be made a defendant, that her objections be sustained, and that all the proceedings since the filing of the petition be set aside, vacated and annulled; that due notice be given to the children of said Pratt of the filing of said petition, and that said petitioner be permitted within a reasonable time to be fixed by the court to make answer to the petition filed in the action and to assert her rights therein.

It appears that upon the filing of the sheriff's return to the writ of partition with the report of the commissioners the plaintiffs and the defendant executors asked its confirmation, and the defendants Field and Pratt thereupon filed their above-mentioned exceptions. Afterward, on the day of the hearing, upon the motion for confirmation and the objections thereto, the complaining defendants filed a motion for leave to amend their exceptions so as to embrace an objection to any further proceedings until the [28] said daughters of the defendant Pratt are made parties and properly brought before the court, and given an opportunity to plead, or take such other action as may be deemed proper, and that all proceedings subsequent to the filing of the amended petition be

vacated and annulled until said parties are properly before the court and under its jurisdiction. In the meantime, by permission of the court, the objecting defendants and the plaintiffs had filed affidavits in support of the exceptions and in opposition thereto respectively; and the hearing as to the controverted facts was had upon such affidavits, and possibly others filed at the time of the hearing, with the exception that Commissioners Whitcomb and Van Tassell were orally examined, the former having been called for that purpose by the defendants and the latter by the court.

All the matters that had thus come into controversy, including the intervening petition of Mrs. Magee, appear to have been heard at the same time, and they were disposed of by the same order. The court denied the petition and exceptions of the intervening petitioner and the motion of the objecting defendants for the bringing in of additional parties, the order reciting as a finding by the court in that connection that "it is not necessary at this time to make additional parties defendant in said cause as prayed for in the petition of the said Hattie B. Pratt Magee and the motion of the said defendants, nor is it necessary at this time to decide what, if any, rights the said Hattie B. Magee, or any other person not made a party to the original petition in this cause, may have in or to the lands described in the said petition, or any of them, under the trust deed heretofore executed by the said defendant James H. Pratt; nor the effect of the joint consent of Marshall Field, trustee, and James H. Pratt to the decree of partition and the appointment of commissioners to make partition, nor the extent to which Marshall Field, trustee, and James H. Pratt represent and bind other parties." Upon the issues joined upon the exceptions to the report of the commissioners the [29] court found generally for the plaintiffs, and overruled each and all of the exceptions to the report. The proceedings of the sheriff upon the writ and the report and proceedings of the commissioners were thereupon approved and confirmed, and it was ordered that the said parties hold in severalty the shares set off and assigned to each respectively, as shown by said report. Exceptions were duly reserved to the several rulings and the order of confirmation; a motion for new trial was made and overruled, and that ruling excepted to, and Marshall Field, trustee, James H. Pratt and Hattie B. Pratt Magee filed their joint petition in error for a reversal of the order aforesaid.

Immediately preceding the hearing and submission of the cause in this court, counsel for plaintiffs in error suggested

in writing the death of Marshall Field since the institution of the proceeding in error, and moved the substitution in his place as one of the plaintiffs in error of Jerome Pratt Magee, who had become successor in trust by virtue of the trust deed and had accepted and qualified as such succeeding trustee. At the same time a motion of plaintiffs in error was also presented for leave to amend the petition in error in certain respects, to the end that it may show that the plaintiffs in error severally, as well as jointly and severally, assign the errors complained of. The motions were not consented to by defendants in error, but were taken under advisement to be disposed of upon a final consideration of the cause. The motion to amend will be passed for the present.

We do not understand the fact to be disputed that the petition in error was filed and the summons in error issued during the lifetime of Mr. Field. As required by the statute, the errors complained of were set out in the petition in error, and no further assignment of error was necessary under our practice. This court thereupon obtained jurisdiction of the cause, and it is clear that Mr. Field's death did not operate to abate the proceeding: 2 Ency. of Pl. & Pr. 198, 199; 2 Cyc. 770. That it did so operate is not [30] contended, but it was suggested that substitution is unnecessary, and that the order made in the cause might be entered as of some date previous to the death of said party. Such a practice exists in some jurisdictions where the death of a party occurs after the submission of the cause, and the order of affirmance or reversal will be entered as of the date of submission or some subsequent date during the lifetime of the deceased party; and we are not inclined to here question the correctness of that practice in the absence of a statute preventing it. But we think the propriety of our entry of an order finally disposing of this cause as of a date prior to its submission might well be doubted. We have not gone fully into the question whether the interest of the deceased trustee is represented by the other plaintiffs in error; nor was that question argued, but we think it at least doubtful. By analogy to the practice in the district courts under the code the successor in trust would seem to be a proper party: Rev. Stats. 1899, secs. 3622-3638. We are of the opinion that the substitution should be allowed. This is purely an appellate proceeding, and the substituted party will succeed herein only to those rights possessed by his predecessor, and to the same extent, for the same purposes, and with the same liabilities under the

order appealed from. The substitution is granted upon that understanding.

The trust deed in controversy executed by James H. Pratt to Marshall Field contains a preamble reciting in substance that said Pratt and Levi Z. Leiter are joint owners of certain tracts of land in the state of Wyoming, and of certain leasehold estates in other lands in said state, and also of livestock and other personal property situated upon or used in connection with said lands, the interest of Pratt therein being one thousand and eighty-six four-thousandths; and further reciting that: "The said Pratt is desirous of creating an interest in the said property in his children, subject to his right to receive the income derived therefrom during his life, and to that end to vest his interest in the said real and personal property in a trustee for the uses and purposes, [31] and upon the terms and conditions and with the powers hereinafter stated."

The deed thereupon proceeds to convey by apt words of conveyance unto said Field "all his [the grantor's] right, title, interest and estate in and to all the property, real and personal, situated and being in the state of Wyoming, which is owned in common by the said James H. Pratt and Levi Z. Leiter, ... intending thereby to convey by this instrument to the said Marshall Field all the interest of every kind and nature which the said James H. Pratt now has in and to any property situated in the state of Wyoming, in which the said Levi Z. Leiter is also interested as part owner, whether the said property is owned by the said Pratt and Leiter as tenants in common, joint tenants, or as partners, together with all increase and additions to the said property so owned by the said Pratt and the said Leiter; the said property so conveyed, assigned and transferred by this instrument in trust, as trustee, for the uses and purposes, and with the powers hereinafter stated as follows, to wit:

"The trustee shall have full power and authority to do all acts, and to execute all instruments in his judgment necessary or proper for the proper management, care and disposition of the said property, including the right to make partition or division of any of the said property with the said Levi Z. Leiter; to authorize or join in the sale, transfer or conveyance of any of the said property, real or personal, upon such terms and at such prices as the said trustee shall deem best; and also to join in or authorize the purchase of any new or additional personal property of any kind or description in the judgment of the said trustee necessary or

proper to produce the best results and income from the said property so conveyed to the said trustee; to make improvements, to insure, to pay taxes, and to do any and all acts for the protection, or to render safe and productive the property and estate hereby transferred to said trustee; and to invest and reinvest any proceeds of the property coming [32] into the hands of the said trustee under his trust, in either real or personal property, of any kind or description, including real estate, stocks of corporations, bonds or loans upon real estate, it being expressly understood and agreed the said trustee shall not be liable for any loss in any way arising or occurring through any mistake in judgment or failure to act on his part, but only for willful default.

"The written request of the said James H. Pratt to the said trustee shall be a sufficient warrant and authority for the said trustee to do any act in relation to the said trust estate, or to make, execute and deliver any instrument of any kind or nature touching or affecting the said property, or any part thereof, or to make any investment of any part of the trust fund at any time in the hands of the said trustee under this instrument. The net income derived from said trust estate shall be paid over from time to time to the said James H. Pratt, or in accordance with his written directions; and the decision of said trustee as to what is income and what is principal of said trust estate shall be conclusive upon all parties interested.

"Upon the death of said James H. Pratt the trust hereby created shall terminate and be at an end, and the trust estate then in the hands of the said trustee shall go to and vest in the children of the said James H. Pratt in equal shares, the issue of any deceased child to stand in the place of and take the share which such deceased child would have been entitled to receive if living.

"In the event of the death of the said Marshall Field during the continuance of the trust hereby created, Jerome Pratt Magee, the grandson of the said James H. Pratt, shall be successor in trust to the said Marshall Field, and shall succeed to all the trusts, estates, powers and duties by this instrument vested in the said Marshall Field, as trustee."

A good part of the argument in the brief and on oral presentation of the case was addressed to the question of the interest secured to the daughters of Mr. Pratt by the trust deed, and the necessity of having them made parties [33] as a jurisdictional condition to a partition of the lands involved in the controversy. A discussion of the question thus presented

may be facilitated by stating briefly the various contentions of counsel. On the one hand it is contended that Mr. Pratt's children took a vested remainder, and have a present vested interest in the lands not represented by either Pratt or Field, or both of them combined, and that without a consideration of their interest upon bringing them in as parties there can be no valid partition. It is argued in that connection that partition under the code is a civil action of an equitable nature to which the rules affecting partition in equity should be applied; and that as to parties not only equitable principles must be held to govern, but that the interest of the children of Mr. Pratt is such as to bring them within the general code provision which permits any person to be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein: Rev. Stats. 1899, sec. 3480.

On the other hand, counsel for defendants in error maintain that the interest of the children under the trust deed is that of a contingent remainder, without any present or vested interest, and further, that whether they take a vested or contingent remainder their interest was fully represented in the action by the trustee, who, as trustee of an express and active trust holding the fee of the Pratt interest, was the sole necessary party as to that interest. They also contend that the powers conferred upon the trustee are sufficiently broad to authorize him to make or consent to a partition of the premises binding upon the interest of all parties under the deed; but if not that under the statute, the children of Pratt were neither necessary nor proper parties because not tenants in common with the plaintiffs below, and that the partition was at least proper as against the life estate.

[34] From the recital contained in the order appealed from quoted above in this opinion, it is evident that the district court entertained the view that in the absence of other parties the partition was at least effective and binding as against Pratt and his life tenancy and as against Field, trustee, to the extent that his representative title and interest might be bound without bringing into the case any other parties; and that it was therefore unnecessary upon a consideration of the report of the commissioners to determine whether that representative interest extended beyond the life estate, or the effect of the partition upon other interests, whatever their character.

That view and the refusal of the court below to pass upon the interest of the intervening petitioner and her sister under

the trust deed and the partition is criticised by counsel for plaintiffs in error, and they refer to it as a holding that, even though such petitioner may have rights to the property sought to be partitioned, it is not necessary that she should be heard in this case which disposes of her property. But we are inclined to doubt the justness of counsel's interpretation of the court's position. The very question that was not decided because deemed unnecessary was whether or not the partition proceedings disposed of the property of the intervening petitioner.

We shall first direct our attention to the question whether, under the rules governing compulsory partition as affected or controlled by our statute and upon the proceedings in this case up to and including the action and report of the commissioners, the plaintiffs were in the absence of the suggested additional parties entitled to partition in any respect or to any extent as against Field, trustee, and Pratt. At common law, prior to the enactment of statutes upon the subject, partition could be compelled only at the suit of a coparcener either against a coparcener or one who had succeeded to the interest of a coparcener. The proceeding at law was by writ of partition. By statutes 31 and 32, Henry VIII, the remedy was extended to joint tenants and tenants in common, whether of estates of [35] inheritance or for life or years. And Mr. Freeman, in his valuable work on Cotenancy and Partition, asserts with what seems to be good reason, though apparently contrary to an assumption of Judge Story in his work on Equity Jurisprudence, that until after the statutes above referred to, courts of equity did not undertake to assume jurisdiction in partition in behalf of joint tenants or tenants in common: Freeman on Cotenancy and Partition, 2d ed., 423. It appears unquestionable, however, that at a very early period jurisdiction was entertained in equity to enforce partition even before the statutes aforesaid at the suit at least of a party entitled thereto at law, though it seems that where the title was involved in some legal objection the parties were usually required to submit the same for settlement to a common-law court. But where in the case of a complication of titles the law court was unable to furnish a plain, complete and adequate remedy, the aid of a court of equity might be invoked because of its power to "promote discovery or to remove obstructions to the right, or to grant some other equitable redress": 1 Story's Equity Jurisprudence, secs. 650, 651. The remedy in equity was concurrent only, and is said to have been founded upon several

grounds, which are summarized by Judge Story in concluding his discussion of the subject as follows: "The necessity of a discovery of titles, the inadequacy of the remedy at law, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar remedial processes of courts of equity and their ability to clear away all intermediate obstructions against complete justice." But the learned jurist further remarked that such courts in making partition follow the analogies of the law, and will decree it in such cases as the courts of law recognize as fit for their interference; though equity jurisdiction in partition is not limited to cases cognizable or relievable at law, for, under some circumstances, where the action could not be maintained at law equity might afford relief, as in the case of an equitable title which cannot be considered in a law court, but which equity regards as true and [36] perfect: 1 Story's Equity Jurisprudence, sec. 658. And Mr. Freeman states that equity generally refused to extend its authority over any species of property which could not be partitioned at law: Freeman on Cotenancy and Partition, 440. While equity would grant partition in cases incapable of relief at law because of legal objections operating as obstructions to the action of the law court, but which might be overcome through the remedial processes of a court of equity, it is not to be understood that it would furnish the remedy to estates not entitled to partition at law, unless perhaps partition should be found necessary as an incident to complete equitable relief in cases otherwise properly before the court.

In this country the remedy of partition has generally been regulated more or less by statute, and the jurisdiction under statute has been in some states vested in courts of law, and in others in courts of equity, and in still others the remedy may be pursued in either a court of law or equity; and, generally, the statutory creation or regulation of the remedy has not been considered as excluding equity jurisdiction over partition in proper cases.

It was essential to compulsory partition at common law that the property be held in cotenancy, and none but estates in possession were bound by the judgment; it did not affect estates in remainder or contingency, and a party without possession or right to possession could not invoke the remedy, for the purpose of the action was to sever an undivided possession, and thus remove the difficulties attending a joint occupancy. As persons holding an estate in lands not entitling them to possession were not injured by the mere fact of the

undivided possession legally held by others, they could not require a severance of such possession. And as the remedy acted upon the possession, a partition of estates held in remainder only without a present right of possession of any part was not enforceable; nor could partition be compelled between a tenant in possession and mere remaindermen: Freeman on Cotenancy and Partition, 439, 440; Nichols v. Nichols, 28 Vt. 228, 67 Am. Dec. [87] 699; Hadley v. Cross, 34 Vt. 586, 80 Am. Dec. 699; Tabler v. Wiseman, 2 Ohio St. 207; Metcalfe v. Miller, 96 Mich. 459, 35 Am. St. Rep. 617, 56 N. W. 16. And in the absence of a statute authorizing it, partition cannot be awarded in equity any more than at law of an estate in reversion or remainder: Freeman on Cotenancy and Partition, 440; 1 Washburn on Real Property, 3d ed., 584; Wilkinson v. Stuart, 74 Ala. 198; Deshong v. Deshong, 186 Pa. 227, 65 Am. St. Rep. 855, 40 Atl. 402.

Partition might be had, however, between tenants for life or years, and also between the owner of the fee of an undivided part and the tenant for life of the other part; and in such cases it was not necessary to join the reversioner or remainderman, though the partition in the absence of the latter as a party would be of temporary duration only. Mr. Freeman says: "While the rule seems to be invariable that courts will not proceed to a partition in the absence of any of the cotenants, yet it must be remembered that this rule is confined to cotenants of the estate of which partition is sought. Hence a partition may be ordered of an estate for years, or for life, or of a mere equity, although the tenants of the reversion or of the legal title are not before the court." The author was there discussing the proceeding in equity: Freeman on Cotenancy and Partition, 463. Judge Story on this subject remarks: "Nor does it constitute any objection in equity that the partition does not or may not finally conclude the interests of all persons; as where partition is asked only by or against a tenant for life, or where there are contingent interests to vest in persons not in esse. For the court will still proceed to make partition between the parties before the court, who possess competent present interests, such as a tenant for life or for years. But, under such circumstances, the partition is binding upon those parties only who are before the court, and those whom they virtually represent; and the interests of third persons are not affected": 1 Story's Equity Jurisprudence, 656.

In Carneal v. Lynch, 91 Va. 114, 50 Am. St. Rep. 819, 20 S. E. 959, the right was upheld of a tenant for life in one

undivided moiety of property to [38] maintain partition against the fee-simple owners of the other moiety and the owners of the estate in remainder of the moiety held by the life tenant; the statute of that state applicable to the proceeding before the court having provided fully for the sale of all contingent interests, and the bill was framed in a double aspect, having been brought for partition and a sale of the contingent estates. The statute in relation to partition provided that "tenants in common, joint tenants and coparceners shall be compellable to make partition," etc. In a learned discussion of the subject the court said that if the life tenant of the one moiety is in law a tenant in common with the owners in fee of the other moiety, it would seem clear that he can maintain the suit to compel partition against such cotenants; and it was held that the parties were plainly cotenants. The court further said: "We do not perceive the force of the objection that a life tenant of a part cannot maintain a suit against his cotenants who own the fee of the other part, for partition. There can be no doubt that the fee simple owners could maintain the suit for partition against the life tenant, as defendant, and the manner in which the parties to the suit are arranged can make no difference."

Mr. Freeman, at section 455 of his work above cited, adds: "A tenant for life or for years could, both at law and in equity, compel a partition. He could not compel the reversioner to join with him; nor could he occasion a compulsory partition which would be binding after the termination of his estate. Partition may be had on the application of a tenant for years, although the tenant of the other moiety holds in fee." Citing Hobson v. Sherwood, 4 Beav. 184. In Indiana it was said: "The right of the owner of a life interest in an undivided part of real estate, to have partition, has been recognized, and, we think, should be deemed to be established": Shaw v. Beers, 84 Ind. 528. The following cases, in addition to others that might be cited, also support the proposition that partition may be had between the life tenant of an undivided [39] part and the owner in fee of the other part, at the suit of either: Arnold v. Bunnell, 42 W. Va. 473, 26 S. E. 359; Metcalfe v. Miller, 96 Mich. 459, 35 Am. St. Rep. 617, 56 N. W. 16; Biddle v. Biddle, 117 Mich. 28, 75 N. W. 91; Eisner v. Curiel, 2 App. Div. (N. Y.) 522, 37 N. Y. Supp. 1119, 20 Misc. Rep. 245, 45 N. Y. Supp. 1010; Jameson v. Hayward, 106 Cal. 682, 46 Am. St. Rep. 268, 39 Pac. 1078; Johnson v. Brown, 74 Kan. 346, 86 Pac. 503; Toledo Loan Co. v. Larkin, 25 Ohio C. C. 209. In the New

York case of Eisner v. Curiel, 2 App. Div. (N. Y.) 522, 37 N. Y. Supp. 1119, 20 Misc. Rep. 245, 45 N. Y. Supp. 1010, the action was between life tenants of an undivided interest, and was treated as one for the partition of the life estates only, and for that purpose other parties were held to be unnecessary.

The statutory provisions of this state relating to partition are found in the Civil Code. The material provisions are as follows:

"Tenants in common, and coparceners, of any estate of lands, tenements or hereditaments within the state, may be compelled to make or suffer partition thereof in the manner hereinafter prescribed": Rev. Stats. 1899, sec. 4081.

"A person entitled to partition of an estate may file his petition therefor in the district court, setting forth the nature of his title, and a pertinent description of the lands, tenements or hereditaments of which partition is demanded, and naming each tenant in common, coparcener or other interested person, as defendants therein": Rev. Stats. 1899, sec. 4083.

"If the court find that the plaintiff has a legal right to any part of such estate, it shall order partition thereof in favor of the plaintiff, or all parties in interest; appoint three disinterested and judicious householders of the vicinity to be commissioners to make the partition, and order a writ of partition to issue": Rev. Stats. 1899, sec. 4084.

"Before a writ of partition is issued, the person of whom partition is demanded may appear in court, in person or by attorney, and consent to a partition of the estate, agreeably to the prayer and facts set forth in the petition, which amicable partition, when made and recorded, shall be valid and binding between the parties thereto": Rev. Stats., sec. 4088.

Section 4085 requires the writ to be directed to the sheriff of either of the counties in which any part of the estate lies, [40] and to command him that, by the oaths of the commissioners, he cause to be set off to the plaintiff or each party in interest such part and proportion of the estate as the court shall order.

Provision is made for a just valuation of the estate by the commissioners if they shall find it incapable of division without manifest injury to the value thereof, and for either party to elect to take the estate at such valuation, and if no such election shall be made, then for a sale of the property.

Manifestly, the statute does not, like the statutes of some states, enlarge upon the common law with respect to the

persons who may require or may be compelled to make or suffer partition. The distinguishing characteristic of tenancy in common is unity of possession or right of possession; there may also exist unity of interest and title, but that is not required: Freeman on Cotenancy and Partition, 86, 87. There must be an equal right to the possession of every part and parcel of the subject matter of the tenancy: Freeman on Cotenancy and Partition, 86, 87. It cannot be doubted that a legal title to an undivided part accompanied by possession or right of possession, whether the title be in fee or for life, gives the owner a right to maintain partition against the owner of the remaining part holding the same as a tenant in common with him. The provision of section 4084 that if the court find that the plaintiff has a legal right to any part of the estate partition shall be ordered clouds the construction of the statute somewhat; but we are not inclined to view it as preventing one with an equitable right, capable of conversion in equity into a present legal title with right of possession, from obtaining full relief in one action, including partition.

The partition statute forms a part of the Civil Code, which declares that there shall be but one form of action, to be called a civil action, and abolishes the distinctions between actions at law and suits in equity, and the forms of all such actions and suits previously existing: Rev. Stats. 1899, sec. 3443. An action to compel partition is therefore, we think, a civil [41] action, and it is so held in Ohio, from which state our code was taken: Perry v. Richardson, 27 Ohio St. 110; McRoberts v. Lockwood, 49 Ohio St. 374, 34 N. E. 734. But it does not necessarily follow that it is purely equitable in character. It may be or it may not, depending upon the nature of the titles asserted and the relief sought. The distinction between actions at law and suits in equity are abolished by the code, but not the distinction between legal and equitable rights or legal and equitable relief. As Mr. Phillips says: "These provisions have neither abolished nor affected legal or equitable rights and reliefs; the object has been to avoid circuity of action and multiplicity of suits, and to simplify, facilitate, and cheapen procedure. Legal and equitable rights and defenses remain as before; the modes of asserting them are changed": Phillips on Code Pleading, 163.

At the common law partition was both a legal and an equitable remedy—that is to say, it might be afforded by either a court of law or equity. In cases without complication of any sort the jurisdiction was concurrent; depending upon

York case of Eisner v. Curiel, 2 App. Div. (N. Y.) 522, 37 N. Y. Supp. 1119, 20 Misc. Rep. 245, 45 N. Y. Supp. 1010, the action was between life tenants of an undivided interest, and was treated as one for the partition of the life estates only, and for that purpose other parties were held to be unnecessary.

The statutory provisions of this state relating to partition are found in the Civil Code. The material provisions are as follows:

"Tenants in common, and coparceners, of any estate of lands, tenements or hereditaments within the state, may be compelled to make or suffer partition thereof in the manner hereinafter prescribed": Rev. Stats. 1899, sec. 4081.

"A person entitled to partition of an estate may file his petition therefor in the district court, setting forth the nature of his title, and a pertinent description of the lands, tenements or hereditaments of which partition is demanded, and naming each tenant in common, coparcener or other interested person, as defendants therein": Rev. Stats. 1899, sec. 4083.

"If the court find that the plaintiff has a legal right to any part of such estate, it shall order partition thereof in favor of the plaintiff, or all parties in interest; appoint three disinterested and judicious householders of the vicinity to be commissioners to make the partition, and order a writ of partition to issue": Rev. Stats. 1899, sec. 4084.

"Before a writ of partition is issued, the person of whom partition is demanded may appear in court, in person or by attorney, and consent to a partition of the estate, agreeably to the prayer and facts set forth in the petition, which amicable partition, when made and recorded, shall be valid and binding between the parties thereto": Rev. Stats., sec. 4088.

Section 4085 requires the writ to be directed to the sheriff of either of the counties in which any part of the estate lies, [40] and to command him that, by the oaths of the commissioners, he cause to be set off to the plaintiff or each party in interest such part and proportion of the estate as the court shall order.

Provision is made for a just valuation of the estate by the commissioners if they shall find it incapable of division without manifest injury to the value thereof, and for either party to elect to take the estate at such valuation, and if no such election shall be made, then for a sale of the property.

Manifestly, the statute does not, like the statutes of some states, enlarge upon the common law with respect to the

persons who may require or may be compelled to make or suffer partition. The distinguishing characteristic of tenancy in common is unity of possession or right of possession; there may also exist unity of interest and title, but that is not required: Freeman on Cotenancy and Partition, 86, 87. There must be an equal right to the possession of every part and parcel of the subject matter of the tenancy: Freeman on Cotenancy and Partition, 86, 87. It cannot be doubted that a legal title to an undivided part accompanied by possession or right of possession, whether the title be in fee or for life, gives the owner a right to maintain partition against the owner of the remaining part holding the same as a tenant in common with him. The provision of section 4084 that if the court find that the plaintiff has a legal right to any part of the estate partition shall be ordered clouds the construction of the statute somewhat; but we are not inclined to view it as preventing one with an equitable right, capable of conversion in equity into a present legal title with right of possession, from obtaining full relief in one action, including partition.

The partition statute forms a part of the Civil Code, which declares that there shall be but one form of action, to be called a civil action, and abolishes the distinctions between actions at law and suits in equity, and the forms of all such actions and suits previously existing: Rev. Stats. 1899, sec. 3443. An action to compel partition is therefore, we think, a civil [41] action, and it is so held in Ohio, from which state our code was taken: Perry v. Richardson, 27 Ohio St. 110; McRoberts v. Lockwood, 49 Ohio St. 374, 34 N. E. 734. But it does not necessarily follow that it is purely equitable in character. It may be or it may not, depending upon the nature of the titles asserted and the relief sought. The distinction between actions at law and suits in equity are abolished by the code, but not the distinction between legal and equitable rights or legal and equitable relief. As Mr. Phillips says: "These provisions have neither abolished nor affected legal or equitable rights and reliefs; the object has been to avoid circuity of action and multiplicity of suits, and to simplify, facilitate, and cheapen procedure. Legal and equitable rights and defenses remain as before; the modes of asserting them are changed": Phillips on Code Pleading, 163.

At the common law partition was both a legal and an equitable remedy—that is to say, it might be afforded by either a court of law or equity. In cases without complication of any sort the jurisdiction was concurrent; depending upon

varying circumstances, the court could grant the relief where the other could not. There is no substantial reason, we think, for designating the action under the code as exclusively either a legal or equitable proceeding. A particular action may be one or the other, or a combination of both; or, to speak more accurately, perhaps, it may, because of the facts alleged or the relief sought, invoke what was formerly essentially equitable jurisdiction, or a jurisdiction that might have been exercised by either a court of law or equity. The statute retains the writ of partition of the law courts, and does not provide for an exchange of conveyances—one of the chief advantages of the former proceeding in equity. We perceive no necessity, however, for distinguishing it as belonging to either class of proceedings. To call it a civil action is enough. The question of parties, like most other questions, must be settled with regard to the issues in the case and the relief demanded.

Concerning the sufficiency of the parties before the court in the case at bar, it should be remembered that the question [42] was not raised until after the order adjudging that partition be had and the return of the writ with the report of the commissioners. The prayer of the intervening petition was that the order previously made and all proceedings that succeeded the filing of the amended petition be vacated and annulled, which was also the practical effect of the supplemental objections of the complaining defendants. By the objections thus interposed the validity of the judgment and proceedings in respect to jurisdiction was assailed, so that the question was not merely whether, to a complete settlement of the rights of all parties interested directly or remotely in the property, the presence of all such parties was necessary; nor whether they would have been proper parties. The question was whether the judgment and proceedings were void.

The code provides generally that any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein; and that the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights, but that when a determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in or dismiss the action without prejudice: Rev. Stats., secs. 3480, 3487. The first provision (section 3480) seems to carry out the equitable theory as to parties, but it

does not make every one referred to a necessary party to the rendition of a valid judgment. The well-known distinction between necessary and proper parties is not abolished. Upon that provision the law-writers generally agree that those persons who have or claim an interest in the controversy adverse to the plaintiff are necessary parties, while those who, in contradistinction to the former, are merely "necessary parties to a complete determination of a question involved," are, as a rule, proper but not necessary parties: Pomeroy's Code [43] Remedies, 3d ed., sec. 333; Phillips on Code Pleading, sec. 453. A familiar illustration is found in the action to foreclose a mortgage; the mortgagor, his heir, devisee, grantee or assignee are necessary parties, while other mortgagees or lienholders are proper parties. The action may proceed to judgment without the latter, but it will not be binding upon their interests.

The chancery rule as to parties was well stated by Mr. Justice Bradley in Williams v. Bankhead, 19 Wall. 563, 22 L. ed. 184: "First, where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule; secondly, where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed without him if he can be reached; thirdly, where he is not interested in the controversy between the immediate litigants, but has an interest in the subject matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

The rights of the parties in an action for partition are determined by the order which finds them to be tenants in common, ascertains and adjudges the respective shares, and orders a partition thereof, whether the order be deemed interlocutory or final: McRoberts v. Lockwood, 49 Ohio St. 374, 34 N. E. 374; Freeman on Cotenancy and Partition, sec. 522. A defect of parties plaintiff or defendant is a ground of demurrer if the defect appears upon the face of the petition, otherwise the objection may be taken by answer, and if the objection is not raised by either demurrer or answer, it is deemed to be waived, unless it goes to the jurisdiction of the court: Rev. Stats. 1899, secs. 3535-3537. We suppose that in partition, upon its appearing that there is such a defect of parties as to render the court without jurisdiction, appro-

priate orders with regard thereto may be made in the absence of an [44] objection raised by demurrer or answer. On the other hand, where the defect is not jurisdictional, the waiver would seem to be complete so far as the parties to the action are concerned without an objection properly raised.

As determined by the petition in the case at bar, as well as the judgment and the award, the action is one for partition between the parties to the suit. Those parties only and others, if any, virtually represented by them would be bound. We need not here determine whether, under our statutes, in an action between the actual tenants in common in possession the owners of reversionary interests without right of possession might be made parties; the question is, Are they necessary parties? Construing a somewhat similar statute, it was held in the Michigan case of Metcalfe v. Miller, 96 Mich. 459, 35 Am. St. Rep. 617, 56 N. W. 16, that the owner of an undivided part of the life estate, and also of an undivided part of the reversion, might have partition of the life estate as between himself and the other tenants thereof, but could not demand partition against the other reversioners.

In fact, as well as by the admission of the pleadings, the trustee, Field, was a tenant in common with the plaintiffs, whether he is to be regarded as holding the fee of the former Pratt interest or merely the title of the life tenant. He had at least the latter. The plaintiffs, therefore, were entitled to a partition as against him, unless there is substantial merit in the contention that they were themselves without right because of the possession of the executors of the Leiter will. We think that contention is without merit, for the reason that the executors offered no objection, but practically consented, and their possession was only that of executors during and for the purpose of administration, and not adverse, and it does not appear that the administration would be in any wise prejudiced by the partition: Phillips v. Dorris, 56 Neb. 293, 76 N. W. 555; Richardson v. Loupe, 80 Cal. 490, 22 Pac. 227. The statute expressly provides that for the purpose of bringing suit for partition the possession of an executor or administrator is the possession of the heirs or [45] devisees: Rev. Stats. 1899, sec. 4693; 1 Abbott on Probate Law, sec. 430. The intervening petitioner and her sister were neither in possession nor entitled to possession, and were not, unless represented by the trustee, tenants in common with the plaintiffs, and did not, therefore, have or claim an interest in the controversy adverse to the plaintiffs, within the meaning of section 3480. Assuming that their reversionary interest was

such as could only be represented by them in person, and as distinct and separate from the title held by the trustee, and that it might have been brought into the case, they would come within the provision of the statute permitting one to be made a party who is necessary to a complete determination of the questions involved, or within the third class mentioned by Mr. Justice Bradley, viz., those not interested in the controversy between the immediate litigants, but having interests in the subject matter capable of convenient settlement in the suit, and who may be made parties or not at the option of the complainant. This would give them the position of proper but not necessary parties.

We conclude on this branch of the case, therefore, that the order adjudging that partition be had and the proceedings thereunder were not void for the want of necessary parties, but that it was valid and binding between the parties to the suit. Indeed, the statute so declares where the defendants have come in and consented to partition. If, as contended, the interest of the children of Mr. Pratt was not virtually represented by the trustee, or if by the terms of the trust deed the latter's appearance and consent could not, and did not, bind that interest, then of course those parties were not concluded by the proceedings. As they were not personally made parties, and were not necessary parties, we know of no practice or reason making it imperative even if proper, which we doubt, for the court in their absence to decide in this action what the rights of the intervening petitioner and others besides the actual parties in and to the property were, nor the effect of the joint [46] consent of the trustee and life tenant to the decree for partition, nor the extent to which they represented and bound other parties. Whether the situation would be different had the commissioners reported the property to be incapable of partition, and proceedings had been taken for a sale thereof, or an election to take at the appraised value had been made, need not be, and has not been, considered, nor do we intend to intimate any opinion upon that question.

In arriving at our conclusion, we have not been unmindful of the provisions of the partition statute requiring each tenant in common, coparcener or other interested person to be named as defendants. The term "other interested person" may be no doubt more or less broadly construed upon a consideration of a cause prior to judgment ordering partition, depending upon the facts alleged and the remedy demanded, though we think it unnecessary to decide, and we do not decide, whether

it is intended to embrace persons not tenants in common or coparceners with the plaintiff in an action strictly in partition. We are of the opinion, however, that it does not prevent a partition between parties in possession as tenants in common where either or both hold less than a fee simple title, at least if the property is capable of partition. In such a case the interested persons may, it seems clear, be only the tenants in possession. Here a judgment was entered effective to the extent of adjudging partition between the tenants in possession. Whether it goes beyond that or not in consequence of the title held by the trustee and the powers conferred upon him, the district court declined to consider, and we observe no substantial reason for disturbing its action in that respect, or for this court to consider the questions involved in that inquiry.

The remaining questions relate to the report and proceedings of the commissioners and the equality of the partition. The statute is silent respecting the contents of the report, and would seem to be satisfied by a report showing generally the action and determination of the commissioners. [47] We do not think that its rejection would be justified upon the sole ground of an omission in the report of the facts concerning the character and situation of the premises, nor its failure to specifically state that the partition had been equitable and advantageously made, since those matters are not expressly required to be set forth. It does not occur to us that such statements would add materially to the report. The court does not make the partition; it only acts to approve or disapprove where partition is reported. The question is not so much whether the commissioners affirm the equality and fairness of the partition as whether it is in fact equitable. The whole matter may be brought before the court, as it was in this case, upon exceptions to the action of the commissioners, and the court does not need a recital in the report of the facts regarding the lands involved to enable it to pass upon the question of confirmation. The statutory requirement that the estate shall be set apart in such lots as will be most advantageous and equitable, having due regard to the improvements, situation and equality of the different parts thereof, is the natural rule, and one that will be intuitively recognized by intelligent persons, such as the commissioners here unquestionably were. We think the report indicates a thorough understanding by the commissioners of their duty, and we can observe no prejudice to any party resulting from the omission to set forth in the report the things suggested.

The record discloses three recognized classes of lands connected with the Clear Creek property, exclusive of the lands held under leases: First, three thousand four hundred and seven acres of irrigated or irrigable lands; second, seventeen hundred acres contiguous to the irrigable lands, but without a water right; third, approximately, ten thousand acres of dry lands, referred to as scrip lands, but which serve to command a range for livestock and furnish access to watering places. It appears from the affidavits of the commissioners considered upon the hearing of the objections that in determining the proportionate values of all the lands involved in the partition and making a division [48] thereof, they valued the first class of Clear Creek lands at twenty-two dollars per acre, the second class at eight dollars and a half per acre, and the third class at five dollars per acre; the Platte River lands at thirty dollars per acre, the two hundred and eighty acre tract in connection therewith at five dollars per acre; and the Rawhide lands at thirty-five dollars per acre. At these values the lands set apart to the objecting defendants would be worth about eighty-five thousand dollars, and those set apart to the plaintiffs about two hundred and thirty thousand dollars—amounts approximately equaling the proportionate shares of the respective parties.

A large number of affidavits of persons asserting a familiarity with the lands and their values were filed by the plaintiffs and defendants respectively. There appears to be very little difference in the estimate placed upon the value of the Rawhide lands; the estimates as to them varying generally from thirty-five to forty dollars an acre. There appears also to be a substantial agreement among the witnesses as to the values of the second and third classes of the Clear Creek lands; the average as to the second class being perhaps seven dollars, though some place the value as low as four dollars, a few at ten dollars, one or two as high as twenty, and a number at seven to eight dollars. The third class of those lands are quite generally agreed to be worth from four to five dollars per acre, a few only of the affidavits stating a higher value than five dollars.

There is, however, a wide disagreement between the parties and upon the evidence impossible to harmonize in relation to the value respectively of the Platte River lands and those embraced in the first class of the Clear Creek group; and the controversy as to values is substantially confined to those lands. According to the evidence on behalf of the complaining defendants below, the value of the first class or irrigable

Clear Creek lands is from thirty to fifty dollars an acre, and of the Platte River lands from ten to twelve dollars an acre, though some of the affidavits filed by defendants place the value of the last-mentioned lands as low per acre as seven or eight dollars, and others as high as thirteen or fifteen dollars; and in a majority of [49] the affidavits furnished by defendants concerning the Clear Creek first-class lands their value is estimated at not less than thirty-five dollars per acre, while in others it is stated as high as forty and fifty dollars. The estimates furnished by the affidavits presented by the plaintiffs, on the other hand, run from thirty to fifty dollars an acre for the Platte River lands, and from twenty to twenty-five dollars an acre for the irrigable Clear Creek lands; but in most of such affidavits the latter are valued not to exceed twenty-two dollars an acre, and the former usually at thirty dollars. Moreover, there is a conflict in the evidence regarding the character of the lands, the extent to which they can be irrigated and rendered productive, as well as the nature of the surface and soil.

From the separate affidavits of the commissioners it appears that they were agreed upon the character, quality and values of the several groups and classes of land, and they each thereby testify to the reasonableness of the respective values, as estimated by them for the purpose of determining upon a proper division of the property. According to such affidavits, which in this particular are not controverted, the commissioners appear to have been men of large experience, long personal acquaintance with most of the lands, and possessing a general knowledge of the character, usefulness and value of lands located as these lands are. One of them shows a continuous acquaintance with the Platte River and Rawhide lands since 1858, and with the Clear Creek lands for fifteen years. It is reasonable to suppose in a matter of this kind and magnitude that the commissioners were selected because of their experience and knowledge, as well as their reputation for fairness.

The conflict upon the evidence concerning the values in controversy is so pronounced that there would seem very small ground for assurance that the vacation of the proceedings and another reference to the same or different commissioners would result in harmonizing in any material degree the contrary opinions of those competent to speak [50] upon the subject. The fact is well known that the honest views of equally fair and capable persons will often differ more or less widely regarding the value of real estate.

The well-settled rule is that the action of commissioners in partition will not be set aside on the ground of unequal allotments except in extreme cases—as where the partition appears to have been made upon wrong principles, or where it is shown by very clear and decided preponderance of evidence that the partition is grossly unequal. The report of commissioners in this class of cases is regarded at least as conclusive as a verdict of a jury upon a trial at law, and will not be disturbed except upon grounds similar to those on which a verdict may be vacated and a new trial granted. Indeed, the rule is maintained by some courts that it is to be regarded with more favor than a verdict, for the reason that the commissioners are usually selected by the parties because of their superior judgment and capacity to perform this particular service, and are authorized to exercise their personal knowledge and to act upon a view of the property: Freeman on Cotenancy and Partition, sec. 525. In New Jersey it was said: "Where a partition has been actually made by commissioners, the court, by its well-settled practice, interferes with their action with great reluctance. It is only where a clear mistake has been made that their proceedings will be interfered with": Bentley v. Long Dock Co., 14 N. J. Eq. 480.

It is strenuously urged, however, that the commissioners valued the Platte River lands upon the erroneous assumption that they are susceptible of irrigation, and there is evidence in support of the view that as a rule they are not capable of successful irrigation. There is evidence also to the contrary; and we not only find the evidence as to that matter as conflicting as upon the general subject of value, but we think it impossible to say that the alleged fact of the mistake in the character of the lands has been established by a clear preponderance of the evidence. Persons possessing an apparently equal acquaintance with the lands [51] and capacity of judging, state different conclusions upon the probable productiveness of the lands under irrigated cultivation. A water right sufficient to irrigate them seems to have been secured and maintained. In addition to their value for cultivation, the commissioners and others regard them as peculiarly valuable as a ranch for raising livestock, owing to the surrounding range, which, it is stated by some of the evidence, is not the case with the Rawhide lands. We have examined the entire evidence in relation to this particular matter with much care, and we are not convinced that the objection upon the ground of an unequal allotment is sustained, unless the evidence on behalf of the plaintiffs be disregarded, and there is

no ground for such a course. It is true that the defendants presented certain written propositions offering to accept a different division—one of them offering to pay the plaintiffs two hundred thirty-two thousand eighty-five dollars and eleven cents for their undivided interest in all the lands. It may be that, as suggested, propositions of that kind may operate to shake the reasonableness of the partition, when the other party prefers to rest upon the allotment of the commissioners. The propositions in this case clearly enough show that the proposer is dissatisfied with the share given him, and that he honestly believes the property given to his adversary to be of a greater value than that placed upon it by the commissioners; but upon the circumstances here they cannot take the place of the partition, nor be held sufficient to vacate it. In effect that would amount to a substitution of the judgment of one of the parties for that of the commissioners, and allow him to determine the method of the partition. We are not inclined to the opinion that where, as in the case at bar, the sworn statements of the party in relation to the values of the land are corroborated by the testimony of many other reputable and competent witnesses, his refusal to accept a proposition apparently based upon a higher valuation of the lands set apart to him and a lower valuation of those set apart to the dissatisfied party should be held sufficient to discredit the [52] truthfulness or honesty of his statements. The lands being capable of partition, the law does not compel the moving party to sell his interest, whatever the price offered. For reasons satisfactory to himself he may wish to retain his interest, though offered an opportunity to dispose of it at a valuation equal to or exceeding that placed upon it by the commissioners, or by himself. Although counsel for defendants in error have suggested some apparently pertinent objections to the various offers, they seem to have been made in good faith, and to indicate a deep-seated conviction on the part of Mr. Pratt that his interest in the property has been unjustly discriminated against in the allotment. Whether that conviction is well founded can only be determined by the court upon all the evidence.

The fairness of the proceedings is challenged on the further ground that Mr. W. C. Irvine accompanied the commissioners on the occasion of their inspection of the lands. He was, and had been for some time, the general manager of these properties, and he went with the commissioners and assisted in conducting them upon the lands and pointed the same out to them, and may have answered questions relative

to them. It appears that he was present at the first meeting of the commissioners, which was also attended by the representatives of the respective parties, and by Mr. Pratt, and the commissioners and the representatives of the plaintiffs each swear that they understood at that meeting, and supposed it to be understood by all parties, that the commissioners would be accompanied by Mr. Irvine, and certain occurrences are related tending to show a general understanding to that effect. Mr. Pratt and his counsel, however, unequivocally state in their affidavits that they had no such understanding or knowledge. Mr. Irvine states that he did not go as the representative of either of the parties, but merely to assist the commissioners in examining the property, and that he did not in fact influence or attempt to influence them in their action or determination; and that is corroborated by each of the commissioners. No [53] statement made to them by Mr. Irvine nor any act of his is pointed out as having influenced the allotment, other than the mere fact of his presence when the property was examined. It does appear that, after the commissioners had reported and the objection had been filed, he assisted counsel for plaintiffs, at the latter's urgent request, in securing some of the affidavits filed in opposition to the objections, and Mr. Irvine, in his affidavit, values the property substantially the same as the commissioners. There is no showing, however, that he made his opinion as to the respective values known before the report was made. After the commissioners returned from viewing the property they held several meetings discussing the matter among themselves; but Mr. Irvine does not seem to have been present at any of their deliberations. And though it was doubtless known to the defendants upon the return of the commissioners that Mr. Irvine had gone with them, no objection thereto was made until after the report had been filed. Before the filing of the report a meeting was held by the commissioners attended by representatives of both parties, and an opportunity was then offered for any additional suggestions from either side, and it appears that some suggestions were made, and finally, ten days after their return from the property, the commissioners verbally announced to the parties at a meeting held for that purpose their conclusions subsequently embodied in the report.

It is imperative, of course, that the proceedings should be fairly conducted with an equal opportunity to all parties to be heard; and the fact that secret or undue influence had been exercised by either party upon the action of the commission-

ers would doubtless require the vacation of their report. The presence of the manager seems to have been in perfect good faith both on his part and on the part of the commissioners, and they each positively deny any undue influence growing out of that circumstance, or that it had any influence upon the decision of the commissioners. It seems to have been the idea of the latter, as well as Mr. [54] Irvine, that his presence was for the purpose of pointing out the property, and assisting the commissioners in going over the premises, as representing all the parties. We are satisfied that the proceeding was free from any intentional impropriety, and we do not perceive upon the evidence any prejudice to the defendants resulting therefrom.

We think it unnecessary to decide whether the lands held by the partnerships under leases from the state might have been included in the partition, or whether upon timely objection a partition could have been successfully resisted unless they were included. Defendants in error maintain that the leasehold estates constituted personal assets of the partnership in the possession of the executors consequent upon the failure of the surviving partner to furnish the bond required by statute as a condition to his retention of possession. The answers consented to a partition of the premises described in the petition, and this does not seem to have been the result of a mistake on the part of the defendants below. Whatever the general rule as to the necessity of the inclusion of all the property held in contenancy by the parties in a partition proceeding, we think that where the parties have thus consented to a partition of certain premises without any suggestion that other tracts are also held in similar cotenancy, an objection on the ground of the exclusion of such other tracts ordinarily comes too late after judgment and the report of the commissioners, and especially so where there is no inherent objection to a separation of the different tracts. The lands held under lease consist, as we understand, of scattering tracts throughout the region more or less adjacent to the Clear Creek or Powder River ranches, and have been used by the partnership as a range for livestock. They are not otherwise connected with the Clear Creek lands; and cannot, we think, legitimately be said to be appurtenant to those lands, in the sense that water rights, ditches or other improvements are appurtenances. They may, we suppose, in a limited sense temporarily enhance the value of the use of [55] a ranch in connection with which the lessee uses them, and one of the commissioners says that he took the leases into consideration

in his valuation of the Clear Creek properties. The length of time the leases have to run is not disclosed, and we know that under the statute state lands are leased for a period of five years only, with a right of renewal generally as to an area not exceeding four sections for another like period at a new appraisement. The right to the leases or to renewals does not depend upon the ownership of adjacent ranches or lands, and it is certain that lands so leased can add nothing intrinsically to the value of other lands owned by the lessee. They may, it is true, be of considerable advantage to such owner as a range for livestock, and thereby assist materially in a business of that kind. Their value in connection with a ranch consists in furnishing grazing facilities and providing a range, and much would therefore depend in that particular upon the number of cattle or livestock maintained by the owner.

But whatever may be the relation between the leased lands and the other property in respect to the values of either, we perceive no such inherent difficulty in making partition of the property described in the petition without including the leasehold premises, as to require a vacation of the judgment and report.

We are not convinced that plaintiffs in error were prejudiced by the fact that one of the counsel for plaintiffs below prepared the report for the signature of the commissioners. The latter had previously announced their conclusions in the presence of counsel for both parties, and then requested counsel to prepare their report. We do not understand that the fact is questioned that the report as finally prepared and signed conformed in all respects with the conclusions so previously announced. A copy of the report was handed to counsel for defendants and an opportunity afforded them to suggest changes, as we understand from the evidence. They, however, concluded not to take a position apparently consenting to the report, and declined to suggest anything as to its contents.

[56] A careful examination of the evidence fails to convince us that the proceedings were unfairly conducted; but we think the trial court was justified in concluding that the exceptions had not been sustained. Our views upon the other points in the case render it unnecessary to pass upon the motion to amend the petition in error. Finding no error in the record, the judgment will be affirmed.

Beard, J., and Craig, D. J., concur.

Hon. David H. Craig, Judge of the third judicial district, sat in place of Mr. Justice Scott, who presided at the hearing in the court below.

ON PETITION FOR REHEARING.

POTTER, C. J. Upon the petition for rehearing it is again insisted on behalf of the plaintiffs in error that the rights of the intervening petitioner, Mrs. Magee, and her sister should have been considered in the partition proceedings and those rights determined. It is also seemingly urged that there is some uncertainty in the opinion previously delivered in this cause relative to the persons bound by the judgment appealed from. Since this court did not assume to decide, but expressly declined to decide whether there were any persons other than the immediate parties to the suit who were or would be concluded by the judgment, it may be true that such question is left uncertain, but not more so than in the case of any other judgment. We are not aware of any custom or rule rendering it necessary for the court pronouncing a judgment upon the issues between the parties to a suit to include therein a statement or determination of its effect upon other designated persons.

The first suggestion of the necessity for additional parties came after the partition commissioners had made and filed their award. The trial court declined to admit the new parties, holding it unnecessary to decide what their rights [57] to the lands were under the trust deed to Field, or the effect upon them of the joint consent of Field, the trustee, and Pratt, the life tenant, to the decree of partition, or the extent to which the trustee and the life tenant represent and bind other parties. Upon error in this court, therefore, the question was, in this respect, whether the suggested new parties were necessary parties to a disposition of the cause upon the issues made upon the pleadings between the parties to the suit; and we held upon the grounds set forth in the opinion that they were not. Whether or to what extent such parties are or may be bound by the proceedings and judgment was not, therefore, a question involved in this cause. We cannot conceive that the former opinion, which fully explained our views, is reasonably capable of misconstruction. The statement in the opinion that only the parties to the suit and others "virtually represented by them" would be bound merely expressed a general principle applicable to all judgments, and was not intended to indicate whether or not any

person interested in this appeal was virtually represented in the suit. Counsel seems to regard the use of the word "virtually" as throwing a cloud of uncertainty about the question. But the employment of that word in speaking of the representation by a party of others not personally named or summoned as parties is not unusual: Story's Equity Jurisprudence, 656; 2 Black on Judgments, sec. 661; 15 Ency. of Pl. & Pr. 629. We do not believe that a reiteration of our views upon the questions in the case and the reasons therefor would serve any useful purpose.

It is now further suggested that we overlooked the undue haste with which the proceedings in the trial court were had. We do not think that the record discloses such haste as would tend to discredit the fairness of the proceedings or the award.

Rehearing will be denied.

Beard, J., concurs.

Scott, J., did not sit.

The Partition of Estates Held in Reversion or Remainder is the subject of a recent note to Fitts v. Craddock, 113 Am. St. Rep. 55. Under the Mississippi statute, rights in reversion and remainder cannot be affected by partition proceedings, and it is improper to make reversioners or remaindermen parties thereto: Lawson v. Bonner, 88 Miss. 235, 117 Am. St. Rep. 738. And according to Rutherford v. Rutherford, 116 Tenn. 383, 115 Am. St. Rep. 799, remaindermen cannot compel partition or a sale for partition where their rights are purely contingent and it is not possible to say who are the ultimate owners of the remainder. Where there are life tenants and contingent remaindermen, partition by sale may be made by having the value of the estates for life ascertained by appraisement and paid over to the life tenants, and the balance of the proceeds paid into court and invested in permanent securities for the benefit of such persons as ultimately become entitled to the estate in possession when the contingency on which it turns shall be ascertained by the happening of the event: Rutherford v. Rutherford, 116 Tenn. 383, 115 Am. St. Rep. 799.

The Partition of Contingent or Future Estates or Interests is the subject of a note to Aydlett v. Pendleton, 32 Am. St. Rep. 778.

Equity has Jurisdiction to partition equitable, as well as legal, estates: Chase v. Angell, 148 Mich. 1, 118 Am. St. Rep. 568.

Partition Involving the Property of Decedents whose estates have not yet been settled or distributed is the subject of a note to Smith v. Smith, 119 Am. St. Rep. 586; and partition in connection with the distribution of the estates of decedents is further discussed in the note to Buckley v. Superior Court, 41 Am. St. Rep. 140.

The Effect of the Judgment in Partition, including its effect on the holders of contingent interests, is considered in the note to Carter v. White, 101 Am. St. Rep. 864.

A Judgment in Partition, unless appealed from, is final, and estops the parties thereto from claiming a greater interest than is given them by the decree, even though the proceedings were irregular: Staats v. Wilson, 76 Neb. 204, 124 Am. St. Rep. 806.

UNION STOCKYARDS NATIONAL BANK v. MAIKA.

[16 Wyo. 141, 92 Pac. 619.]

APPEAL AND ERROR.—Striking Out Papers Improperly Sent Up.—If the papers and journal entries in a case between the same parties other than that appealed from are certified and returned to the appellate court, they will be stricken out and directed to be returned to the clerk of the court so certifying them. (p. 1033.)

LIMITATION OF ACTIONS—Conflict of Laws.—Statutes of limitation go to the remedy and not to the cause of action. Therefore, an action upon a contract is governed by the law where it is brought. (p. 1033.)

LIMITATIONS OF ACTIONS—Questions Presentable by Demurrer.—The sufficiency of a petition as to whether it presents a cause of action against which the statute of limitation has run may be presented by demurrer. (p. 1034.)

LIMITATION OF ACTIONS—Involuntary Part Payment as the Result of a Judicial Proceeding.—If a judgment is rendered foreclosing a mortgage and directing a sale of the property to satisfy promissory notes described therein, such sale and the application of its proceeds toward the payment of those notes do not create such part payment as arrests the running of the statute of limitations. (p. 1036.)

Allen G. Fisher, for the plaintiff in error.

Alvin Bennett, E. E. Entertine and Clark, Riner & Clark, for the defendants in error.

146 SCOTT, J. This action was commenced in the district court of Johnson county on December 28, 1904, to recover upon an alleged balance claimed to be due from defendants in error to plaintiff in error upon two certain promissory notes. A demurrer was interposed to the petition, and after argument and due consideration the court sustained the demurrer, to which ruling the plaintiff excepted and elected to stand upon its petition. Judgment was rendered against the plaintiff, and it brings the case here on error.

1. The defendants in error have filed a motion to strike certain papers from the files as not being a part of the transcript or record in this case. The judgment complained of was rendered in a case docketed as No. 711 in the court below, and the original papers and transcript of the journal entries therein have been properly certified and returned to this court. In addition to these the original papers and transcript of journal entries in another case between the same parties and entitled the same, but bearing the docket No. 677 in the court below, have been certified and returned by the clerk of that court. As it is the judgment in the former case which is here sought to have reviewed, it is apparent that

the files and journal entries in docket No. 677 are improperly here. The motion will be granted and the clerk of this court is directed to return to the clerk of the district court of Johnson county the files and certified journal entries in case No. 677.

2. From the petition it appears that at South Omaha, Nebraska, on August 19, 1898, the defendants in error for value received, made, executed and delivered their joint and several promissory note to R. Becker and Degan, whereby they promised to pay five thousand one hundred dollars one year from date, with interest at the rate of ten per cent per annum. At the same place on August 30, 1898, they executed to the same payee and on the same terms their joint and several promissory note for the sum of four thousand fifty dollars. Both of these notes were indorsed to the plaintiff in error. A real estate mortgage was [147] given by defendants in error to plaintiff in error to secure the payment of these notes, upon real estate owned by them and situated in Dawes county, Nebraska. Thereafter, and upon default in the payment of said notes and interest, plaintiff in error instituted suit for foreclosure of said mortgage in the district court of Dawes county, in the state of Nebraska, and such proceedings were had that judgment and decree of foreclosure was entered in that court. The judgment is not set out in haec verba, but from the allegations of the petition that court rendered its judgment or decree in rem, but no personal judgment for deficiency after applying the proceeds of the mortgaged property on the notes was rendered. The action is for a balance claimed to be due upon the notes after allowance of credit for proceeds of sale of the mortgaged property.

The dates of the notes were August 19 and 30, 1898, respectively, and as each note was due one year from its date, more than five years had elapsed since the notes became due and the time of the commencement of this action. Statutes of limitation go to the remedy and not to the cause of action, and such being the case, an action upon a contract is governed by the lex fori or the law of the place where the action is brought: 25 Cyc. 1018, and cases there cited; 33 Cent. Dig., tit. "Limitation of Actions," sec. 4. The time within which an action could be maintained upon these notes is fixed by section 3454, Revised Statutes of 1899. That section is as follows: "Within five years an action upon a specialty or any agreement, contract or promise in writing, and on all foreign claims, judgments or contracts, expressed or implied,

contracted or incurred before the debtor becomes a resident of this state, action shall be commenced within two years after the debtor shall have established his residence in this state." It is apparent from the allegations of the petition that these notes were barred by the statutes unless the application of the proceeds of the mortgaged property arrested the running of the statute, and the sufficiency of the petition in that respect may be and [148] was raised by demurrer: Cowhick v. Shingle, 5 Wyo. 87, 63 Am. St. Rep. 17, 37 Pac. 689, 25 L. R. A. 608; Marks v. Board of Commrs., 11 Wyo. 488, 72 Pac. 894; Columbia S. & L. Assn. v. Clause, 13 Wyo. 166, 78 Pac. 708. Section 3466, Revised Statutes of 1899, is as follows: "When payment has been made upon any demand founded on contract or a written acknowledgment thereof, or promise to pay the same, has been made and signed by the party to be charged, an action may be brought thereon within the time herein limited, after such payment, acknowledgment or promise."

In Cowhick v. Shingle, 5 Wyo. 87, 63 Am. St. Rep. 17, 37 Pac. 689, 25 L. R. A. 608, this court held that a partial payment by one or two parties jointly and severally liable upon a promissory note was not sufficient under section 3466 above quoted to suspend the running of the statute in favor of the other. The question is fully discussed, and the authorities are reviewed as to what is sufficient to toll the statute. Mr. Justice Clark, who delivered that opinion, after reviewing many cases, said: "In some of the above cases the acknowledgment or partial payment relied upon to take the case out of the statute was made before the bar of the statute had become complete; but in my judgment there is no distinction in principle between the legal effect of payment made before or after the bar of the statute had attached; in either case the legal effect thereof is to create a new cause of action. Upon the whole case I am of the opinion that the true construction of our statute, section 2381, Revised Statutes of 1887 (which is identical in language with section 3466, Revised Statutes of 1899), is that given by the supreme court of Ohio in Kerper v. Wood, 48 Ohio St. 621, 29 N. E. 501, 15 L. R. A. 656, viz.: 'A payment, an acknowledgment or promise in writing will not avail to take the case out of the statutory bar unless made by a party to be charged thereby, or an agent authorized for that express purpose'": See, also, Bergman v. Bly, 66 Fed. 40, 13 C. C. A. 19. In construing a statute of similar import the supreme court of

Nebraska, in Whitney v. Chambers, 17 Neb. 90, 52 Am. Rep. 398, 22 N. W. 229, held that "the payment of a dividend by the assignee of an insolvent debtor is not such a part payment as will, [149] under section 22 of the code, take the residue of the debt out of the statutory limitation, as against such debtor." That court said later in reference to that decision: "This case is sustained by the great weight of authority, and it was decided and rests upon the principle that the sale of the property of the maker of the note by his assignee and his application of the proceeds of such sale toward the payment of the note was not a voluntary payment made on the note by the maker, but was a payment in invitum, ... and by operation of law": Moffitt v. Carr, 48 Neb. 403, 58 Am. St. Rep. 696, 67 N. W. 150. In Hughes v. Boone, 114 N. C. 54, 19 S. E. 63, the supreme court of North Carolina held: "A partial payment of a judgment made on execution does not interrupt the running of the statute of limitations." In Harper v. Fairley, 53 N. Y. 442, the court said: "A part payment, whether made before or after the debt is barred by the statute, does not revive the contract, unless made by the debtor himself or by someone having authority to make a new promise on his behalf for the residue." In Moffitt v. Carr, 48 Neb. 403, 58 Am. St. Rep. 696, 67 N. W. 150, there was a foreclosure of a trust deed or mortgage under a power of sale contained therein upon land situated in Missouri, and the holder of the note indorsed the amount of the proceeds upon the note, and it was held not sufficient to arrest the running of the statute. The authorities uniformly support the rule thus announced, though there is a difference of opinion in the adjudicated cases as to the effect of the application by the creditor of the proceeds of collateral security to the payment of the debt. An examination of those cases shows that where such application has been made pursuant to express authority it was regarded as the act of the maker of the note, and thus constituted a part payment within the definition of the statute. That question, however, is not presented and need not be discussed further. The court further said: "Had the mortgage made by Carr conveyed lands in the state of Nebraska; had the mortgage been foreclosed, a judicial sale made of the premises, and the proceeds of such sale [150] indorsed upon the note in suit—it is quite clear that such indorsement would not have been a part payment on the note, within the meaning of the code, and would not have arrested the running of the statute of limitations." Wherever the question has arisen in a foreclosure sale under a power con-

tained in the mortgage, the courts, with the exception of one case in Missouri, which has since been repudiated, have proceeded upon the theory that the act of the creditor in such case represents no voluntary affirmative act on the part of the debtor from which a promise to pay could be reasonably implied. In support of this rule and as to what constitutes a part payment within the meaning of the statute may be cited the following cases, viz.: Holmquist v. Gilbert, 41 Colo. 113, 92 Pac. 232, 14 L. R. A., N. S., 479; Wolford v. Cook, 71 Minn. 77, 70 Am. St. Rep. 315, 73 N. W. 706; Lang v. Gage, 65 N. H. 173, 18 Atl. 795; Gibson v. Lowndes, 28 S. C. 285, 5 S. E. 727; Campbell v. Baldwin, 130 Mass. 199; Moffitt v. Carr, 48 Neb. 403, 58 Am. St. Rep. 696, 67 N. W. 150; Westinghouse Co. v. Boyle, 126 Mich. 677, 86 Am. St. Rep. 570, 86 N. W. 136; Regan v. Williams, 88 Mo. App. 577, overruling Bender v. Markle, 37 Mo. App. 234; 19 Am. & Eng. Ency. of Law, 2d ed., 328, and Vol 3 of Supplement, and cases cited in footnotes; 25 Cyc. 1370, and cases there cited; 33 Cent. Dig., tit. "Limitation of Actions," sec. 631, and cases there cited. The application of the proceeds of the sale to the payment of the notes was by order of the court, and the most that can be said is that it operated as a payment pro tanto. It did not revive the unpaid balance, or arrest the running of the statute, for it was an enforced part payment made pursuant to the order of the court and in accordance with a judgment in rem, and in so far as the makers of the notes are concerned, was an involuntary payment: Gibson v. Lowndes, 28 S. C. 285, 5 S. E. 727; Thomas v. Brewer, 55 Iowa, 227, 7 N. W. 571; Benton v. Holland, 58 Vt. 533, 3 Atl. 322. In Lang v. Gage, 65 N. H. 173, 18 Atl. 795, the rule is thus stated: "Part payment alone is merely an acknowledgment of indebtedness pro tanto. The efficiency of a payment to avert the effect of the statute of limitations as a bar rests in the [151] conscious and voluntary act of the debtor, explainable only as a recognition and confession of the existing liability. It must appear that the payment was a partial one, and made under such circumstances as to show that the debtor understood that he was liable to pay the residue of the debt, and his willingness to pay it." To the same effect is Blair v. Lynch, 105 N. Y. 636, 11 N. E. 947. In Campbell v. Baldwin, 130 Mass. 199, the court say: "In the case at bar, the plaintiff executed a mortgage in which he gave to the mortgagee a power to sell the estate and to appropriate the proceeds to the payment of the mortgage debt. But this cannot be fairly construed as an

authority to the mortgagee to make a new promise on behalf of the mortgagor to pay the debt, so as to avoid the statute of limitations." So in the case before us the action of the district court of Dawes county, Nebraska, was limited to an interpretation and adjudication of the rights of the parties under the mortgage, and no jurisdiction existed in the court, and the makers of the note did not create, nor was anyone authorized, so far as the petition shows, to create a new liability on their part.

It follows that the order of the district court in sustaining the demurrer to the petition was correct, and that the judgment should be affirmed.

Potter, C. J., and Beard, J., concur.

In Case of Conflict of Laws, the statute of limitations of the forum governs, unless the statute is regarded as extinguishing the debt, and not merely barring the remedy: Gross v. Watts, 206 Mo. 373, 121 Am. St. Rep. 662; Arp v. Allis-Chalmers Co., 130 Wis. 454, 118 Am. St. Rep. 1036; Galliher v. State Mut. Life Ins. Co., 150 Ala. 543, 124 Am. St. Rep. 83. And the general rule is that the statute of limitations affects the remedy without extinguishing the right: See the note to Menzel v. Hinton, 95 Am. St. Rep. 658.

The Part Payment Which will Arrest the Statute of Limitations must, it would seem, be made voluntarily: Wolford v. Cook, 71 Minn. 77, 70 Am. St. Rep. 315; Moffitt v. Carr, 48 Neb. 403, 58 Am. St. Rep. 696.

HOVEY v. SHEFFNER.

[16 Wyo. 254, 93 Pac. 305.]

HABEAS CORPUS—Errors of the Committing Court.—In a proceeding by habeas corpus, the court is not concerned with mere errors of law not affecting the jurisdiction of the court making the order under which the prisoner is held. (p. 1042.)

THE WRIT OF HABEAS CORPUS is not Endowed with the Functions of a Writ of Error or other proceeding for the correction of error. (p. 1043.)

THE WRIT OF HABEAS CORPUS does not Bring Up the Record, if any, wherein the commitment has occurred. Hence, the revisory or appellate jurisdiction of the court to which the writ is returnable is not invoked. (p. 1043.)

HABEAS CORPUS—Irregularities in the Committing Court.—The writ of habeas corpus is not designed to interrupt the orderly administration of the criminal laws by a competent court acting within the limits of its jurisdiction. Mere irregularities or errors not affecting the jurisdiction of the trial court, do not authorize the discharge of the accused on habeas corpus. (p. 1043.)

HABEAS CORPUS.—Jurisdiction to Render the Particular Judgment Must Exist or the prisoner may be discharged on habeas corpus, though the court had jurisdiction of the subject matter and the person. (p. 1044.)

CRIMINAL LAW.—Discharge of the Jury.—The trial court has the right, without prejudicing a future prosecution, to discharge the jury in a criminal case, where it appears that, after reasonable time for deliberation has elapsed, a verdict has not been agreed upon, and there is no probability of an agreement. (p. 1045.)

CRIMINAL LAW.—The Discharge of the Jury at a time when the court is without power to set or make an order discharging them has the same effect as their discharge without any reason or necessity existing therefor. (p. 1046.)

HABEAS CORPUS.—Improper Discharge of the Jury After the Accused has been Placed in Jeopardy does not furnish any ground for his release on habeas corpus. It is a defense which may be presented to the court in the original prosecution, and may be there found sufficient to entitle the accused to an acquittal, but it does not deprive the court of jurisdiction to proceed further, so that the accused is entitled to be released on habeas corpus without trial. (p. 1046.)

CRIMINAL LAW.—The Legal Effect of the Discharge of the Jury Without a Verdict and After the Accused has been Placed in Jeopardy is neither greater nor less where the act is erroneous because void, than where it is erroneous for any other reason. (p. 1048.)

CRIMINAL LAW—Jurisdiction.—Though the Jury has been Discharged in a Criminal Prosecution After the Accused has been Placed in Jeopardy and Without Sufficient Reason, still the court retains jurisdiction to proceed with the cause and to commit the prisoner to the custody of the sheriff for further trial, and if it does so, its action cannot be questioned by habeas corpus. (pp. 1048, 1059.)

HABEAS CORPUS.—The Discharge of the Jury on a Sunday or Other Nonjudicial Day in a Criminal Case After the Accused has Been Placed in Jeopardy, conceding it to amount to an acquittal, does not entitle him to release on habeas corpus. If the discharge has the effect insisted upon, it may be presented to the court by some proper pleading or other proceeding as a ground for the acquittal from any further prosecution. (p. 1059.)

Fred D. Hammond, for the plaintiff.

W. E. Mullen, attorney general, for the defendant.

[259] POTTER, C. J. A writ of habeas corpus was issued in this case by order of the chief justice and made returnable before the court, upon the petition of Fay Hovey, alleging that she is unlawfully imprisoned and restrained of her liberty at the town [260] of Casper, in Natrona county, in this state, by Jesse A. Sheffner, sheriff of said county, under an order and commitment of the district court sitting in and for said county, made and entered November 21, 1907, which order, by reason of certain facts set out in the petition, presently to be stated, is alleged to be insufficient to justify the imprisonment complained of. The sheriff's answer and re-

turn admits the imprisonment and restraint of plaintiff, but denies its alleged illegality, and sets out a certified copy of the order aforesaid as his authority in the premises.

It appears from the pleadings that on the seventh day of November, 1907, one of the regular days of the July term of said district court, the plaintiff was placed on trial, after a plea of not guilty, upon an information filed by the prosecuting attorney of Natrona county charging her with the statutory offense of enticing a female of good repute and chastity into a house of ill-fame for the purpose of prostitution; that a jury was impaneled and sworn upon said trial, to whom, after the introduction of evidence, arguments of counsel, and instructions of the court, the cause was submitted on Saturday, November 9, 1907, and they thereupon retired to deliberate upon their verdict. That on the following day, Sunday, November 10, 1907, at the hour of 10 o'clock in the forenoon, the presiding judge of said court convened the same in session, the clerk and sheriff being present, as also the plaintiff here, who was defendant in said cause, and the attorneys for the state; whereupon the jury aforesaid was called into the presence of the court, and upon inquiry by the court reported that they were unable to agree, and that there was no probability of their agreeing or rendering a verdict, and asked to be discharged from a further consideration of the case. Thereupon, on said day, they were discharged by the court; and an order was then made and entered of that date reciting the report of the jury, and that "it thereupon appearing to the court that the jury cannot agree and that there is no probability of their agreeing, and that they were unable to [261] agree upon a verdict, and for these reasons it is ordered that the said jury be discharged from a further consideration of the case."

It further appears that thereafter, at the same term, viz., November 21, 1907, the following order, which constitutes the authority for the imprisonment complained of, was made and entered by said court in the cause aforesaid:

(Omitting the title and caption.) "This cause coming on to be heard regularly on the special plea in bar heretofore filed by the defendant, Fay Hovey, and the same having been argued by counsel, and fully considered by the court, it is, this twenty-first day of November, 1907, by the court, ordered, adjudged and decreed that the special plea in bar of the defendant, Fay Hovey, be and the same is hereby denied and overruled, to which denial and overruling of the court of said plea in bar, the defendant here and now excepts, and

the court being unable to retry said cause at this present (July term, A. D. 1907), term, it is by the court ordered, that the said cause be and the same is hereby continued until the next regular term of this court, the January, A. D. 1908, term, and it is further ordered that the bond in this cause shall be and hereby is fixed at the sum of three hundred dollars ($300.00) for the appearance of said defendant, Fay Hovey, before this court on the first day of the regular January, 1908, term thereof, at 10 o'clock A. M., and there to remain and not depart without leave of court, and to abide the judgment and order of the court, and it is further ordered that the sheriff of Natrona county, Wyoming, be and he is hereby commanded to receive and safely keep the said Fay Hovey and her, the said Fay Hovey, to safely keep and imprison in the jail of said Natrona county until she, the said Fay Hovey, be discharged by due process of law, and a certified copy of this order shall be the authority of said sheriff of Natrona county. To each and every part of this order the defendant now and here excepts. Done in open court this twenty-first day of November, 1907."

Upon the ground that the discharge of the jury was unlawful and void, for the reason that it occurred on Sunday, [262] an alleged nonjudicial day, and without the consent of plaintiff, or a waiver by her of any of her rights, it is alleged that it operated as an acquittal, and that as a result of the proceedings the plaintiff has been placed in jeopardy for said offense.

The defendant admits, by his answer and return, the discharge of the jury on Sunday, but denies that it was a nonjudicial day, and alleges that the jury was discharged because of disagreement. He further alleges that one of the jurors, named in the answer, was not a citizen of the United States, a fact not known to the prosecuting attorney at the time of the impaneling and swearing of the jury, and which could not then have been ascertained by the exercise of ordinary diligence, for which reason it is alleged that the jury was not competent and was not regularly and legally impaneled to try the cause.

Plaintiff filed a reply admitting that the juror named was not a citizen of the United States, but alleging that such disqualification was known to this plaintiff at the time, and that, being satisfied with him as a juror, she accepted him as such and considers that she thereby waived her right to object to him. The cause has been heard by the court upon

the pleadings, and certain papers offered by the defendant as evidence for the purpose of establishing his allegation as to the disqualification aforesaid of one of the jurors.

We are not advised by the record in this proceeding as to the ground or substance of the special plea in bar, which appears to have been overruled by the order committing the petitioner or the time when it was filed. The strong inference, perhaps, may be that it was filed after the discharge of the jury, and that it was based upon the ground that such discharge was illegal and void and the proceedings, therefore, tantamount to a verdict of acquittal, entitling the accused to set up the defense of former jeopardy or acquittal to a second trial upon the information or for the same offense.

At any rate, the only ground urged here for the plaintiff's discharge upon habeas corpus is that, by reason of the proceedings [263] upon her trial, she has been once placed in jeopardy, and that a second trial would violate the provision of the state constitution that a person shall not be twice put in jeopardy for the same offense: Const., art. 1, sec. 11. It is urged that at common law Sunday is dies non juridicus, and, though there is no local statute expressly prohibiting the sitting of the court or the transaction of judicial business on that day, that the common law in that respect is in force in this state, since, by statute, the common law of England has been adopted so far as the same is of a general nature, and not inapplicable nor inconsistent with the laws of the state: Rev. Stats. 1899, sec. 2695. It is conceded that even at common law it is competent to receive a verdict on Sunday, but it is said to have been so declared for the sole reason that such a proceeding is merely ministerial; and it is contended that the discharge of a jury for disagreement requires a judicial determination that they have deliberated a reasonable time so as to authorize a discharge, and that there is no probability of an agreement, and, therefore, as a judicial act is illegal when performed on a nonjudicial day. With that proposition as a basis it is contended that the illegal discharge of the jury without a verdict operated as an acquittal of the plaintiff, and that since she cannot legally be again placed in jeopardy she is entitled to be discharged.

On the other hand, while it is conceded that at common law Sunday is a nonjudicial day, it is argued that the purpose of the day is far better subserved by discharging a jury unable to agree instead of keeping them together throughout the day and until Monday morning, and that the act may well be re-

garded as a necessity and upheld on that ground. It is further contended that the district courts are authorized to sit on Sunday, and to discharge a jury on that day for disagreement, by virtue of the statute of 1895 (Rev. Stats. 1899, sec. 3612), which provides that, in addition to the regular terms fixed by law, "each district court shall be open at all times for the transaction of business in the entry of judgments, [264] decrees, orders of course, and such other orders as have been made or granted by the district court, or any judge thereof, and for the hearing and determination of all matters brought before the court or judge, except the trial of issues of fact."

Counsel for plaintiff insists that the expression "at all times" in said statute has reference only to days in vacation or recess upon which a court may lawfully sit and transact judicial business, and does not necessarily include Sunday or other nonjudicial days. It is argued that a clear and unequivocal statute to the contrary is required to overthrow the common-law principle prohibiting the transaction of judicial business on Sunday; and that the statute aforesaid is reasonably capable of a construction not interfering with that principle.

The question thus sought to be presented is an important one. If the propositions relied on by plaintiff are sound, and should be disregarded by the district court, and the plaintiff compelled against her objection to undergo another trial, notwithstanding that she has been once in jeopardy for the same offense or that in legal effect the result of the former trial was equivalent to an acquittal, an error will be committed. And if, as we suppose, the overruled plea in bar set up the facts here alleged, the order denying it and committing the plaintiff may have been erroneous. The question here upon habeas corpus, however, is not whether error has been or may be committed by the district court, but whether, in committing the plaintiff to the custody of the sheriff to await another trial, the court has exceeded its jurisdiction. In this proceeding we are not concerned with mere errors of law not affecting the jurisdiction of the court to make the order under which the plaintiff is held, nor is it material here whether the discharge of the jury was a void act or not, unless, if held to have been illegal, it devested the court of jurisdiction to proceed further in the cause. And upon this point it is contended on behalf of defendant that the court retained jurisdiction, and that habeas corpus [265] is not

the appropriate remedy for the determination of the question of former jeopardy.

That the writ of habeas corpus is not endowed with the functions of a writ of error or other proceeding for the review and correction of errors is an elementary rule, and has many times been asserted by this court: Kingen v. Kelly, 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177; In re McDonald, 4 Wyo. 150, 33 Pac. 18; Miskimmins v. Shaver, 8 Wyo. 392, 58 Pac. 411; Fisher v. McDaniel, 9 Wyo. 457, 87 Am. St. Rep. 971, 64 Pac. 1056; Younger v. Hehn, 12 Wyo. 289, 109 Am. St. Rep. 286, 75 Pac. 443; Hollibaugh v. Hehn, 13 Wyo. 269, 79 Pac. 1044. Hence, authority to issue the writ and determine the legality of a particular imprisonment thereon is frequently, if not usually, conferred equally upon courts of different grades and the judges thereof, without regard to the appellate jurisdiction of such courts. In this state the power is vested concurrently in the district and supreme courts and the judges thereof; and the right to entertain an application for the writ is not made to depend upon appellate or revisory authority over the judgment, order or process by which the applicant may be restrained. The writ brings up the body of the prisoner, and the cause of his commitment, but not the record of the judicial proceeding, if any, wherein the commitment has occurred. The strictly appellate or revisory jurisdiction of this court is not invoked, therefore, through the institution of an original proceeding by a petition for habeas corpus, whether the writ be ordered issued by the court or by a justice thereof and made returnable before the court.

Neither is the writ of habeas corpus designed to interrupt the orderly administration of the criminal laws by a competent court while acting within its jurisdiction. The occurrence of mere errors or irregularities in a criminal case, not affecting the jurisdiction of the trial court, will not authorize a discharge of the accused upon habeas corpus. Jurisdictional facts only are to be considered upon this writ, whenever the restraint complained of appears to be under legal process or judicial order. A void process or a void judgment or order of a committing court is ground for the [266] discharge of one held upon it in this summary and collateral proceeding, not because of error merely, but for the reason that the court has acted without jurisdiction, or, having had jurisdiction, has either lost or exceeded it.

Our statute proceeds upon this principle in the provision that "it is not permissible to question the correctness of the action of a grand jury in finding a bill of indictment, or a

petit jury in the trial of a cause, nor of a court or judge when acting within their legitimate province and in a lawful manner: Rev. Stats. 1899, sec. 5498. In the case of In re McDonald, 4 Wyo. 150, 33 Pac. 18, Chief Justice Groesbeck, speaking for this court, said, in referring to that statute in connection with the facts of the case, that "the court had acted within its legitimate province, for it had jurisdiction of the offense and of the person of the offender"; and a decision of the Iowa supreme court construing the words "in a lawful manner" in a similar statute was quoted from with approval. In effect the decision thus approved held that "manner" had reference to the method of acting more than to the degree of perfection or correctness in the results arrived at, so that if a court observes proper methods or means, it may be said to be acting in a lawful manner, although it may err in the application of legal principles to such an extent as to involve reversible error. But it was explained that a court would not be regarded as having acted in a lawful manner when the judgment pronounced is absolutely void, since such a judgment would have no support in law: Elsner v. Shrigley, 80 Iowa, 30, 45 N. W. 393.

This court has adopted the liberal view sustained by the later authorities that the jurisdictional facts cognizable on habeas corpus are not alone those which relate to jurisdiction of the subject matter, and of the person, but as well to jurisdiction to render the particular judgment: Kingen v. Kelley, 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177; Miskimmins v Shaver, 8 Wyo. 392, 58 Pac. 411; Younger v. Hehn, 12 Wyo. 289, 109 Am. St. Rep. 986, 75 Pac. 443. In Kigen v. Kelley, 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177, it was said: "Lack of jurisdiction of the subject matter, jurisdiction of the person, or jurisdiction to render the particular judgment assailed, [267] seems to include all cases which render a judgment void or subject to collateral attack in habeas corpus." In the Miskimmins case (8 Wyo. 392, 58 Pac. 411), the applicant was discharged on the ground that the act for which he had been committed as for a contempt by a magistrate holding a preliminary examination did not constitute a contempt in law, and that, therefore, the magistrate had been without jurisdiction to render the particular judgment. The applicant had been committed for a refusal to answer certain questions propounded to him as a witness, the expressed ground of his refusal having been that his answers would tend to criminate him. In Bandy's case a sentence to the penitentiary as for grand larceny upon an accepted plea of guilty of petit larceny

to an information charging grand larceny was held to have been in excess of jurisdiction, and the applicant was discharged. The sentence appeared to have been based upon the fact that the records of the trial court disclosed a previous conviction of the accused of petit larceny, and, without a charge having been preferred of a second offense, or a plea of guilty thereto or a regular conviction thereof, the court, upon the bare record of such previous conviction, attempted to apply the statute authorizing the punishment prescribed for grand larceny upon a second conviction of petit larceny. There jurisdiction was found wanting to render the particular judgment. In the other cases above cited previously decided by this court questions were considered connected with the procedure of courts, and the acts complained of held, if objectionable at all, to have been more errors or irregularities, and not void as without jurisdiction, though some of the acts were objected to on constitutional grounds. Those cases serve to illustrate the principle now under discussion, but none of them involved a state of facts similar to that presented in this case.

We are, therefore, to inquire into the legal consequences of the wrongful or illegal discharge without verdict of a trial jury impaneled and sworn in a criminal case, to ascertain whether or not the act presents a jurisdictional question, [268] such as would entitle the accused to discharge from further imprisonment upon habeas corpus, in the event that the proceeding in relation to the jury should be held to have been erroneous either because improper under the circumstances, or void as beyond the lawful powers of the court upon the day of its occurrence.

At this day it is unnecessary to cite authority to sustain the right of a trial court, without prejudicing a future prosecution, to discharge a jury in a criminal case, where it appears that after a reasonable time for deliberation has been allowed a verdict has not been agreed upon, and there is no probability of an agreement. In accordance with the general rule upon that subject, now well established on the ground of necessity, the constitution of this state, in the section containing the provision against a second jeopardy, provides that, "if the jury disagree, ... the accused shall not be deemed to have been in jeopardy." The statute, moreover, provides that whenever a jury shall be discharged after they have been kept so long together that there is no probability of agreeing, the court shall, upon directing the discharge, order the reasons therefor to be entered on the journal; and such discharge

shall be without prejudice to the prosecution: Rev. Stats. 1899, sec. 5386.

It may be conceded that the improper discharge of a jury in a criminal trial after the commencement of jeopardy will render the proceedings equivalent to a verdict of acquittal, so far as such a verdict will constitute a good defense in bar of a subsequent trial for the same offense, either upon the same or another indictment or information, and perhaps also entitle the accused to a judgment of acquittal and discharge upon the same information upon motion in the trial court. When a criminal trial has reached the stage where jeopardy has commenced, and the jury is discharged without the consent of the defendant on trial, without some recognized necessity or reason authorized by law, it may well be held, as it generally is, since the right of the accused to a verdict at the hands of the jury has been rendered impossible [269] without fault on his part, through the erroneous act of the court, that he may demand that the result be regarded as an acquittal, and he will be protected by the rule forbidding a second jeopardy. And, manifestly, the same situation arises upon a discharge of the jury, though for a lawful cause, at a time or on a day when the court is without power to sit or make an order discharging them.

It does not follow, however, that the erroneous or void discharge of the jury, and the advantage thereby afforded to the accused, will deprive the court of further jurisdiction in the case, or upon another information or indictment for the same offense. It is true that the facts may furnish the accused with a good defense on the ground of former jeopardy; but whether they amount to a sufficient defense or not, either as a matter of law or fact, is to be determined in the manner provided by law, the same as any other defense. The fact that the defense is based upon an immunity granted by the constitution offers no valid objection to the court's jurisdiction to hear it, and determine upon its sufficiency; nor is the opportunity offered to pass upon the matter incorrectly a ground for denying jurisdiction.

The constitution gives an accused the right to demand the nature and cause of the accusation against him, to have a copy thereof, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses; yet, it is apparent that neither the chance that the court wherein the prosecution is pending may commit error in respect to any of those matters, or an actual erroneous ruling thereon, will

usually affect the jurisdiction of the court. One of the most frequent objections in a criminal prosecution is the alleged insufficiency of the indictment or information to apprise the accused of the nature and cause of the accusation; and it is not, however, generally supposed that an adverse decision upon such an objection, though erroneous, takes away further jurisdiction, unless, indeed, the act sought to be punished constitutes no crime or offense under the law. In Ex parte Harding, 120 U. S. 782, 7 Sup. Ct. Rep. 780, 30 L. ed. 824, it was [270] held that a denial of the right to have compulsory process for witnesses was not a jurisdictional objection; and this is in harmony with the general run of decisions on that question: See, also, In re McKnight, 52 Fed. 799.

The statute clearly contemplates that the trial court has jurisdiction to entertain and determine the plea of former jeopardy. It prescribes that upon arraignment the accused may offer a plea in bar that he has before had judgment of acquittal, or been convicted or been pardoned for the same offense, to which plea the prosecutor may reply that there is no record of such acquittal or conviction, or that there has been no pardon; and a trial of such issue to a jury, if necessary, is provided for: Rev. Stats. 1899, sec. 5331.

In this case there has been no judgment of acquittal, and in such case, where the further proceedings are had upon the same information that was before the discharged jury, as well generally where the accused is held to answer upon a second trial to the same information, a formal plea in bar may, perhaps, be unnecessary, though the usual practice, we think, is even then for the accused to ask and be granted a right to withdraw his previous plea of not guilty and substitute the plea in bar, setting up the facts deemed to constitute former jeopardy. There is, however, authority denying the necessity of the formal plea after a disposition of one trial upon the same information or indictment under circumstances that place the accused once in jeopardy: People v. Taylor, 117 Mich. 583, 76 N. W. 158; State v. White, 71 Kan. 356, 80 Pac. 589. It is so held in the cases cited upon the ground that the proceedings relied on as constituting the former jeopardy are before the court upon its own record in the case; and that upon the question being raised, the court will take cognizance of the facts so disclosed and determine their proper legal effect.

The legal effect of an erroneous discharge of the jury without a verdict is neither greater nor less where the act is erroneous because void, than where it is erroneous for any other reason, as, for example, where it occurs in the enforced [271] absence of the defendant, or without allowing sufficient time for deliberation, or to accommodate the prosecution in obtaining absent testimony, if that be not permitted, or upon any ground not authorized by law. Whatever the particular imperfection in the proceeding, the only result is a condition protecting the accused against further prosecution upon the ground of former jeopardy. The most that can be said in any case as to the effect of an improper discharge of a duly sworn jury in a criminal case is that it is equivalent to a verdict of acquittal, thereby placing the accused within the protecting clause of the constitution when confronted with a further prosecution.

The order committing the plaintiff into the custody of the sheriff was made on a lawful day of the court, subsequent to the discharge of the jury. Was it made in excess of jurisdiction? The authorities are numerous upon the subject of the effect upon the jurisdiction of the court of an erroneous discharge of a jury in criminal cases, and, with very few exceptions, the loss of jurisdiction is denied, as well as the right to have the resulting question of jeopardy determined upon habeas corpus. If the court has jurisdiction, it is evident that it is not confined in its exercise to the rendering of a correct decision. As said in Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. Rep. 542, 28 L. ed. 1005, in discussing the court's jurisdiction upon a claim of former jeopardy, after an alleged improper discharge of the jury pending a previous trial, "it had jurisdiction to hear the charge and evidence against the prisoner. It had jurisdiction to hear and decide upon the defenses offered by him. The matter now presented was one of those defenses. Whether it was a sufficient defense was a matter of law on which the court must pass so far as it was purely a question of law, and on which the jury under the instruction of the court must pass if we can suppose any of the facts were such as required submission to the jury."

In that case several indictments against the defendant for embezzlement had been ordered by the trial court to be consolidated for the purpose of trial. A jury was thereupon [272] impaneled and sworn, the district attorney made a statement of his case to the jury, and the court then took a recess.

Upon reconvening, the court decided that the indictments could not be well tried together, and discharged the jury from further consideration of them. The prisoner was thereafter tried against his protest before the same jury upon one of the indictments and convicted. He asked leave to file a petition for habeas corpus to obtain his discharge, upon the ground that he had been once in jeopardy with regard to all the offenses charged in the several indictments. The supreme court refused the writ, basing its decision upon the proposition that the trial court had not lost its jurisdiction by the discharge of the jury, and, though error may have been committed, because of the circumstances, in permitting the prisoner to be convicted upon a second trial, it did not go to jurisdiction.

It was further said in the opinion in that case: "If the question had been one of former acquittal—a much stronger case than this—the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offense, and if the identity of the offense were in dispute, it might be necessary on such a plea to submit that question to the jury on the issue raised by the plea. The same principle would apply to a plea of former conviction. Clearly in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial it is error, which may be corrected by the usual modes of correcting such errors."

In Ex parte Ulrich, 43 Fed. 661, it was alleged that the petitioner had been placed on trial before a state court upon an indictment charging bigamy, and that, pending the trial, after the impaneling and swearing of a jury and partial examination of witnesses, the jury was discharged against the prisoner's protest, and another trial was ordered. Thereupon a writ of habeas corpus was sued out by the prisoner in the United States district court and the [273] same was granted. Upon appeal to the circuit court, the order discharging the petitioner was reversed. Circuit Judge Caldwell, in the opinion, said:

"Whether the first jury was discharged without sufficient legal excuse was a mixed question of law and fact, to be determined by the court, or by the court and a jury, if the facts were disputed. It is undeniable that the court had jurisdiction to determine that issue. It was the only court that had

jurisdiction to determine it in the first instance; and, if it be conceded that the court decided the question erroneously, its jurisdiction over the cause was not thereby lost or in any degree impaired, and its judgment was not void, and is not open to collateral attack."

So we find it laid down as a general rule that the defense of former jeopardy or of former acquittal or conviction does not entitle the prisoner to be discharged on habeas corpus: 21 Cyc. 305, and cases cited; 9 Ency. of Pl. & Pr. 632; Church on Habeas Corpus, 2d ed., sec. 253, and note; 1 Bishop's New Criminal Procedure, sec. 821. In the section cited, Mr. Bishop states that a discharge of the jury after jeopardy begun, without verdict or the prisoner's consent, operates in law as an acquittal; and on motion, without plea, he is entitled to be set at liberty, but that should the court refuse, habeas corpus will not lie.

One of the early cases on this subject frequently cited and approved is Wright v. State, 5 Ind. 290, 61 Am. Dec. 90. There it appeared that the petitioner had been put on trial upon an indictment for murder; the trial progressed until a day deemed by the court to be the expiration of the term, and, as the court was satisfied the trial would not be completed on that day, it discharged the jury over the prisoner's objections, and remanded the latter to jail to await trial at the next term. His discharge from custody under the order so committing him was denied on habeas corpus, although it was held that there was former jeopardy. The court conceded the privilege of everyone conceiving himself illegally detained in custody to demand the writ of habeas [274] corpus as a matter of right, but said that it did not follow that the court or judge before whom the cause may be brought can in all cases investigate the merits of the detention. A statute existed in Indiana to the effect that on habeas corpus the legality could not be inquired into of any judgment or process whereby the party is in custody upon a warrant issued upon an indictment or information. The court held that, as the case had not been finally disposed of, and there had not been a release of the prisoner by any judgment of the trial court, he was to be regarded as in custody under the indictment, and habeas corpus could not be employed to discharge him.

The case of Wright v. State, 5 Ind. 290, 61 Am. Dec. 90, has been followed upon this point in an unbroken line of decisions in Indiana, with the single exception of the case of

Maden v. Emmons, 83 Ind. 331, and that case was expressly overruled in Gillespie v. Rump, 163 Ind. 457, 72 N. E. 138. The case of Maden v. Emmons, 83 Ind. 331, was where the jury had dispersed without rendering a verdict, upon discovering after they had retired that one of their number was not a resident of the county. The case of Gillespie v. Rump, 163 Ind. 457, 72 N. E. 138, which was an appeal from a judgment refusing discharge on habeas corpus, disclosed the following facts: After a jury had been impaneled and sworn upon the trial of the petitioner under an indictment charging the crime of murder, the submission was set aside over the objection of the accused to permit the challenge by the prosecution of one of the jurors on the ground of relationship to one of the defendants; the challenge was made and allowed, and a new juror called and sworn, all over the protests of the defendants on trial. The latter thereupon moved their discharge on the ground of jeopardy, and, it being overruled, filed a special plea in bar, which was also overruled. The trial proceeded and resulted in a disagreement of the jury and the remanding of the prisoner for another trial. In that state of the case the writ of habeas corpus was sued out. The judgment refusing to discharge was affirmed, for the reason that the question [275] sought to be raised could not be heard and determined on habeas corpus. The various Indiana cases are reviewed in an instructive opinion.

It is true that the Indiana cases rest largely upon the provision of their statute above referred to, which, perhaps, may be regarded as more strongly prohibitive of questioning the judgment of a competent court than our own statute. It is evident, nevertheless, that the theory of the Indiana cases is opposed to the loss of jurisdiction in the trial court after an irregular or wrongful discharge of the jury. Indeed, in Gillespie v. Rump, 163 Ind. 457, 72 N. E. 138, it is stated in the opinion, that the discharge of a juror and the impaneling of another in his place, even if erroneous, did not deprive the court of jurisdiction and render the subsequent proceedings void. And it seems clear from a reading of that case that a void judgment, apparent on the record, would even, under the Indiana statute, be deemed ground for discharge upon habeas corpus.

Ex parte Maxwell, 11 Nev. 428, was a habeas corpus case before the supreme court of Nevada. The petitioner claimed to be entitled to his discharge because of the discharge of the

jury upon his trial after they had been out but three hours, upon the mere statement of the foreman that they were unable to agree, whereby the proceedings became equivalent to an acquittal. The court upheld the contention as to the unwarranted and illegal discharge of the jury and the effect thereof, but remanded the prisoner on the ground that the order holding him for another trial was not void, but voidable only. It was held that the right to claim former jeopardy might be waived.

A statute like that in Indiana did not exist in Nevada, but the statute of the latter state was said to extend the power of the court in habeas corpus beyond that at common law. Yet it was remarked that the writ was not intended to operate or to have the force of an appellate proceeding, and that the process or authority holding the prisoner must be absolutely void, and not merely voidable, [276] to justify a discharge upon the writ, where the detention is by virtue of legal process.

That a claim of former jeopardy based upon an alleged improper discharge of the jury without verdict will not be determined on habeas corpus is also maintained in Missouri. The principle was announced in an early case where the discharge occurred in the prisoner's absence, and without his consent, after the jury had been out but a few hours: Ex parte Ruthven, 17 Mo. 541. And in another case where a verdict of guilty and fixing a punishment unsatisfactory to the court was set aside by the court on its own motion, and the prisoner held for another trial: Ex parte Snyder, 29 Mo. App. 256. Though there was a statute in Missouri somewhat like the one in Indiana, it is apparent that it was not deemed to take away the right to habeas corpus where want of jurisdiction appeared; and hence the decisions above cited may be regarded as authority, we think, upon the point that the improper discharge of a trial jury does not devest the court of jurisdiction, although it may have resulted in placing the accused in jeopardy. Indeed, in State v. Williams, 117 Mo. App. 564, 92 S. W. 151, it was held that, notwithstanding a party had been in jeopardy and was entitled to be discharged on motion in the trial court, after an improper discharge of the jury pending a previous trial had occurred, yet the court retained jurisdiction, so that prohibition would not lie to restrain further proceedings: See, also, Ex parte Bedard, 106 Mo. 616, 17 S. W. 693.

In Texas, habeas corpus is held not the proper remedy to try the issue of former acquittal, but that the appropriate remedy is by special plea entered in the court wherein the indictment is pending, under which the party is imprisoned: Pitner v. State, 44 Tex. 578; Ex parte Crofford, 39 Tex. Cr. App. 547, 47 S. W. 533. In the Crofford case the defense was raised upon an alleged discharge of the jury in the enforced absence of the accused on trial. The court said: "This is not a novel question in Texas. Since the case of Perry v. State, 41 Tex. 488, the decisions have [277] been uniform that the writ of habeas corpus cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy."

However, in Ex parte Davis, 48 Tex. Cr. 644, 122 Am. St. Rep. 775, 89 S. W. 978, the Texas court of criminal appeals had under consideration a case where it was contended that a verdict of not guilty rendered upon a trial of the accused in one county constituted a constitutional objection to a trial for the same offense in another county, there having been a serious question in the case as to venue. The constitution provided that "No person for the same offense shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction." The court regarded this provision as distinguishing between jeopardy and a verdict of not guilty in a court of competent jurisdiction; and concluded that after a verdict of not guilty the only way to avoid a second trial, if the same is being proceeded with, is to interpose the writ of habeas corpus; and it was said that the statutes and their decisions gave the court great latitude in the issuance of such writ. The other Texas cases above cited were not referred to, and the doctrine of the case last cited evidently applies only to cases where there may have been an actual verdict of acquittal.

That no inquiry can be had on habeas corpus as to whether the prisoner was present or absent when the jury impaneled and sworn to try him upon an indictment had been discharged from further consideration of the case, or whether such discharge was proper or not, was held in State v. Sheriff, 24 Minn. 87. The court said: "The fact, therefore, if it be one, that the court improperly discharged the jury in the enforced absence of the prisoner, did not dispossess the court of its jurisdiction over the cause." To the same effect, where the

jury was discharged for disagreement over the objection of the accused, is the case of Ex parte McLaughlin, 41 Cal. 211, 10 Am. Rep. 1072. In Ex parte Hartman, 44 Cal. 32, whether an arrest of judgment upon [278] a verdict of a less offense under an indictment charging assault with intent to murder constituted jeopardy was held to be a question not competent for consideration in an application for habeas corpus, where the accused, after the arrest of judgment, had been remanded to await the action of the next grand jury upon the charge originally preferred.

In Steiner v. Nerton, 6 Wash. 23, 32 Pac. 1063, a trial jury had been discharged, the indictment quashed, and, later, an information filed upon which the accused was being held for trial. Claiming former jeopardy, he applied for discharge on habeas corpus, but the same was denied, the court saying: "If the petitioner has been before in jeopardy for the same offense, that is a proper plea in bar, to be tried by the court, and from the decision of which an appeal would lie to this court." A like conclusion was reached in the case of In re Allison, 13 Colo. 525, 16 Am. St. Rep. 224, 22 Pac. 820, 10 L. R. A. 790.

The principle under discussion is further illustrated by cases where the claim of former jeopardy has arisen out of circumstances other than the discharge of a trial jury. In a Colorado case the petitioner for habeas corpus was in jail awaiting trial on a charge of murder. He had been once tried and found guilty of manslaughter, and announced himself ready to receive sentence upon the verdict. The court declined to pass sentence, but, over the objection of the petitioner, ordered the verdict set aside, and a new trial had. A motion for the prisoner's discharge was then made on the ground of former jeopardy, and denied, and he was remanded to await trial. On petition for habeas corpus before the supreme court, it was held that the defense of former jeopardy could not be raised in that proceeding. It was contended by counsel that as all the facts appeared upon the record in respect to the plea, it entitled the party to be heard and to be discharged in the summary proceeding; the court recited a part of the argument and stated its conclusion as follows: "In support of this proposition they urge that in such circumstances, where the petitioner has already moved the trial court for a discharge [279] upon the ground now urged in support of his application, he should not be subjected to another

trial, or the formality of submitting to a jury undisputed questions of fact, the force and effect of which are entirely a question of law. These matters do not change the rule with respect to questions which can be inquired into on applications of this character. It has uniformly been held by this court that in habeas corpus proceedings only jurisdictional questions can be reviewed." The court, in further discussing the question, stated in substance that the trial court had not lost jurisdiction, but was authorized to hear and determine the claim of once in jeopardy, and the question whether there should be another trial, and that, though the court might decide the question erroneously, it would not be devested of jurisdiction, nor would the question be available on habeas corpus: In re Mahany, 29 Colo. 442, 68 Pac. 235.

In re Terrill, 58 Kan. 815, 49 Pac. 158, was a case where a party claimed to have been in jeopardy through a former conviction which had been held void because the trial had occurred when the court was without power to sit. Being held to await another trial, he sought release on habeas corpus. It was held that the question of former jeopardy could not be determined on habeas corpus. To the same effect the following additional cases, where the claim was made after an alleged previous conviction or acquittal: State v. Criminal Sheriff, 45 La. Ann. 316, 12 South. 307; Commonwealth v. Norton, 8 Serg. & R. 72; People v. Rulloff, 3 Park. C. C. 126; Ex parte Barnett, 51 Ark. 215, 10 S. W. 492; State v. Sistrunk, 138 Ala. 68, 35 South. 39; In re Bogart, 2 Saw. 396; State v. White, 71 Kan. 356, 80 Pac. 589; In re Miller, 7 Kan. App. 686, 51 Pac. 922. The case of State v. White, 71 Kan. 356, 80 Pac. 589, was not decided on habeas corpus, but the question of jurisdiction on a second trial was before the supreme court, on error, the jury having been discharged, as claimed, irregularly upon a previous trial. It was contended that, though no plea of former jeopardy had been presented, and no objection made to the second trial on that ground, the facts were in the record [280] and showed the second trial to have been without jurisdiction. The court, however, held otherwise, expressly stating that the district court did not lose jurisdiction; and that by not having objected to the second trial on the ground of jeopardy because of the alleged improper discharge of the jury, the objection had been waived. In the Pennsylvania case of Commonwealth v. Norton, 8 Serg. & R. 72, the petitioners had been found not guilty on nine counts of an indictment containing sixteen counts, the verdict not

referring to the remaining counts. Having been afterward committed for trial upon the other seven counts, the prisoners sought their discharge on habeas corpus on the ground that the verdict was in effect an acquittal on the whole indictment. The court refused to discharge for the reason that the court where the indictment was pending had jurisdiction, and if an erroneous judgment should be given the remedy would be by writ of error.

Our investigation of this question has resulted in the discovery of but three cases which appear to be flatly opposed to the principle supported by the array of authorities above cited. One of them, Ex parte Ulrich, 42 Fed. 587, was afterward reversed by the circuit court in the case of In re Ulrich, 43 Fed. 661, above referred to. Another case, In re Bennett, 84 Fed. 324, decided by United States District Judge De Haven, in California, holds that after the reversal of a conviction of a less offense than the one charged a sentence upon conviction of the greater offense upon the same indictment on a second trial in the same court is void in the extreme sense, as in violation of the constitutional exemption of the accused from a second jeopardy. A discharge was, however, refused in that case, for the reason that there had not been an acquittal of the less offense. Ex parte Glenn, 111 Fed. 257, decided by District Judge Jackson, in West Virginia, holds that an accused is entitled to be discharged on habeas corpus when committed for a second trial upon an indictment, after such an improper discharge of the jury at the first trial as to render the trial [281] equivalent to an acquittal. The opinion in the Bennett case refers to the case of Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. Rep. 542, 28 L. ed. 1005, above cited, but evidently regarded it as inapplicable. The opinion in the Glenn case does not notice the Bigelow case, nor, indeed, any of the authorities laying down the same doctrine. The fact is that in the Bigelow case the second trial had occurred in the same court upon one of the same indictments involved in the former trial; so that if the proceedings of the former trial amounted to an acquittal upon all the indictments as claimed, the fact appeared upon the record of the court in relation to the indictment under which the second trial was had. It is, therefore, difficult to distinguish the Bigelow case from the Bennett and Glenn cases. That the Bigelow case continues to be regarded as authority by the supreme court upon the question thereby decided is evident from its citation and approval in two subsequent cases: In re Belt, 159 U. S. 95, 15 Sup. Ct. Rep. 987, 40 L. ed.

88; Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. Rep. 297, 40 L. ed. 496. In the case last cited it was said with reference to a contention that there had been a previous disposition of the offense charged in another court: "Whatever effect it (the other proceeding) might have, if pleaded to a subsequent indictment, affords no ground for his discharge on habeas corpus."

The supreme court of the United States, however, has had occasion to distinguish between the case of Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. Rep. 542, 28 L. ed. 1005, and one where, after one conviction, the accused has been again convicted upon the same indivisible act for the same offense and sentenced upon both convictions: Ex parte Snow, 120 U. S. 274, 7 Sup. Ct. Rep. 556, 30 L. ed. 658. In that case Snow had been charged, convicted and sentenced upon three indictments in Utah charging the offense of unlawful cohabitation. The alleged unlawful cohabitation appeared to have been continuous, but it was divided by the prosecution and grand jury arbitrarily into three periods and an indictment presented covering each period. After serving the sentence upon the first conviction habeas corpus was applied for. The court held that the act throughout the entire period constituted [282] but one offense, and that one conviction and sentence for any part of the period exhausted the power of the court to punish for the offense. Hence, although the constitutional immunity relied upon was the exemption from second jeopardy, the precise ground of the decision was that the court had no jurisdiction to inflict a punishment in respect of more than one of the convictions. This case was followed by In re Hans Neilsen, 131 U. S. 176, 9 Sup. Ct. Rep. 672, 33 L. ed. 118. The petitioner there had pleaded guilty to unlawful cohabitation, and was sentenced to pay a fine and be imprisoned in the penitentiary. After he had suffered the penalty he was put on trial for the crime of adultery with the same woman during the same period covered by the indictment for unlawful cohabitation upon which he had been punished. He was convicted over a plea of former conviction, and again sentenced to the penitentiary. It was held that there had been a double conviction and sentence for one and the same criminal act; and that the last sentence was void as beyond the jurisdiction of the court, the first sentence having exhausted the court's power in the premises. Those cases were deemed to be in line with the leading case of Ex parte Lange, 18 Wall. 163, 21 L. ed. 872.

There may be cases where a prisoner has been discharged on habeas corpus on the ground of former jeopardy, where the question of the right to the writ under the circumstances was not raised. They might be persuasive, but hardly controlling authority where the objection to the use of the writ in such cases is presented. Such a case apparently is State v. Blevins, 134 Ala. 213, 92 Am. St. Rep. 22, 32 South. 637. In that case, however, upon a trial for assault and battery, the court, instead of pronouncing judgment on the charge which was tried, found that the accused was guilty of another crime, viz., assault with intent to ravish the complaining witness, and thereupon bound the accused over for his appearance to answer to the latter charge. It might well be held that the court exceeded its jurisdiction in the premises, although the opinion in the case seems to put the discharge upon the ground of former jeopardy. In view of the facts in the [283] case it appears to be distinguishable from the case at bar and other like cases.

The main reliance of the plaintiff is upon the Oregon case of In re Tice, 32 Or. 179, 49 Pac. 1038, which, upon the facts, more nearly resembles the case before us than any other coming to our notice. In that case the jury was discharged for disagreement on Sunday, and on the same day the defendant was ordered committed pending a retrial. The fact that the committing order was made on Sunday may distinguish that case from the one here. But the court in that case, while apparently not questioning the general rule that an improper discharge of a jury would not ordinarily deprive the court of further jurisdiction, held that the order of discharge on Sunday being a void act, habeas corpus became a proper remedy for the prisoner's discharge. One of the cases cited by the court in support of its conclusion is Maden v. Emmons, 83 Ind. 331, which has since been overruled in Indiana, as above noted. The case of State v. McGimsey, 80 N. C. 377, 30 Am. Rep. 90, also cited, was not a habeas corpus case, but was before the appellate court on certiorari; and that was held a proper remedy for the review of the error complained of in the exercise by the court below of its jurisdiction. The case of Ex parte White, 15 Nev. 146, 37 Am. Rep. 466, which is also cited, depended upon the application of a different principle. There a magistrate had on Sunday received a plea of guilty and entered a sentence of imprisonment. Under such a condition the accused was clearly held under a void judgment, assuming that the court was not authorized to sit or render judgment on Sunday.

Notwithstanding that the Oregon court, for whose opinions we entertain great respect, seems to distinguish the discharge of a jury upon a nonjudicial day from a discharge upon a lawful day for an improper or unauthorized reason, in its effect upon the jurisdiction of the court, we think that the case cited is out of harmony with the general line of decisions respecting the jurisdictional consequences of an unnecessary or irregular discharge of a jury on a criminal trial.

[284] We are unable to agree with the reasoning and conclusion of the Oregon case that a void act discharging the jury operates to devest the court of further jurisdiction in the case. As previously suggested, whether the discharge be a void act, because occurring on a nonjudicial day, or improper or unauthorized for any other reason, the trial, through the irregular or unauthorized act, will have come to a close without a verdict, so that, if the act of discharging the jury be held to have been unauthorized and not to have been waived by any act or conduct of the defendant, if a waivable matter, the latter will have been in jeopardy. By such erroneous procedure, however, the court does not devest itself of jurisdiction to hear and determine any further motions, pleas or other applications that may be presented in the case; and even to hold another trial of the case if a plea of former jeopardy should be heard and overruled, although, in doing so, grave error may be committed.

Suppose it to be conceded that the act of the court in discharging the jury was absolutely void. The prisoner is not held under that order, any more than if he should be held under a warrant of arrest or commitment upon a new information. The old information is still pending and undisposed of, and the plaintiff's commitment is for trial thereon. She has already submitted a plea of some kind in bar of another trial, and that plea has been overruled. Let it be assumed that she interposed in defense of the pending charge the former proceedings, or that she will do so. If it be true that those proceedings amounted to an acquittal, then her plea ought to be sustained, and the court has erred or may err in otherwise disposing of it. But the jurisdiction of the court to hear and determine the plea is clear, it seems to us; and the error, if any, in such determination may be reviewed and corrected before the proper court in the mode pointed out by law. It ought not to be considered on habeas corpus, in which proceeding this court has no greater authority than a single justice, or a district judge would have upon a similar application. We are of the [285] opinion that, though it is

possible that the court may have erred, its act in committing the plaintiff was within the legitimate province of the court while acting in a lawful manner; and, by express command of the statute, it is not permissible in this proceeding to question the correctness of the committing order.

For the above reasons we think it not only unnecessary, but improper, to consider the other questions presented; and we are constrained to refuse to discharge the plaintiff from the custody of the sheriff.

Beard, J., and Scott, J., concur.

In Habeas Corpus Proceedings, the court cannot review mere irregularities which do not go to the jurisdiction of the court making the order under which the prisoner is held. The writ is not a corrective remedy, and cannot be made to discharge the functions of an appeal or a writ of error or certiorari, nor is it designed as a substitute for either: See the note to Koepke v. Hill, 87 Am. St. Rep. 172; Younger v. Hehn, 12 Wyo. 289, 109 Am. St. Rep. 986; Martin v. District Court, 37 Colo. 110, 119 Am. St. Rep. 262; Ex parte Knight, 52 Fla. 144, 120 Am. St. Rep. 191.

Habeas Corpus Will Lie, according to Ex parte Davis, 48 Tex. Cr. 122 Am. St. Rep. 775, to prevent the violation of a constitutional provision that no person shall be again put on trial for the same offense after a verdict of not guilty in a court of competent jurisdiction.

An Accused is in Jeopardy when a jury is impaneled and sworn to try him; and if the jury is unnecessarily or improperly discharged without his consent, it has been affirmed that he cannot again be put on trial for the same offense: State v. Ward, 48 Ark. 36, 3 Am. St. Rep. 213; State v. Nelson, 19 R. I. 467, 61 Am. St. Rep. 780; Allen v. State, 52 Fla. 1, 120 Am. St. Rep. 188. But the fact that one accused of a crime is tried before a jury which, in announcing that its members cannot agree, is discharged in his absence, and while he is confined in jail, does not entitle him to be released from custody and further trial on the ground that he has been once in jeopardy: Yarbrough v. Commonwealth, 89 Ky. 151, 25 Am. St. Rep. 524. And where the constitution provides that "if the jury disagree, the accused shall not be deemed to have been in jeopardy," it is within the discretion of the court to determine when a disagreement sufficient to justify a discharge of the jury exists. No specific period for deliberation can be designated, nor any absolute rule laid down, to control this discretion; and unless it has been grossly abused, the objection of former jeopardy is not ground for reversal upon error, much less for discharge upon habeas corpus: In re Allison, 13 Colo. 525, 16 Am. St. Rep. 224.

CASES

IN THE

SUPREME COURT

OF

FLORIDA.

RICHBOURG v. ROSE.

[53 Fla. 173, 44 South. 69.]

STATUTE OF FRAUDS.—A Sale of Growing or Standing Timber is a contract concerning an interest in land and within the statute of frauds. (p. 1066.)

DEEDS—Attestation—Substantial Compliance with Statute Sufficient.—Although the phrase commonly used to denote that the persons signing a deed are witnesses is "signed, sealed and delivered in the presence of," the statute does not require any particular form of words for such attestation clause, and any phrase which clearly denotes that the persons signing were witnesses is sufficient. (p. 1067.)

DEEDS—Attestation.—A deed properly delivered is not invalid because the attestation clause recites that it was signed and sealed only, without reciting that it was delivered. (p. 1068.)

DEEDS—What Constitutes a Sufficient Attestation.—Where the concluding clause recites, "In witness whereof we hereunto set our hands and seals," and under those words on the left-hand side of the page, in the place where the names of witnesses to the execution of a deed are usually found, appear the word or letters "Wit.," and the names of two persons underneath, the deed shows substantially and clearly upon its face that it was signed and sealed in the presence of the two persons whose names so appear. (p. 1069.)

EVIDENCE—Order of Introduction—Discretion.—The trial court is authorized to regulate the order of introduction of evidence, and its discretion in this matter will not be reviewed on appeal unless clearly abused. (p. 1069.)

AGREEMENT TO SELL Standing Timber—Revocability of License to Remove Trees.—An agreement to sell another the wood and timber on certain land with a given time to remove it is an executory contract for the sale of chattels to take effect when the timber is severed from the land, with a license to enter, cut and remove the trees, which license is revocable at any time before the purchaser has entered and cut the trees. (p. 1070.)

TIMBER DEEDS—What Constitutes an Irrevocable Sale of Standing Timber.—Where an instrument recites the payment of a cer-

tain sum of money, that the grantors have bargained, sold and conveyed to a certain person all of the pine timber now standing upon certain described lands, that the described lands have been granted, bargained, sold and leased to the grantee to be used for turpentine purposes and privileges, and that the grantee is granted and given the right for a certain period to enter upon and work said timber for turpentine purposes as well as to cut and remove the timber with the right of ingress and egress, which said instrument was acknowledged and recorded, it cannot be revoked by a subsequently executed deed of conveyance of the real property made by the same grantor. (p. 1071.)

REPLEVIN—Lies for Personal Property Only.—An action of replevin is one for the recovery solely of personal property, and cannot be maintained to recover real property. (p. 1072.)

CRUDE TURPENTINE—Nature of as Personal Property.—Crude turpentine in boxes in pine trees, in a state to be dipped up, is personal property. The turpentine crop is properly classed with fructus industriales, for it is not a spontaneous product of the trees, but requires annual labor and cultivation. (p. 1072.)

CRUDE TURPENTINE Which has Formed on the Body of the Tree, and is called scrape, is personal property. (p. 1073.)

REPLEVIN—Possession Necessary to be Shown.—In replevin, the plaintiff, in order to recover, must show a right of possession in himself to the property replevied. He can recover only upon the strength of his own right of possession. (p. 1073.)

REPLEVIN—Effect of Plea of not Guilty.—In an action of replevin a plea of not guilty puts in issue not only the right of plaintiff to the possession of the property replevied, but also the wrongful taking and detention thereof. Under such plea, defendant can give any evidence of special matter which amounts to a defense to plaintiff's cause of action, to show that the plaintiff is not entitled to the possession of the property replevied. (p. 1073.)

REPLEVIN.—Where Property Which has been Annexed to the Freehold is Severed therefrom, it becomes personal property so as to become recoverable by an action of replevin. (p. 1073.)

REPLEVIN of Property Severed from Freehold.—In order to maintain replevin for property which had been annexed to the freehold, but subsequently severed therefrom, the plaintiff must have the actual or constructive possession of the land. (p. 1073.)

REPLEVIN—Effect of Adverse Possession.—Inasmuch as the title to land cannot be tried, ex directo in replevin, if the series of acts, by which property which had been annexed to the freehold is severed therefrom, are sufficient to create an adverse possession in the defendant, replevin cannot be maintained. But such adverse possession must be something more than a mere act of trespass. It must be so long continued, and so far yielded to, as to constitute a possession to the exclusion of others, an occupancy, as distinguished from a mere act of trespass. (p. 1073.)

THE CONSTRUCTIVE POSSESSION of Wild Land is in the owner of the fee unless there is an adverse possession in some one else. (p. 1073.)

ADVERSE POSSESSION of Turpentine—Timber Land.—The occupation of pine land, by annually making turpentine on it, is such an actual possession as will oust a constructive possession by one claiming merely under a superior paper title. (p. 1075.)

ADVERSE POSSESSION.—The Effect of Color of Title, when an entry is made and possession taken and held in accordance with it, is to define the extent of the possession claimed; but the entry and

possession must be proved by acts sufficient to constitute such adverse entry and possession. (p. 1076.)

REPLEVIN OF TURPENTINE—Defense of Adverse Possession.—Where defendants were in the exclusive possession of turpentine trees and the land, their employés cutting the boxes in the trees, chipping them, dipping the turpentine and hauling it away in barrels, some six or seven thousand trees being so worked by them, and plaintiff knew these facts for months previously, but never entered the land, nor cut timber thereon, nor chipped trees, nor turpentined them, his constructive possession of the property was not sufficient to overcome the possession of the defendants, which was under a claim and color of right, and hence plaintiff could not maintain replevin for the turpentine made on the property by defendants. (p. 1076.)

ADVERSE POSSESSION—Misleading Instruction.—An instruction that "If the jury should find from the evidence that has been introduced before them that the plaintiff was the owner of pine trees located upon lands described in the declaration by a conveyance from persons who derived title to the land by title from the United States government, and that the defendants were in possession, at the time of the institution of this suit, or crude turpentine in the boxes located on this land, and they were not there with the plaintiff's consent—that is, they were not in possession with the plaintiff's consent—then the jury should ascertain how much of the turpentine there was, and its value, and render a verdict for the plaintiff for the amount so found," is erroneous and misleading, in that it excludes the contention of defendants that they were in adverse possession, claiming under color of right and were not trespassers. (p. 1076.)

Daniel Campbell & Son, for the plaintiffs in error.

S. K. Gillis and Avery & Avery, for the defendants in error.

176 PARKHILL, J. On the twenty-fifth day of April, 1906, the defendant in error, hereinafter called the plaintiff, instituted an action of replevin against the plaintiffs in error, who for convenience will be known elsewhere in this opinion as the defendants, in the circuit court for Walton county, to recover the crude turpentine in the turpentine boxes in the pine trees on the west half of the southeast quarter and the west half of northeast quarter of section 26, township 3 north, range 23 west, in Walton county, Florida, alleged in the affidavit to be of the value of one hundred and twenty-five dollars. The property was redelivered to defendants upon their forthcoming bond. On the seventh day of May, 1906, the plaintiff filed his declaration, alleging therein that defendant wrongfully detained from the plaintiff the said personal property, the crude turpentine as aforesaid, from the plaintiff's possession; that said property was of the value of one hundred and twenty-five dollars, and claimed two hundred and fifty dollars damages. On the fourth day of June, 1906, the defendants filed a plea of not guilty and on the third day of October, 1906, an additional plea "that the said property is not the property of plaintiff." The plaintiff

joined issue on both pleas. On the third day of October, 1906, a trial was had, resulting in a verdict in favor of the plaintiff for twelve barrels of crude gum of the value of five dollars and fifty cents per barrel, sixty-six dollars. A motion for new trial was overruled, to which ruling the defendants excepted. Final judgment was rendered on the verdict, from which verdict defendants [177] seek relief here by writ of error. Three other causes between the same parties, of a similar nature, pending in the court below, by agreement, depend upon and will abide the decision in the instant case.

1. Passing by the first and second assignments of error, to consider them in their logical order, we will direct our attention first to the third assignment, as follows: "The court erred in admitting in evidence the timber lease or deed from J. B. Allen and wife to Rose and Johnson over defendants' objection." This assignment is based upon the introduction in evidence of the following paper-writing by the plaintiff:

"State of Florida,
Walton County.

"Know all men by these presents, That we, J. B. Allen and wife, Alice Allen, for and in consideration of the sum of one hundred and fifty ($150.00) to us in hand paid by Johnson & Rose the receipt of which is hereby acknowledged have granted, bargained and sold and by these presents do bargain, sell and convey unto the said Johnson & Rose all the pine timber now standing upon the lands, to wit: W. ½ of S. E. ¼ and W. ½ of N. E. ¼ of Section 26 in Township 3 North of Range 23 West, containing 160 acres, situated and lying in Walton County, Florida.

[178] "We further grant, bargain, sell and lease unto the said Johnson & Rose the above described lands to be used for turpentine purposes and privileges giving and granting unto the said Johnson & Rose the right at any time from the date hereof until the 1st day of May, 1910, to enter upon and work said timber for turpentine purposes as well as to cut and remove said timber from said land with the right of ingress and egress to and from same. We warrant the title of said lands and its freedom from all incumbrances.

"In witness whereof we hereunto set out hands and seals, this 4th day of May, 1903.

"Wit. his
"J. R. SMITH, J. X B. ALLEN, (Seal.)
his mark
"JOE X ALLEN, ALICE ALLEN. (Seal.)
mark.

"State of Florida,
Walton County.

"Before the subscriber personally appeared J. B. Allen and Alice Allen, known to me to be the individuals described, and acknowledged that they executed the foregoing instrument for the uses and purposes therein set forth, and the said Alice Allen, on a private examination by me, held separate and apart from her husband, acknowledged and declared that she executed the same freely and voluntarily, and without fear, apprehension, compulsion or constraint of or from her husband, and for the purposes of renouncing, relinquishing and conveying all her rights of whatsoever kind in and to the said property: Given under my hand and seal this 4 day of May, A. D. 1903.

"(L. S.) E. W. CARTER, J. P.

"Filed for record, this 3 day of June, A. D. 1903, at 10
179 o'clock A. M., and recorded in Vol. 14, at page 451 of deeds and record verified.

"(L. S.) JAMES A. McLEAN,
"Clerk Circuit Court, Walton County, Florida."

To the reading of the same in evidence, the defendants objected on several grounds. The objections argued here are as follows: "It does not purport to be signed, sealed and delivered in the presence of two witnesses; there is no attestation clause to it." The judge overruled the objections thereto and admitted same in evidence. To which ruling the defendants excepted.

It is urged in argument that "this instrument purported to convey the turpentine privileges upon a certain piece or parcel of land; it was offered in evidence as a conveyance of the interest in land; it was necessary, in order to operate as a conveyance of the interest in land, that it be signed, sealed and delivered in the presence of two witnesses," and that the letters "wit" above the names of J. R. Smith and Joe Allen are not sufficient to show a signing by grantors in the presence of two witnesses.

We agree with counsel for plaintiff in error that this instrument purports to grant an estate in land for a term of more than two years, and, under the provisions of section 2448 of the General Statutes of 1906 and section 1950 of the Revised Statutes of 1892, "no estate or interest of freehold, or for a term of years of more than two years, or any uncertain interest of, in or out of any messuages, lands, tenements or hereditaments shall be created, made, granted, transferred or released in any other manner than by deed in writing,

signed, sealed and delivered in the presence of two subscribing witnesses."

There is conflict of authority, both in England and in [180] this country, upon the question whether a sale of growing trees is the sale of an interest in or concerning land, so as to be within the operation of the statute of frauds. The great weight of authority in this country is that a sale of growing or standing timber is a contract concerning an interest in land, and within the statute of frauds: Hirth v. Graham, 50 Ohio St. 57, 40 Am. St. Rep. 641, 33 N. E. 90, 19 L. R. A. 721, and cases cited; Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295, and cases cited and reviewed; Garner v. Mahoney, 115 Iowa, 356, 88 N. W. 828; Wiggins v. Jackson, 24 Ky. Law Rep. 2189, 73 S. W. 779.

In Hirth v. Graham, 50 Ohio St. 57, 40 Am. St. Rep. 641, 33 N. E. 90, 19 L. R. A. 721, and cases cited, the court, after reviewing the cases pro and con on this question, said: "The question is now for the first time before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not the subject of levy and sale upon execution as chattel property—it descends with the land to the heir and passes to the vendor with the soil. Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend, not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty. This rule has the additional merit of being clear, simple and of easy application qualities entitled to substantial weight in choosing between conflicting principles."

This is not an open question in this state. In Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19, the court held that a "simple [181] contract for sale of the trees is void as a contract for an interest in land, standing trees being of the realty." And in King v. State, 43 Fla. 211, 31 South. 254, the court considering an instrument of like force and effect as the one in the instant case, held that it purported to grant an estate in land for a term of more than two years, and was executed with only one subscribing witness, and was under the above statute invalid and ineffectual as a lease for such term.

We must determine, then, the sufficiency of the attestation clause of the lease from Allen to Johnson & Rose.

In Hogans v. Carruth, 19 Fla. 84, this court said: "As to the matter of the attestation of the deed, our statute does not require any particular form of words for the attestation clause of a deed and the attestation clause of a deed in the words: 'Bargained, sold, transferred and acknowledged in presents (presence) of us,' where the testificandum clause is: 'In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written,' other facts showing delivery being established is sufficient. The term 'acknowledged' indicates that the parties affirmed the signing and sealing to be their act before these witnesses."

In 9 American & English Encyclopedia of Law, second edition, 150, it is said: "It is advisable for witnesses to sign under the phrase commonly used in the state where the land lies, yet any phrase which clearly denotes that the persons signing were witnesses will be valid."

Do the letters "wit" written above the names of J. R. Smith and Joe Allen clearly denote that these persons were witnesses, so as to comply with our statute herein [182] quoted? The answer to this question is not without difficulty. The phrase commonly used in this state to denote that the persons signing are witnesses is "signed, sealed and delivered in the presence of." An attestation "sealed and delivered in the presence of" the subscribing witnesses has been held sufficient: Fosdick's Lessee v. Risk, 15 Ohio, 84, 45 Am. Dec. 562. In that case the court said: "True, the words of the statute are that the witnesses shall attest the 'signing and sealing,' but, really, to require the strictness insisted upon by the defendants' counsel, would be going a great length; it would be taking one step more toward that point to which we seem to be progressing with railroad speed—the point of declaring all the land titles in the state doubtful, defective or uncertain. The same technical nicety is not required in the execution and acknowledgment of deeds as in special pleadings. If deeds are acknowledged substantially in accordance with the statute, it is all that can be required. The signing and sealing of deeds is usually done at one and the same time, unless, perhaps, the scrivener who writes them shall have attached the seal at the time of writing, and previous to the signature. In such case the sealing is adopted by the signature of him who executed the instrument. It is not customary for a man to sign on one day and another make his scrawl or attach a wafer. There is not, I presume to say, one case in a thousand

in which the same person who witnesses the sealing does not witness the signature also. And after all, it is the delivery which gives effect to the instrument."

In the case of Arrington v. Arrington, 122 Ala. 510, 26 South. 152, the court said: "The deed has the names of two persons written in the place where the names of subscribing witnesses are usually placed, and found upon [183] such instruments, but the word 'attest' or 'witness' does not appear alone or in connection with these names. Nor are there any other words appearing upon the deed showing the purpose of their signatures. At common law attesting witnesses to a deed were not essential to its validity as a conveyance of lands, prior to the adoption of the statute requiring them to be attested or acknowledged this rule prevailed in this state. The usual clause to denote that the witnesses sign as such is: 'Signed, sealed and delivered in the presence of the witnesses writing their names thereunder.' The manifest object of requiring an attestation of subscribing witnesses is to enable the grantee to prove the execution by the grantor of the deed, and to show the circumstances attending the sealing and delivery. No formal words are requisite under the statute to be incorporated in the deed, or upon it, to show that the names subscribed are those of witnesses. Its language is: 'The execution of such conveyance must be attested by one witness, or, when the party cannot write, by two witnesses who are able to write, and must write their names as witnesses': Code 1896, sec. 982. True, they must write their names as witnesses upon the deed, but we cannot hold if from an examination of the instrument it clearly appears, as it does in this case, that the only purpose for which the names were written was to attest the signature of the grantor to the deed, that they are not witnesses; simply because of the failure to employ some word or words indicating the purpose for which their names were written."

We do not overlook the difference between the Alabama statute and our own in this respect, but the applicability of the persuasive reasoning of the court in the cases cited [184] is apparent. A deed properly delivered is not invalid because the attestation clause recites that it was signed and sealed only, without reciting that it was delivered: Bradley Fertilizer Co. v. Pace, 80 Fed. 862, 26 C. C. A. 198; Hogans v. Carruth, 19 Fla. 84. There was proof of the proper delivery of this deed; and it was shown also that the deed was in possession of the grantee and that the deed was recorded, which is prima facie evidence of its delivery: Southern Life Ins. etc. Co. v. Cole, 4 Fla. 359; Campbell v. Carruth,

32 Fla. 264, 13 South. 432; Billings v. Stark, 15 Fla. 297; Ellis v. Clark, 39 Fla. 714, 23 South. 410. Were the attestation clause of the deed in the instant case "signed and sealed in the presence of us" it would clearly be sufficient. The concluding clause of the deed in question declares "in witness whereof we hereunto set our hands and seals." Under those words, on the left-hand side of the page, in the place where the names of witnesses to the execution of a deed are usually found, appear the word or letters "Wit" and the names of two persons. We have no difficulty in coming to the conclusion that "wit" means and stands for the word "witness," or "witnesses," and, therefore Smith and Joe Allen signed the deed as witnesses, and that they were witnesses of the setting of the hands and seals—of signing and sealing —of the grantors in the deed, as declared by them in the concluding clause of the deed. We think the deed shows substantially and clearly upon its face that it was signed and sealed in the presence of the two persons who purport to have signed the same as witnesses. In coming to this conclusion, we confine our decision to the objections raised.

2. The fourth assignment of error is: "The court erred in admitting in evidence the transfer of leases made [185] by Johnson and wife to E. P. Rose." The paper referred to here was a properly executed and acknowledged and recorded transfer by J. N. Johnson of his undivided one-half interest in several timber leases, including the one from J. B. Allen and Alice Allen, his wife, already introduced in evidence by the plaintiff. To the introduction in evidence of this paper, the defendant objected, on the ground that the title of J. B. Allen in and to the locus in quo had not been traced back to the government; but plaintiff announced his intention to do so, and the objection was overruled, the paper admitted in evidence, to which ruling the defendants excepted. This ruling of the court was correct, because later the plaintiff offered and the court admitted in evidence letters patent from the United States to Joseph B. Allen for the land, covered by the lease from Allen to Johnson and Rose, already in evidence.

The trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will only be interfered with by this court where clearly abused: Wilson v. Johnson, 51 Fla. 370, 41 South. 395.

3. The fifth, sixth, seventh and eighth assignments have been argued and will be considered together. They relate to the refusal of the court to admit in evidence a deed, duly executed, acknowledged and recorded, from J. B. Allen and wife to J. M. Barrow, purporting to convey the lands in-

cluded in the lease by Allen to Johnson and Rose prior to the deed from Allen to Barrow. The other deeds covered by these assignments include a deed from Barrow to Madden, a deed from Madden to Settles, a deed from Settles to J. A. Richbourg & Co., and a deed from Barrow to J. A. Richbourg & Co., purporting to [186] convey the lands involved in this suit, and which had been leased to plaintiff Rose before the execution thereof. Upon being offered in evidence by the defendants, each deed was objected to by the plaintiff upon the ground that the "deed bore date subsequent to the date and record of the timber and turpentine lease from the original owner to the plaintiff, the source from which all these titles sprung." The objection was sustained and the court refused to allow the deeds to be read in evidence, to which ruling the defendants excepted.

Counsel for plaintiffs in error contend that the sale of the standing timber for turpentine purposes made by Allen and wife to Johnson and Rose was nothing but a mere license liable to revocation, and was revoked by the making of a subsequent conveyance by the licensor, without a reservation; that the timber lease from Allen to Johnson and Rose passed no interest in the land upon which the timber grew. In support of this contention, counsel cites Fish v. Capwell, 18 R. I. 667, 49 Am. St. Rep. 807, 29 Atl. 840, 25 L. R. A. 159. The written instrument therein relied upon, not acknowledged or recorded as a deed, purporting to convey all the standing wood on a certain lot of land, with two years in which to cut and remove said wood, was construed not as passing any interest in the land, but as an executory contract or parol license, which was revoked by a subsequent conveyance of the land to another person. In a note in 25 L. R. A. 159, the author says: "While as the court states in the above case it refuses to follow the weight of authority upon the question how far a sale of standing timber is within the statute of frauds (see note to Hirth v. Graham (Ohio), 19 L. R. A. 721), it seems to have at the same time applied the rule in force in states holding sales to be within the statute as to [187] attempted sales being regarded as a license. The only way to reconcile the two positions would seem to be to hold that no sale was effected until the timber was delivered. In other words, that a sale could not be made of standing timber." Other cases cited by counsel hold that an agreement to sell another the wood and timber on certain land with a given time to remove it is an executory contract for the sale of chattels to take effect when the timber is severed from the land, with a license to enter and cut the trees and remove

them, and that this license is revocable at any time before the purchaser has entered and cut the trees: Fletcher v. Livingston, 153 Mass. 388, 26 N. E. 1001; Drake v. Wells, 11 Allen (Mass.), 141; United Soc. v. Brooks, 145 Mass. 410, 14 N. E. 622; Claflin v. Carpenter, 4 Met. (Mass.) 580, 38 Am. Dec. 380. To the same effect is the holding by this court in Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19, Counsel are mistaken in their contention that the instrument relied upon in Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19, is similar to the one in the instant case. The instrument signed by Atkinson in the former case was nothing but a contract to cut the cedar within a reasonable time, the court saying on page 158: "The doctrine is that though the simple agreement for a sale of the trees is void as a contract for an interest in land, standing trees being of the realty, yet if executed by cutting the trees, timber is converted into personalty, and was sufficient to vest a title thereto in the party acting under the license, he having complied with the conditions under which the license was granted." The instrument in that case contained no words of conveyance, simply stating: "This is to certify that I have sold to C. T. Jenkins all the cedar now standing. The condition that the said C. T. Jenkins [188] do give the sum of one hundred dollars in a promissory note," etc. The instrument in the instant case is not a license, or executory contract or agreement to sell growing trees. It acknowledges receipt of payment of one hundred and fifty dollars by Johnson and Rose, and recites that grantors "have granted, bargained and sold, and by these presents do bargain, sell and convey unto the said Johnson & Rose all the pine timber now standing" upon the lands therein described. It provides, "we further grant, bargain, sell and lease unto the said Johnson & Rose the above-described lands to be used for turpentine purposes and privileges, giving and granting unto the said Johnson and Rose the right at any time from the date hereof until the first day of May, 1910, to enter upon and work said timber for turpentine purposes as well as to cut and remove said timber from said land with the right of ingress and egress to and from same." This instrument, duly acknowledged and recorded, was not revoked by the subsequently executed deed of conveyance of the real property made by Allen and wife to J. M. Barrow: Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295.

4. Plaintiffs in error contend that the deed from Allen and wife to Barrow, and the other deeds under which defendants claimed, ought to have been admitted in evidence as showing

"an adverse holding upon the part of the defendants that they were in possession of the land under a claim of right, and even should the court find that the instrument from Allen to Rose and Johnson conveyed an interest in the land, the deeds offered by the defendants should have been read in evidence under their plea of not guilty, to show how they were holding, and to show that if the plaintiff had any remedy, that this was not the proper remedy, and the remedy should have been [189] by ejectment." This objection should be considered in connection with the contentions presented by the first and second assignments of error, and the motion for new trial: "That the turpentine replevied was in the boxes on the trees, so attached to the land as to be a part of the realty and not subject to replevin; that in order to maintain replevin plaintiff must be the owner of, or in possession of, the property, and that the evidence does not show that the plaintiff was ever in possession of the turpentine that he sought to replevy."

The evidence in this case shows that the plaintiff never went into actual possession of the locus in quo; that he was engaged in the turpentine business in Walton county, and bought the land from Allen for that purpose, but before he needed the timber thereon the defendants, having bought the same land as we have seen, went into possession of it and boxed and chipped the trees. While the turpentine was in the boxes, in a state to be dipped up, it was replevied by plaintiff.

We agree with counsel that an action of replevin is one for the recovery solely of personal property, and cannot be maintained to recover real property: 4 Am. & Eng. Ency. of Law, 2d ed., 480. It is well settled, however, that turpentine in boxes, in a state to be dipped up, is personal property. It no longer forms a part of the tree, but has been separated by a process of labor and cultivation. The turpentine crop has been properly classed with fructus industriales, for it is not the spontaneous product of the trees, but requires annual labor and cultivation. As was said in State v. Moore, 11 Ired. 70: "If, like the sap of the sugar maple, its flow were directed into a vessel set on the ground near the tree, no one would doubt its being severed from the realty. Now, [190] this is the same in substance. For the box, though, in the tree, is but a more convenient receptacle for the turpentine, after it has been extracted or has been made to exude from the pores, which contained it, while in the tree, as a part of it. When it ceased to be a part of the tree it necessarily becomes a chattel." Crude turpentine which has formed on the body of

the tree, and is called scrape, is said to be personal property: Lewis v. McNatt, 65 N. C. 63. See, also, Branch v. Morrison, 5 Jones, 16, 69 Am. Dec. 770; Holt v. Holt, 57 Mo. App. 272; Brittain v. McKay, 1 Ired. 265, 35 Am. Dec. 738; State v. Moore, 11 Ired. 70.

The plaintiff, to recover in this action, must show right of possession in himself to the property replevied. He can only recover upon the strength of his own right of possession: Holliday v. McKinne, 22 Fla. 153.

In an action of replevin a plea of not guilty puts in issue not only the right of the plaintiff to the possession of the property replevied, but also the wrongful taking and detention thereof. Under such plea the defendant can give any evidence of special matter which amounts to a defense to the plaintiff's cause of action, to show that the property is not entitled to the possession of the property replevied: Holliday v. McKinne, 22 Fla. 153.

Where property which has been annexed to the freehold as severed therefrom, it becomes personal property so as to become recoverable by an action of replevin. But in order to maintain such action the plaintiff must have the actual or constructive possession of the land, and as the title to land cannot be tried, ex directo in replevin, if the series of acts in which the severance has occurred are sufficient to create an adverse possession in the defendant, [191] replevin cannot be maintained: Washburn v. Cutter, 17 Minn. 361; 7 Smith's Lead. Cases, 6th Am. ed., 604; Cobbey on Replevin, sec. 375. The possession here alluded to is something more than a mere act of trespass. It must be so long continued, and so far yielded to, as to constitute a possession to the exclusion of others—an occupancy, as distinguished from a mere act of trespass: Stockwell v. Phelps, 34 N. Y. 363, 90 Am. Dec. 710.

The owner in fee of wild land has the constructive possession thereof, unless there be an adverse possession: Washburn v. Cutter, 17 Minn. 361; Cobbey on Replevin, sec. 378. See Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19. Thus it is stated in the section cited from Cobbey on Replevin: "Where the land was in the actual possession of W. under a claim of right and adverse to the plaintiff, who, it was held, had the title, and cut a quantity of grass and sold the hay to the defendant, on replevin brought by the plaintiff against the defendant, held, that as W. was in possession under a claim of right, he would be regarded as the owner until decreed otherwise, and that W. could convey a good title to the hay so sold. The courts have gone so far as to hold that where the

defendant was in possession of the land in good faith and severed property therefrom, the real owner could not maintain replevin therefor, basing it on the ground that the title to the land could not be settled in this way. Where there is no adverse possession, the owner of the land may always bring replevin, or he may always bring it against the trespasser." In Powell v. Smith, Watts (Pa.), 126, Gibson, C. J., said: "The principle which is to govern this case was settled in Mather v. Trinity Church, 3 Serg. & R. 509, 8 Am. Dec. 663; Baker v. Howell, 6 Serg. & R. 476, and Brown v. Caldwell, 10 Serg. & R. 114, 13 Am. Dec. 660, in which it was determined on principle and authority that the right of property in a chattel [192] which has become such by severance from the freehold cannot be determined in a transitory action by a trial of the title to the freehold, because the title to the land might otherwise be tried out of the county. An action of trover or replevin for such a chattel, therefore, does not lie by a plaintiff out of possession. Independent of this technical inhibitory principle, which, however, is decisive, it would provoke much useless litigation and be attended with great practical mischief, if an owner out of possession were suffered to harass the actual occupant with an action for every blade of grass cut or bushel of grain grown by him, instead of being compelled to resort to the action of mesne profits, after a recovery in ejectment, by which compensation for the whole injury may be had at one operation": See Anderson v. Hapler, 34 Ill. 436, and note thereto in 85 Am. Dec. 318; Harrison v. Hoff, 102 N. C. 126, 9 S. E. 638. In Mather v. Ministers of Trinity Church, 3 Serg. & R. 509, 8 Am. Dec. 663, Tilghman, C. J., said: "The explanation is, that he who has the general property in a personal chattel need not prove possession, because the law draws the possession of the property. But he who claims only a special property must prove that he once had actual possession, without which no specific property is complete. That the law draws the possession to the property, of personal chattels unconnected with land, may be true, and yet it does not follow that the possession is drawn in like manner to the property of that kind of chattel which was part of the soil until severed from it; when the soil itself, at the moment of severance, was held adversely by another. I should rather suppose that in such case he who had possession of the land had possession also of the stones dug from it, and against him another person who had the right to the possession of the land could not support [193] trover." In order to constitute adverse possession as against the real owner, it must be such a possession as

would, if continued for the period required by the statute of limitations, ripen into a perfect title and constitute a bar to the assertion of a legal title by the owner. The possession must be actual, visible, notorious, distinct and hostile: Washburn v. Cutter, 17 Minn. 361; 3 Washburn on Real Property, 3d ed., p. 122.

The occupation of pine land, by annually making turpentine on it, is such an actual possession as will oust a constructive possession by one claiming merely under a superior paper title: Bynum v. Carter, 26 N. C. 310. In Branch v. Morrison, 5 Jones, 16, 69 Am. Dec. 770, the court said: "In our case, however, suppose the land belonged to Blount's heirs, that does not give them a right to the turpentine which had been severed from the realty by the plaintiffs while they were in possession of the land; on the contrary, the turpentine, when by the labor and cultivation of the plaintiffs it was made personal property, became the property of the plaintiffs. So they are the true owners. The heirs of Blount, if they ever regain possession of the land, may have an action of trespass quare clausum fregit, 'for treading down grass,' against the plaintiffs, but they will have no right of action to recover this particular turpentine, either against them or the defendants, for they never had a right of property in it, and cannot acquire either a right of possession or of property in respect to it by the jus postliminii": Brothers v. Hurdle, 10 Ired. 490, 51 Am. Dec. 400. It is there held that the owner of land cannot maintain trover for corn, fodder, etc., that had been raised on the land and severed while the defendant was in possession. The court said: "The amount of which would be, [194] when one who has been evicted regains possession, he may maintain trover against everyone who has bought a bushel of corn or a load of wood from the trespasser at any time while he was in possession. This, especially in a country where there are no markets overt, would be inconvenient, and no person could safely buy of one whose title admitted of question. The defendants' counsel took a distinction between things which are of annual cultivation, e. g., corn, and such as are of the natural growth of the earth, e. g., trees. This distinction makes a difference to this extent: the former is personal property for some purposes before severance, the latter is not; but after severance both species become personalty, and the same principle is applicable." As was said in Washburn v. Cutter, 17 Minn. 361: "Such adverse possession must amount to a disseisin of the real owner. There must be an actual entry upon the land, with palpable intention to claim the possession as his

own by the adverse claimant, and this claim of possession must be not the assertion of a previously existing right to the land, but the assuming of a right to the land from that time and a subsequent holding with assertion of right. This intention to claim and possess the land is one of the qualities indispensable to constitute a disseisin, as distinguished from a trespass." The effect of color of title, when an entry is made and possession taken and held in accordance with it, is to define the extent of the possession claimed; but the entry and possession must be proved by acts sufficient to constitute such adverse entry and possession: Washburn v. Cutter, 17 Minn. 361.

In the instant case the evidence shows that the plaintiff never went into actual possession of the locus in quo, never cut timber thereon, nor chipped trees, nor turpentined 195 them; that he saw the land after the trees were boxed—"that was last winter, last box season." Since that time, and at the time the turpentine was replevied, the defendants were in the exclusive possession of the trees and the land, their employés were there, cutting the boxes in the trees, chipping them, and dipping the turpentine, and hauling same away in barrels. Defendants had boxed, and were working, between six and seven thousand trees at the time the writ of replevin herein issued, and plaintiffs knew this for months and did not enter. At the trial defendants offered the deeds under which they claimed to hold possession. These deeds were admissible to show claim of right, followed by proof of adverse possession, and as defining the extent of the possession claimed: Washburn v. Cutter, 17 Minn. 361. The plaintiff had the property in the trees, and also constructive possession thereof, as long as no one had actual possession thereof. His general property drew to it the possession and the right of possession. But this was not so if the defendants, under claim and color of right went into the exclusive, open, notorious, adverse possession of the locus in quo, acquiesced in for months by plaintiffs, and worked the trees, and by their labor and care made the crop of turpentine. Under such circumstances, plaintiff could not maintain this action of replevin.

5. The court charged the jury as follows: "If the jury should find from the evidence that has been introduced before them that the plaintiff was the owner of pine trees located upon lands described in the declaration by a conveyance from persons who derived title to the land by title from the United States government, and that the defendants were in possession, at the time of the institution of this suit, of crude

turpentine in the boxes located [196] on this land, and they were not there with the plaintiffs' consent—that is, they were not in possession with the plaintiffs' consent—then the jury should ascertain how much of the turpentine there was, and its value, and render a verdict for the plaintiff for the amount so found." From what we have said, this charge was erroneous and misleading. If the defendants were in adverse possession, claiming under color of right, and were not trespassers, plaintiffs could not recover.

For the errors found the judgment is reversed.

Taylor and Hocker, JJ., concur.

Shackleford, C. J., and Cockrell and Whitfield, JJ., concur in the opinion.

Growing Trees are Regarded as a Part of the Realty by most authorities, and hence a contract to sell or convey them is within the statute of frauds: Ives v. Atlantic etc. R. R. Co., 142 N. C. 131, 115 Am. St. Rep. 732, and cases cited in the cross-reference note thereto.

The Question of When Replevin is Sustained is the subject of a note to Sinnott v. Feiock, 80 Am. St. Rep. 741. Growing grass, vegetables and fruit are usually regarded, if not severed from the land, as partaking of the nature of realty: Matter of Chamberlain, 140 N. Y. 390, 37 Am. St. Rep. 568; Kirkeby v. Erickson, 90 Minn. 299, 101 Am. St. Rep. 411; Sparrow v. Pond, 49 Minn. 412, 32 Am. St. Rep. 571; note to People v. Miller, 88 Am. St. Rep. 591. But in Cannon v. Matthews, 75 Ark. 336, 112 Am. St. Rep. 64, growing strawberry plants attached to the soil are held to be personal property, and the subject of replevin.

Crude Turpentine which has run from the body of the tree above into boxes which were cut into the tree to serve as receptacles is the subject of larceny: Dickens v. State, 142 Ala. 49, 110 Am. St. Rep. 17.

WESTERN UNION TELEGRAPH COMPANY v. MILTON.

[53 Fla. 484, 43 South. 495.]

PLEADING—Sufficiency of Allegations of Damages Against Telegraph Company.—Where a declaration alleges that for reward and hire the defendant telegraph company received from plaintiff for transmission a message reading: "Bought for your account today's limit 175. Am doing my best to rush bill lading"; that defendant in its transmission negligently and carelessly substituted "125" for "175," whereby plaintiff lost certain sums of money by reason of a third person not accepting certain cotton purchased for him under circumstances set forth in the declaration, it states a cause of action for at least nominal damages. (p. 1083.)

PLEADING—Demurrer to Allegations for Damages.—In an action on the case for damages, if the declaration makes a case entitling

plaintiff to any recovery whatever, though it be only nominal damages, a demurrer will not lie thereto, even if the declaration claims other or greater damages than the cause may legally entitle the plaintiff to recover. A demurrer is not the proper way to test the extent of the recovery to be had, since such questions are properly raised and settled by objections to testimony at the trial, or by instructions to the jury, or by requiring the declaration to be reformed under section 1043, Revised Statutes of 1892, and section 1433, General Statutes of 1906, when it is calculated to embarrass a fair trial of the case. (p. 1083.)

PLEADING — Extent of Damages Recoverable. — Where a declaration claims damages amounting to five hundred dollars, if the declaration states any cause of action, damages not exceeding five hundred dollars could be recovered thereon. (p. 1083.)

TELEGRAPH COMPANIES—How Duty to Transmit Messages Promptly is Created.—The authority, franchises and privileges which a telegraph company must have and exercise in serving the public, and without which it cannot render the service, are conferred by law for the purpose of providing for the public the prompt transmission and delivery of a correct copy of messages. (p. 1084.)

TELEGRAPH COMPANIES—Their Duty to the Public.—In undertaking to render the public service by virtue of the franchises and privileges conferred upon it by law, a telegraph company assumes the duty to transmit messages with care and skill and to deliver a correct copy of messages received for transmission. The compensation allowed by law to be received by the company for its services in that respect is allowed and received for a careful and skillful transmission of such messages and the delivery of correct copies of the messages transmitted. (p. 1084.)

UNREPEATED TELEGRAMS—Effect of Printed Blank Provisions Limiting Damages to Price of Transmission.—In receiving a message and taking the price of transmission, a telegraph company undertakes to send and deliver it correctly, and if it fails in doing so without legal excuse, it cannot avoid its liability for such failure on the ground that the sender used a printed blank in delivering the message to it, which provided that the company "shall not be liable for mistakes and delays in the transmission or delivery of any unrepeated message"; that is, a message telegraphed back to the originating office for comparison. (p. 1085.)

TELEGRAPH COMPANIES are Entitled to a Reasonable Compensation, by law, for the services which they render, and the amount charged for transmitting the message should be a reasonable compensation for the complete performance of the service undertaken—i. e., the transmission and delivery of a correct copy of the message received for transmission. (p. 1086.)

NEGLIGENCE—Proximate Cause.—In cases where losses have been sustained by reason of the negligence of another, damages may be recovered for losses that would likely or probably result where such negligence is a proximate or directly contributing cause of the loss, and the plaintiff is not at fault. (p. 1089.)

A PROXIMATE CAUSE is One that leads to or produces or directly contributes to producing the result or loss. If the loss is not such as would likely or probably result from the negligence of the defendant, he is not liable, since he can ordinarily be held responsible only for the probable results of his negligence which he should have foreseen. (p. 1090.)

TELEGRAPH COMPANIES—Damages Recoverable.—In an action in tort against a telegraph company for the breach of a public duty in negligently transmitting an incorrect copy of a message de-

livered to it for transmission, the damages that can be recovered are for the loss or injury sustained by the plaintiff as a proximate consequence of the defendants' negligent act, which consequence the parties contemplated, or should have contemplated, as likely to follow from a breach of the duty. (p. 1090.)

DAMAGES from Erroneous Telegram Stating Amount of Cotton Purchased.—Where the plaintiff had a contract with a third person to take and receive all cotton he could buy at ten cents per pound upon a basis of middling cotton upon a report by wire of the number of bales so bought on each day, an error on the part of a telegraph company in transmitting a message of plaintiff reporting the purchase of one hundred and seventy-five bales of cotton so that the message reported only one hundred and twenty-five bales as purchased entitles the plaintiff to recover from the telegraph company the difference between the price which would have been paid by this third person if the message had been correctly transmitted and the highest market price, which was nine and one-half cents, paid for the fifty bales of cotton. (p. 1091.)

TELEGRAPH COMPANIES—Notice to Company of Losses from Negligent Transmission.—Where the terms of a telegraphic message and the circumstances known to the company when the message was presented for transmission were reasonably sufficient for the defendant to contemplate therefrom that the losses sustained by the plaintiff would probably result from a negligent transmission, it will be liable in damages to the amount of loss directly sustained by plaintiff from its negligence. And it is not essential that the particular loss sustained was contemplated, it being sufficient if the loss sustained should have been contemplated as a probable and proximate result of the negligence. (p. 1094.)

Jno. E. Hartridge & Son, for the plaintiff in error.

Benj. S. Liddon, for the defendant in error.

485 WHITFIELD, J. The defendant in error brought an action in the circuit court for Jackson county against the Western Union Telegraph Company for damages for the failure to transmit and deliver a correct copy of a telegram received from the plaintiff for transmission.

The amended declaration filed July 7, 1905, is as follows: 486 "Now comes plaintiff, and by his attorney, sues the Western Union Telegraph Company, a foreign corporation, for that, whereas, heretofore, to wit: On the 24th day of September, A. D. 1904, and for a long time before said date and continuously ever since said date, the said defendant was a telegraph company engaged in the transmission of messages, by electric wires, from various points in the United States; and that on said date above mentioned, said plaintiff delivered to the said defendant at its office and place of business in the town of Marianna, Jackson county, Florida, a message to be sent and delivered by said defendant, for reward and hire then and there paid defendant, by electric wire to a firm or corporation called George H. McFadden &

Brothers, Agency, at Pensacola, Florida, in the words and figures following, to wit: 'Marianna, Florida, 9-24-04. George H. McFadden & Brothers, Agency, Pensacola, Florida: Bought for your account today's limit 175. Am doing my best to rush bill lading. John Milton, Jr.' That the said George H. McFadden & Brothers, Agency, was engaged in the business of purchasing and selling cotton on and before said date, and the said words 'one hundred and seventy-five' meant 175 bales of cotton which plaintiff had that day purchased for the account of the said George H. McFadden & Brothers, Agency; and the fact that said George H. McFadden & Brothers, Agency, was engaged in dealing in cotton, and that the plaintiff had been engaged in shipping cotton to and buying cotton for said agency was well known to the said defendant. Said plaintiff, on the said day and date aforesaid, had a contract with the said George H. McFadden & Brothers, Agency, to buy for the account of the said George H. McFadden & Brothers, Agency, all the cotton which he could buy at ten cents per [487] pound upon a basis of middling cotton, the said ten cents middling basis being the limit of price which he was authorized on said day to buy; that the said George H. McFadden & Brothers, Agency, agreed to take and receive from the said plaintiff all the cotton he could buy at the price aforesaid upon his, the plaintiff, reporting by wire the number of said bales which he had so bought on said day, to said George H. McFadden & Brothers, Agency; but instead of transmitting said message as it was written and delivered as aforesaid, to it, said defendant in the transmission of said message negligently and carelessly substituted and used the words 'one hundred and twenty-five' in the place and stead of the words 'one hundred and seventy-five,' whereby plaintiff lost great sums of money as follows: Said George H. McFadden & Brothers, Agency, being only advised of the purchase of one hundred and twenty-five bales of cotton, by the plaintiff, by reason of the error and negligence of said defendant in transmitting and delivering said message, would only receive, as purchased on said day for their account by said plaintiff, 125 bales of cotton, and rejected the other fifty bales. The market for cotton had fallen one-half cent per pound by the time said cotton which had been bought as aforesaid by the plaintiff could arrive in Pensacola, Florida, and be delivered to said George H. McFadden & Brothers, Agency, the said George H. McFadden & Brothers, Agency, would only allow plaintiff, by reason of the premises, 9½c per pound upon said fifty bales in excess of the one hundred and twenty-five reported to it by

the telegraph message aforesaid, wherefore plaintiff lost ½c per pound on fifty bales of said cotton, total weight of said bales being 26,700, or a total loss of one hundred and thirty-three and 50-100 [488] dollars. Wherefore, plaintiff brings suit and claims five hundred dollars damages."

The declaration was demurred to on the grounds:

"1. The negligence alleged is not the proximate cause of the loss claimed.

"2. The fact that the message was sent one hundred and twenty-five instead of one hundred and seventy-five could not affect the right of plaintiff to claim on one hundred and seventy-five bales, the amount plaintiff's amended declaration shows he was authorized to buy for the account of George H. McFadden & Brothers, Agency.

"3. The damages claimed are not such as might fairly be supposed to have been in contemplation of the parties when the contract of the transmission of the telegram was made.

"4. The damage alleged, and in the way alleged, is not one for which the law allows recovery.

"5. The amended declaration does not state a cause of action."

The demurrer was overruled and the defendant company filed the following pleas: "(1) Not guilty; (2) The message delivered by the plaintiff to it at its place of business in the town of Marianna, as set forth in the declaration, to be sent and delivered to George H. McFadden & Brothers, Agency, at Pensacola, Florida, was received under the special condition in contract as follows: 'All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half of the regular rate is charged in addition. It is agreed between the sender of the following message and this [489] company that said company shall not be liable for mistakes or delays in transmission or delivery of any unrepeated message beyond the amount received for sending same; nor mistakes or delays in transmission or delivery, or for nondelivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of the lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of a message to any point on the lines of this

company can be insured by contract in writing stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeating messages, viz.: one per cent for any distance not exceeding one thousand miles, and two per cent for any greater distance. No employé of the company is authorized to vary the foregoing.'

"And the defendant says that the said message was an unrepeated message, and was not repeated for the purpose of protecting against mistakes as contracted for by the defendant; wherefore the defendant says that there is no liability upon the part of the defendant."

The plaintiff demurred to the second plea on the grounds that it "is vague, indefinite, uncertain and insufficient, and states no sufficient defense to plaintiff's declaration; the rule and regulation and special condition of the contract referred to an unreasonable one and void."

The demurrer was sustained, and at the trial the plaintiff received a judgment for one hundred and thirty-three dollars and fifty cents and twenty dollars interest. A motion for a new trial was overruled and [490] the defendant took writ of error, assigning the following as errors: 1. Overruling the demurrer to the amended declaration. 2. Sustaining the demurrer to the plea of the defendant, as filed, to the amended declaration. 3. In refusing to permit Frank Golson, a witness introduced by the defendant, to answer the question in words as follows, to wit: "How many rates are there?" 4. Refusing to give the charge requested by defendant numbered 1, as follows: "The evidence having been submitted and the argument of counsel concluded, the court charges you that under the facts the plaintiff cannot recover, and your verdict should be for the defendant." 5. Refusing to give the charge requested by the defendant numbered 2, as follows: "The evidence having been closed and the argument of counsel concluded, the court instructs you that under the undisputed facts the plaintiff can recover only the tolls paid for sending the telegram which is the basis of this suit to the extent of the amount proved to have been paid to the defendant company as tolls for transmitting the message, together with interest at the rate of eight per cent per annum from the date the same was paid." 6. Refusing to give the charge requested by defendant numbered 5, as follows: "A party is not, in law, chargeable with results which do not naturally and reasonably follow as the consequences of his act." 7. Overruling the motion of the defendant for a new trial.

WHITFIELD, J. The declaration alleges that for reward and hire then and there paid [491] the defendant telegraph company received from the plaintiff for transmission a message reading: "Bought for your account to-day's limit 175. Am doing my best to rush bill of lading"; that said defendant in the transmission of said message negligently and carelessly substituted "$125" in the place and stead of "$175," whereby plaintiff lost great sums of money, under circumstances alleged in the declaration, wherefore plaintiff claims five hundred dollars damages.

This declaration was demurred to on several grounds, but as it stated a cause of action for at least nominal damages, the demurrer was properly overruled. In an action on the case for damages, if the declaration makes a case entitling the plaintiff to any recovery whatever, though it be only nominal damages, a demurrer will not lie thereto, even if the declaration claims other or greater damages than the case may legally entitle the plaintiff to recover; demurrer not being the proper way to test the extent of the recovery to be had. Such questions are properly raised and settled by objections to testimony at the trial, or by instructions to the jury as to the law applicable to the points raised, or by requiring the declaration to be reformed under section 1043, Revised Statutes of 1892, and section 1433, General Statutes of 1906, when it is calculated to embarrass a fair trial of the case: Borden v. Western Union Tel. Co., 32 Fla. 394, 13 South. 876; Jacksonville etc. Ry. Co. v. Griffin, 33 Fla. 602, 15 South. 336; Tillis v. Liverpool etc. Ins. Co., 46 Fla. 268, 110 Am. St. Rep. 89, 35 South. 171; Cline v. Tampa Waterworks Co., 46 Fla. 459, 35 South. 8, and cases cited; Muller v. Oscala Foundry & Machine Works, 49 Fla. 189, 38 South. 64; Western Union Tel. Co. v. Wells, 50 Fla. 474, 111 Am. St. Rep. 129, 39 [492] South. 838, 2 L. R. A., N. S., 1072; Western Union Tel. Co. v. Barlow, 51 Fla. 351, 40 South. 491, 4 L. R. A., N. S., 262.

While the declaration does not specifically claim recovery of the tolls, damages are claimed amounting to five hundred dollars, and if the declaration states any cause of action, damages not exceeding five hundred dollars could be recovered thereon. The declaration states a cause of action for at least nominal damages. No application was made for compulsory amendment of the declaration under the statute above referred to, and no testimony in support of the cause of action stated in the declaration was objected to. An instruction going to

the merits of the declaration was asked for by the defendant and refused by the court. It will be considered later in this opinion.

The order sustaining the demurrer to the second plea is assigned as error. The second plea sets up a "special condition in contract," the purport of which is that the company "shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of an unrepeated message beyond the amount received for the same"; and avers that the message in this case was an unrepeated message. This plea was demurred to upon the grounds that it "is vague, indefinite, uncertain, insufficient and states no sufficient defense to the plaintiff's declaration; the rule and regulation and special condition in the contract referred to is an unreasonable one and void."

The authority, franchises and privileges which a telegraph company must have and exercise in serving the public, and without which it cannot render the service, are conferred by law for the purpose of providing for the public the prompt transmission and delivery of a correct copy of messages; and the law authorizing the performance [493] of the service for the public imposes upon the company the duty of properly rendering such service, and also imposes liability for any neglect of duty. A telegraph company is authorized by law to transmit messages with care and skill, and to deliver a correct copy of the messages received for transmission; and it is not authorized to carelessly or negligently transmit messages or to deliver an incorrect copy of messages received for transmission. In undertaking to render the public service by virtue of the franchises and privileges conferred upon it by law, a telegraph company assumes the duty to transmit messages with care and skill, and to deliver a correct copy of message received for transmission; and it does not assume or engage to carelessly or negligently transmit messages or to deliver an incorrect copy thereof. The compensation allowed by law to be received by a telegraph company for the transmission and delivery of a message is allowed and received for a careful and skillful transmission of the message and for the delivery of a correct copy of the message received for transmission; and such compensation is not allowed or received for a careless or negligent transmission of a message or for the delivery of an incorrect copy thereof.

The failure of a telegraph company to transmit and deliver a correct copy of a message received for transmission is

a failure to properly render the service it has undertaken to perform, and is a breach of duty imposed by law, for which the company is liable in damages to the person injured thereby, unless the failure is legally excused, or unless the liability is affected by a valid stipulation. No excuse is offered in this case for the breach of duty alleged.

The "special condition in contract" averred in the [494] second plea as limiting the liability of the company is that beyond the amount received for sending the message, the company "shall not be liable for mistakes and delays in the transmission or delivery of any unrepeated message"—that is, a message "telegraphed back to the originating office for comparison. For this (repeating) one-half of the regular rate is charged in addition." This telegraphing back is to the originating office of the company for comparison, and not to the sender; therefore, it is for the benefit of the company in proper discharge of its duty to transmit a correct copy of the message delivered for transmission.

Under the second plea it is contended that the sender of the message, by not having the message repeated in accordance with the terms of the printed blank used by the sender in delivering the message, agreed to a limitation of the liability of the company as stated on the blank so used for mistakes in transmitting the message, to the amount received for transmission. The amount paid for sending the message was for transmitting it correctly as the duty of the company required it to do. If, because of the negligence of its employés, the company failed to transmit the message correctly, it has failed in the performance of its duty, and is liable for such failure notwithstanding the provisions printed on its blanks. In receiving the message and taking the price of transmittal the company engaged to send and deliver the message correctly, and if it fails in doing so without legal excuse, it cannot avoid its liability for such failure on the ground that the sender in using the blank containing a provision limiting the liability of the company unless the sender should pay for repeating the message to the originating office for comparison, when the sender has already paid for the proper [945] transmission and delivery of a correct copy of the message. If the duty imposed by law and assumed by the company to carefully and skillfully transmit and deliver a correct copy of the message be properly performed, there would be no necessity for the message to be "telegraphed back to the originating office for comparison." If repeating the message "to

the originating office for comparison" is necessary for the transmission and delivery of a correct copy of the message, it is the duty of the company to do this in order to properly render the service it undertook to do and received compensation for doing. The company is allowed by law to charge a reasonable compensation for the service it renders, and the amount charged for transmitting the message should be a reasonable compensation for the complete performance of the service undertaken by the company, i. e., the transmission and delivery of a correct copy of the message received for transmission: See Jones on Telegraph and Telephone, secs. 377, 378.

The plea does not respond to the allegation of the declaration that the company carelessly and negligently transmitted and delivered an incorrect copy of the message received for transmission. No excuse for failure to perform the duty assumed by the company is averred; nor does the plea aver any valid stipulation avoiding liability for the alleged negligence and carelessness of the company in the discharge of its duty by failing to transmit and deliver a correct copy of the message received by it for transmission. This being the duty imposed by law and assumed by the company, it cannot avoid liability for the nonperformance of such duty because of the negligence of its employés, by averring a stipulation relieving the company, prepared by it and set out in the blank form [496] used by the sender in delivering the message for transmission. The duty of the company imposed by law and assumed by it is to use due care and skill in transmitting messages and in delivering a correct copy thereof, and its liability for negligence or carelessness in transmitting messages and in delivering a correct copy cannot be affected as stated in such stipulation: Western Union Tel. Co. v. Champlee, 122 Ala. 428, 82 Am. St. Rep. 89, 25 South. 232; Western Union Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; Western Union Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Western Union Tel. Co. v. Norris, 25 Tex. Civ. App. 43, 60 S. W. 982; Brown v. Postal Tel. Co., 111 N. C. 187, 32 Am. St. Rep. 793, 16 S. E. 179, 17 L. R. A. 648; Western Union Tel. Co. v. Eubank, 100 Ky. 591, 66 Am. St. Rep. 361, 38 S. W. 1068, 36 L. R. A. 711; Thompson v. Western Union Tel. Co., 64 Wis. 531, 54 Am. Rep. 644, 25 N. W. 789; Page on Contract, sec. 366; Jones on Telegraph and Telephones, secs. 265, 376, and authorities cited; 27 Am. & Eng. Ency. of Law, 2d ed., 1043, and authorities cited.

In the case of Atlantic Coast Line Ry. Co. v. Dexter & Conner, 50 Fla. 180, 111 Am. St. Rep. 116, 39 South. 634, referred to by counsel for plaintiff in error, on the subject of limiting by contract the liability of a common carrier, the record shows that the contract related to the transportation of livestock under the care of their owner, and was limited to the injury "which shall not affirmatively appear to have been caused by the negligence of said railway or its connecting lines." The value of the livestock agreed upon was not arbitrarily fixed as the amount of the charge for the transportation, but an actual value was agreed on, and there was no showing that such agreed value was unreasonable. Even in that case where the service was peculiar to livestock and the limitation as to the [497] amount of liability did not appear to be unreasonable, there was no attempt to limit the liability of the common carrier for its negligence to the price paid for the service undertaken as the plea in this case seeks to do.

The peculiar conditions applicable to the transportation of livestock under the care of the owner widely distinguish the service from that rendered by a telegraph company, which has absolute control of messages it transmits, and is held to a contemplation of the consequences involved in the terms of the message taken with knowledge of other relevant circumstances affected by the message and known to the company.

The service rendered by a railroad company in the transportation of livestock under the personal care of the owner thereof is essentially different from the service rendered by a telegraph company in the transmission of messages. Where the value of the livestock being transported is agreed upon by the carrier and the shipper as the limit of the carrier's liability for losses from causes other than the negligence of the carrier, and the valuation does not appear to be unreasonable or unduly imposed, such a limitation of the liability of the carrier may be permitted under circumstances justifying it. But a telegraph company has absolute possession and control of message delivered to it for transportation. The duty of the company is to transmit and deliver a correct copy of the message. The company is liable for the proximate consequences of its negligence to the extent disclosed by the terms of the message and other circumstances known to the company when the message was presented for transmission. To permit the telegraph company, by a stipulation printed upon its blanks used in presenting messages [498] for transmission, to limit its liability for negligence to the amount paid

for transmission would enable the company to avoid responsibility for its own wrong in rendering a service in which the sender of the message has no part or control, where the losses probably consequent upon the wrong may be enormously out of proportion to the amount paid for a correct transmission. A sound public policy will not permit such an abuse of the authority given by law to a company for the benefit, and not for the detriment, of the public. Such a stipulation should not be enforced.

In this case the law imposed and the telegraph company assumed the duty of transmitting and delivering with care and skill a correct copy of the message received by the company for transmission. The declaration alleges that the company carelessly and negligently transmitted and delivered an incorrect copy of the message, to the plaintiff's injury. The second plea seeks to avoid the company's liability for the failure to properly perform its duty, in carelessly and negligently transmitting an incorrect copy of the message, by averring a "special condition in contract" limiting such liability to the amount received for sending the message. This is unreasonable upon its face. The defendant cannot, by such "special condition in contract," relieve itself of liability resulting from the negligence alleged in the declaration in the performance of a duty imposed by law and assumed by the company in its capacity as a transmitter of messages for the public. The plea, therefore, did not present a legal defense to the action, and it was properly overruled on demurrer.

In view of the principles above announced it was immaterial whether the defendant had one or more rates of toll; and consequently there was no error in overruling [499] the question, "How many rates are there?" which was assigned as error.

The only plea before the jury was the general issue, and as there was evidence showing the liability of the defendant, the affirmative charge numbered 1 requested by the defendant was rightly refused.

Exception was taken to, and error is assigned on, the refusal of the court to give the following charge requested by the defendant: "2. The evidence having been closed and the argument of counsel concluded, the court instructs you that under the undisputed facts the plaintiff can recover only the tolls paid for sending the telegram which is the basis of this suit to the extent of the amount proved to have been paid to the defendant company for tolls for transmitting the message,

together with interest at the rate of eight per cent per annum from the date the same was paid.

The declaration alleges and the proof shows that George H. McFadden & Brothers, Agency, of Pensacola, Florida, had agreed to take and receive from John Milton, Jr., the plaintiff, of Marianna, Florida, at ten cents per pound, all the cotton of middling grade bought by plaintiff on a given day upon plaintiff's reporting by wire the number of bales so bought on said day; that on September 24, 1904, the plaintiff delivered to the defendant the following message: "Marianna, Florida, 9-20-04. George H. McFadden & Brothers, Agency, Pensacola, Florida: Bought for your account to-day's limit 175. Am doing my best to rush bill lading. John Milton, Jr." That the words "one hundred and seventy-five" meant one hundred and seventy-five bales of cotton, which plaintiff had that day purchased for said agency; that defendant, in transmitting said message, negligently and carelessly substituted and used the words "one 500 hundred and twenty-five" in the place and stead of the words "one hundred and seventy-five"; that said agency being only advised of the purchase of one hundred and twenty-five bales of cotton by plaintiff, by reason of the defendant's said error and negligence, would only receive as purchased on said day one hundred and twenty-five bales of cotton, and rejected the other fifty bales; that the market price of cotton declined and the fifty bales brought only nine and one-half cents per pound, to the plaintiff's loss of one hundred and thirty-three dollars and fifty cents. It is further alleged that defendant well knew that the George H. McFadden & Brothers, Agency, was engaged in dealing in cotton, and that the plaintiff had been engaged in shipping cotton to and buying cotton for said agency. The proofs show that the agent of the telegraph company, who was also the agent of the railroad, knew plaintiff's business, and had sent similar messages daily, and he had to sign the bills of lading as agent for the railroad; that said agent knew McFadden Brothers were cotton buyers, and that the plaintiff had an agreement with them to buy cotton for them on the limits given plaintiff each day by means of the defendant telegraph company.

In cases where losses have been sustained by reason of the negligence of another, damages may be recovered for losses that would likely or probably result, where such negligence is a proximate or directly contributing cause of the loss, and the plaintiff is not at fault. The damages must be for losses

that would likely or probably result, and did result, from the proximate or directly contributing negligence of the defendant, and the plaintiff must not be at fault. If there is an independent efficient cause intervening between the negligence of the defendant and the result or loss, the defendant's negligence is not a proximate or directly contributing cause. If the plaintiff is not at fault and the [501] negligence of the defendant was one of the proximate or directly contributing causes, the defendant is liable for the loss without reference to other proximate or directly contributing causes where they do not intervene between the negligence of the defendant and the result or loss. A proximate cause is one that leads to or produces, or directly contributes to producing, the result or loss. If the loss is not such as would likely or probably result from the negligence of the defendant, he is not liable, since he can ordinarily be held responsible only for the probable results of his negligence, which he should have foreseen: See Moore v. Lanter, 52 Fla. 353, 42 South. 462; Jacksonville etc. Ry. Co. v. Peninsular Land etc. Mfg. Co., 27 Fla. 1, 9 South. 661, 17 L. R. A. 33, 65; Janes v. City of Tampa, 52 Fla. 92, 120 Am. St. Rep. 203, 42 South. 729; 21 Am. & Eng. Ency. of Law, 2d ed., 485-496.

In an action in tort against a telegraph company for the breach of a public duty in negligently transmitting an incorrect copy of a message delivered to it for transmission, the damages that can be recovered are for the loss or injury sustained by the plaintiff as a proximate consequence of the defendant's negligent act, which consequence the parties contemplated, or should have contemplated, as probably to follow from a breach of the duty. An act is a proximate cause when it leads to or produces, or contributes directly to producing, a result. When a result might have been reasonably expected as likely or probably to directly follow the performance or nonperformance of an act, the party performing, or failing to perform, the act is responsible for the loss to another resulting proximately from the performance or nonperformance of the act: Jones on Telegraph and Telephones, sec. 519 et seq., and authorities cited; 3 Sutherland [502] on Damages, 3d ed., sec. 961; 27 Am. & Eng. Ency. of Law, 2d ed., 1059 et seq.; Joyce on Electric Law, sec. 945; 6 Current Law, 1673; McCarty v. Western Union Tel. Co., 116 Mo. App. 441, 91 S. W. 976; Western Union Tel. Co. v. Love-Banks Co., 73 Ark. 205, 83 S. W. 949.

In the case of Hocker v. Western Union Tel. Co., 45 Fla. 363, 34 South. 901, this court said: "It is urged that the damages are too speculative, remotive, contingent, and conjectural, and all dependent upon elements uncertain and contingent in their character. This contention is not well founded. The amount claimed is the difference between a certain price at which plaintiff's contract was sold and a certain definite and determined price at which it would have been sold had the messages been properly delivered. It is true that until the actual sale was made the ultimate result of the mistake in the message was contingent and speculative, being dependent upon the fluctuations of the market. This uncertainty was determined, however, by the making of the sale as finally effected, and will no more bar recovery of the damages sustained in this case than in one where a defendant should refuse to take goods which he had contracted to purchase, and which are subsequently sold on a falling market to another for a less price, the amount of which cannot be predicted until the sale is made: 2 Thompson on Negligence, No. 2461."

It appears that in this case the McFadden Agency would have been obliged under the contract with the plaintiff to take one hundred and seventy-five bales of cotton at ten cents per pound if the defendant had correctly transmitted the message it received from plaintiff for transmission. Because of the negligence of the defendant in transmitting the message incorrectly, the McFadden Agency was obliged to take only one hundred and twenty-five bales [503] of cotton at ten cents a pound, and consequently such negligence is the proximate cause of the loss to the plaintiff of one-half cent a pound on fifty bales of cotton which sold for nine and one-half cents per pound, the best market price; and, from the allegation of the declaration and the proofs, it appears that such loss is one that the parties knew of, or had reason to know would probably follow an incorrect transmission of the message. If the defendant's negligence in the performance of its duty was a proximate cause of the loss to the plaintiff, and the plaintiff is not at fault, he may recover for the loss sustained that the parties contemplated, or, under the circumstances, should have contemplated, as likely and probably to result from such negligence.

It is urged that the plaintiff cannot recover damages in excess of the toll collected, because it is not shown that the error in the transmission of the message was the proximate cause

of the loss, as it does not appear that plaintiff "made any attempt to secure a better price for this cotton, or that he offered the same to any other person, or that he could not by holding it have obtained a better price." The contract of the plaintiff with the McFadden Agency was that the agency would take and receive from the plaintiff all the cotton he could buy at ten cents per pound upon a basis of middling cotton, upon the plaintiff reporting by wire to said agency the number of bales so bought on said day. The loss of the plaintiff could not have been avoided, because the agency was not bound to take more cotton than was reported to it by telegram, and as the market declined a sale to others at ten cents per pound was impracticable, and the fifty bales were sold at the best market price for nine and one-half per pound. The plaintiff was not required to hold the fifty bales for a rise in the market, but he had a right to expect the defendant to [504] properly perform its duty of correctly transmitting the telegram, so as to bind the McFadden Agency to take the entire one hundred and seventy-five bales at that day's price, even if the market declined; but as the message was incorrectly transmitted, and as the McFadden Agency was bound to take, and did take, at ten cents per pound only the lesser number of bales stated in the telegram as received by it, the loss to the plaintiff by the refusal of the McFadden Agency to take at the given price more than the one hundred and twenty-five bales stated in the message received was caused directly by the failure of the telegraph company to correctly transmit the message. The difference in the price was not within the control of the plaintiff. The message contained no element of speculation or contingency. The plaintiff was not buying for speculation, but bought at a stated price for another, who was to take at that price all the cotton reported by wire that day pursuant to an agreement. A correct report was filed for transmission by the defendant telegraph company, but the company incorrectly transmitted it. The plaintiff would have had a right to hold the McFadden Agency to take the one hundred and seventy-five bales at ten cents per pound, notwithstanding a decline in the market price, if a correct copy of the message filed had been transmitted and delivered, and no loss to plaintiff would have resulted. But the message was not correctly transmitted by the defendant telegraph company, as it reported one hundred and twenty-five bales instead of one hundred and seventy-five bales. The McFadden Agency was not bound to

take at ten cents per pound any more cotton than was reported to it by wire that day, and as the market declined one-half cent a pound and plaintiff was paid only nine and one-half cents per pound for fifty bales, the same being then the highest market price, loss resulted to the plaintiff directly from failure of the defendant telegraph company to correctly transmit the message. This [505] loss was one that the parties could and should have known from the telegraph and other facts known to the company would probably result from the negligence of the defendant. The amount of recovery is the difference between the price the McFadden Agency would have paid the plaintiff for the fifty bales of cotton if the message had been correctly transmitted and the highest market price paid the plaintiff for the fifty bales of cotton: See Thompson v. Western Union Tel. Co., 64 Wis. 531, 54 Am. Rep. 644, 25 N. W. 789; Manville v. Western Union Tel. Co., 37 Iowa, 214, 18 Am. Rep. 8; Western Union Tel. Co. v. Nye & Schneider Grain Co., 70 Neb. 251, 97 N. W. 305, 63 L. R. A. 803; Reed v. Western Union Tel. Co., 135 Mo. 661, 58 Am. St. Rep. 609, 37 S. W. 904, 34 L. R. A. 492; Western Union Tel. Co. v. Haman, 2 Tex. Civ. App. 100, 20 S. W. 113; Western Union Tel. Co. v. Spivey, 98 Tex. 308, 83 S. W. 364. There is no showing that the plaintiff did not act in good faith, and get all that could have been obtained from the sale of the fifty bales of cotton left on his hands by reason of the incorrect transmission of the message. On the contrary, it is shown that the fifty bales were sold for the best market price.

It is contended that the terms of the message did not indicate that the damages claimed were in the contemplation of the parties. The declaration alleges that the defendant telegraph company well knew that the McFadden Agency was engaged in dealing in cotton, and that the plaintiff had been engaged in shipping cotton to and buying cotton for said agency. It is also shown in evidence that the agent of the telegraph company was also the agent of the railroad company; that he had transmitted similar messages daily, and he had to sign bills of lading for the railroad. It also appears that this agent knew the business of the plaintiff with the McFadden Agency [506] as to which messages had been sent and bills of lading signed by the agent. It is a matter of common knowledge that the price of cotton fluctuates. The company appears to have well known of the buying and shipping of cotton by the plaintiff for the agency. The telegram was addressed to the agency, and its terms indicated its im-

portance and probable reference to shipment of cotton about which defendant knew.

The terms of the message and the circumstances known to the company when the message was presented for transmission were reasonably sufficient for the defendant to contemplate therefrom that the losses sustained by the plaintiff would probably result from a negligent transmission of the message. It was not essential that the particular loss sustained was contemplated, but the company is liable if the loss sustained should have been contemplated as a probable and proximate result of the negligence: Jones on Telegraphs and Telephones, secs. 519-529; Western Union Tel. Co. v. Edsall, 74 Tex. 329, 15 Am. St. Rep. 835, 12 S. W. 41.

Under the circumstances the terms of the message were sufficient to put the defendant upon notice that matters of considerable value were involved, and it was bound to exercise care accordingly: Western Union Tel. Co. v. Edsall, 74 Tex. 329, 15 Am. St. Rep. 835, 12 S. W. 41. If nothing of value was involved, the defendant was by law held to a proper discharge of its duty by transmitting and delivering a correct copy of the message received by it for transmission. The knowledge of the defendant's agent of the plaintiff's business and the terms of the message amply indicated its importance. The damage here alleged is the proximate result of defendant's negligence, and the law imposes liability for such negligence: See Jones on Telegraphs and Telephones, sec. 538. [507] The charge numbered 2 requested by defendant was properly refused.

The decline in the market price of cotton was not an independent efficient cause intervening between the negligence of the defendant and the plaintiff's loss. If the message had been correctly transmitted, the decline in the market price of cotton would not have resulted in loss to the plaintiff. Even if the decline in the price were a directly contributing cause of the loss, the correct transmission of the message would have avoided a loss notwithstanding the decline in the price; therefore the negligence of the defendant was at least a proximate cause of the loss.

There is no evidence that an independent efficient cause intervened between the negligence of the defendant and the result or loss to the plaintiff; therefore the court did not err in refusing to give the following charge: "If the telegraph company is in default, but their default is made harmful to

a party only by some other intervening cause, the company is not liable."

It does not appear from the allegations or the proofs that the injury complained of was the result of any independent intervening cause. No wrongdoing, negligence or lack of good faith on the part of the plaintiff appears. The defendant telegraph company failed to properly perform its duty by not transmitting a correct copy of the message received by it for transmission. Such failure has resulted in loss to the plaintiff without his fault and without the intervention of any independent cause, and the defendant is, therefore, liable in damages to the amount of the loss directly sustained by the plaintiff that would probably have resulted, and did result, from the defendant's [508] negligence. Damages under this rule have been adjudicated to the plaintiff.

This disposes of all the points argued for the plaintiff in error.

The verdict and judgment awarding damages are sustained by the allegations and proof, and as no error is made to appear, the judgment is affirmed.

Shackleford, C. J., and Cockrell, J., concur.

Taylor, Hocker and Parkhill, JJ., concur in the opinion.

Stipulations Releasing Telegraph Companies from Liability for their negligence in sending or delivering messages are usually held void: Smith v. Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126; Harkness v. Western Union Tel. Co., 73 Iowa, 190, 5 Am. St. Rep. 672; Brown v. Postal Tel. Co., 111 N. C. 187, 32 Am. St. Rep. 793; Pacific Tel. Co. v. Underwood, 37 Neb. 315, 40 Am. St. Rep. 490; Western Union Tel. Co. v. Linn, 87 Tex. 7, 47 Am. St. Rep. 58; Reed v. Western Union Tel. Co., 135 Mo. 661, 58 Am. St. Rep. 609. Compare Stamey v. Western Union Tel. Co., 92 Ga. 613, 44 Am. St. Rep. 95. Hence, a stipulation upon the back of a telegraph blank that the company is released from all damages if mistakes occur in the transmission, unless the sender requires the message to be repeated, is an unreasonable regulation and void: Western Union Tel. Co. v. Chamblee, 122 Ala. 428, 82 Am. St. Rep. 90; Western Union Tel. Co. v. Eubanks, 100 Ky. 591, 66 Am. St. Rep. 361; Gillis v. Western Union Tel. Co., 61 Vt. 461, 15 Am. St. Rep. 917; Western Union Tel. Co. v. Crall, 38 Kan. 679, 5 Am. St. Rep. 795; Ayer v. Western Union Tel. Co., 79 Me. 493, 1 Am. St. Rep. 353. Some courts, however, have taken a different view: Birkett v. Western Union Tel. Co., 103 Mich. 361, 50 Am. St. Rep. 374; Coit v. Western Union Tel. Co., 130 Cal. 657, 80 Am. St. Rep. 153. In Barnes v. Western Union Tel. Co., 24 Nev. 125, 77 Am. St. Rep. 791, it is decided that a contract contained in a telegraphic blank stipulating that the company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of an unrepeated message, does not exonerate the company from liability for negligent delay in the delivery of an unrepeated message received and correctly transcribed at the terminal or delivery office.

See, further, the note on this question in Webbe v. Western Union Tel. Co., 61 Am. St. Rep. 214.

Damages Recoverable from Telegraph Companies for a failure to transmit and deliver messages are discussed in the note to Kagy v. Western Union Tel. Co., 117 Am. St. Rep. 286.

PATRICK v. KIRKLAND.

[53 Fla. 768, 43 South. 969.]

PAROL TRUST in Land Bought at Execution Sale.—A mere parol agreement without consideration to buy in land at an execution sale and to reconvey it to the judgment debtor upon payment of the purchase price and interest may not create a trust in favor of the judgment debtor, but where there is in the transaction an element of equity arising from fraud, confidential relation, refraining from bidding at the sale or from further protection of the property from sale, gross inadequacy of the purchase price, the supplying by the debtor of a part of the purchase money, or otherwise, such circumstances may be shown by parol and establish a trust. (p. 1099.)

PAROL TRUST in Land Bought at Execution Sale—Facts Constituting.—Where the lessees for turpentine purposes of land upon which an execution has been levied, upon being applied to for a loan to prevent a sale of the land, orally agree with some of the heirs of the execution debtor that the lessees will bid in the land at the execution sale, and upon payment by the heirs of the amount with interest, the lessees would reconvey the land to the heirs, and pay them the usual rent for turpentine purposes while the lands were held under the sheriff's deed, and the land alleged to be worth three thousand dollars is bought in for two hundred and fifty dollars, and thereafter profitably used by the purchasers as it had been previously used, and where it was agreed that fifty dollars due as rent at the execution sale should be credited on the purchase price, a trust in favor of the heirs is thereby created, which a court of equity will enforce. (p. 1099.)

INTEREST—Rate When not Agreed upon.—Where a person agrees to pay interest but no rate is stated, the rate fixed by law prevails. (p. 1100.)

THE TIME Within Which to do an Act where no time is agreed on is a reasonable time. (p. 1100.)

APPEAL—Necessity for Objections.—Where no objections were made to testimony before the trial court, the appellate court will not review the rulings thereon. (p. 1100.)

EVIDENCE.—Where Testimony is Made Incompetent by statute, it should be disregarded by both the trial court and appellate courts. (p. 1100.)

HARMLESS ERROR—Admission of Incompetent Testimony.—Where there is sufficient evidence given by competent witnesses upon a controverted point to sustain the decree, the admission of evidence objected to on the ground that the witnesses, being parties to the suit, could not testify as to communication had with a person deceased at the time of the trial, constitutes harmless error. (p. 1100.)

EVIDENCE.—Facts Admitted by the answer need not be proved. (p. 1101.)

APPEAL—Harmless Error.—Where there is sufficient competent evidence in the record to sustain the decree, it will be affirmed, although the record also contains incompetent evidence. (p. 1100.)

C. J. Wilson, for the appellant.

Jno. M. Calhoun, for the appellees.

[770] WHITFIELD, J. The appellees filed a bill in equity in the circuit court for Jackson county against the appellant individually and as surviving partner of the late firm of Jordan & Patrick, composed of J. C. Jordan and M. V. Patrick, in which it is alleged in substance that Green B. Kirkland died intestate, leaving seven of the appellees as his heirs; that at his death said Green B. Kirkland was seised and possessed of certain described lands in Jackson county, Florida; that said Ansel W. Kirkland was appointed and qualified as administrator of the estate of Green B. Kirkland, deceased; that afterward, in 1898, one G. H. Dickenson brought an action in the circuit court for Jackson county against said administrator on a judgment obtained against the decedent in the state of Georgia; that during a term of the circuit court a demurrer to defendant's pleas being sustained, and the defendant not pleading over, and consenting thereof, a judgment was entered in said cause against said Ansel W. Kirkland as administrator of Green B. Kirkland; that said judgment is null and void because the consent to its entry is in substance a confession of judgment which an administrator cannot make; that execution issued on said judgment; that said judgment commands the same to be levied on the goods and chattels, lands and tenements of decedent which have come into the hands of said administrator; that the lands levied on were not at the entry of the judgment or the levy of the execution, or at the sale, or at any time, ever in the possession and control of said administrator under an order from the probate court of Jackson county, authorizing him to take possession and control over them; that the lands were sold at sheriff's sale under the execution to Jordan & Patrick for two hundred and thirteen dollars and sixty-three cents; that prior to said sale said Jordan & Patrick had leased the land from [771] some of the heirs for turpentine purposes, and at the sale there was then due by Jordan & Patrick, as rent, fifty dollars, which defendant agreed and promised should be credited; that twenty-five dollars was also paid on the debt; that at the rendition of said judgment the personal property of decedent was insufficient to settle the same; that

it was the desire of the administrator to allow the lands to remain intact for the heirs, all of whom were then under age except the administrator, who applied to said Jordan & Patrick to loan the estate a sufficient sum to pay off said judgment; this the said Jordan & Patrick agreed to do, but stated that inasmuch as all the heirs were under age except one, they would not convey any title to the real estate or make any security, but that if the heirs would agree that Jordan & Patrick bid the land in at the sale, that if complainants would repay with interest whatever amount Jordan & Patrick had to pay, they would reconvey said lands to complainants and pay them the usual rent for the turpentine privileges while they so had them under the sheriff's deed; this was agreed to, and in pursuance thereof said Jordan & Patrick did bid in the lands aforesaid for two hundred and fifty dollars, but in fact only paid two hundred and thirteen dollars and sixty-three cents, the amount of the judgment and costs; that the cash paid Jordan & Patrick, together with the rents, issues and profits of said lands for six years, would more than pay the indebtedness; that Jordan is dead and that Patrick, as surviving partner of the late firm of Jordan & Patrick, holds the lands in trust for complainants; that prior to the institution of this suit complainants have tendered to defendant the full amount due on said loan with interest, but said defendant has wholly failed and refused to convey said lands to complainant; that profert in curia is made of all amounts due defendants upon an accounting; [772] that the lands were reasonably worth three thousand dollars. The bill prayed for an accounting, a reconveyance, etc. A demurrer on the ground that the bill does not make out a case against this defendant, or entitle complainants to the relief prayed, was overruled, and the defendant answered, admitting the death of J. C. Jordan, denying that the judgment obtained against the administrator of the estate of Green B. Kirkland, deceased, is void; alleges that said judgment was entered in open court during a term of the circuit court when the court had jurisdiction of the subject matter and the parties, and had the right to enter the judgment; denies the loan of money to pay off said judgment, and denies the alleged agreement as to bidding in the land at the sale with leave to pay the amount and receive a reconveyance; avers that said lands were bought without conditions or agreements with any of complainants; that the money paid to defendant was by agreement credited on an open account, and paid on lands sold to one of the complainants; that some of

said lands have been sold to one or more of complainants and to other parties; denies a tender of the amount due on a loan prior to the suit; denies that the price paid at the sale was grossly inadequate. The oath to the answer was waived in the bill. Testimony was taken before a master, and the court decreed an accounting and a reconveyance of the land not previously sold. An appeal was taken by the defendant, who assigns as errors: (1) Overruling the demurrer; (2) failing to pass on objections to testimony; (3) entering decree for complainants; (4) entering decree against defendant.

It is contended under the first assignment of error that the allegations of the bill are too indefinite to show a resulting trust; that there is no allegation of the interest [773] to be paid, or when the land should be reconveyed or redemption made; that no sufficient contract to reconvey is stated.

A mere parol agreement, without consideration, to buy in land at an execution sale and to reconvey it to the judgment debtor upon payment of the purchase price and interest may not create a trust in favor of the judgment debtor, but where there is in the transaction an element of equity arising from fraud, confidential relation, refraining from bidding at the sale or from further protection of the property from sale, gross inadequacy of the purchase price, the supplying by the debtor of a part of the purchase money, or otherwise, such circumstances may be shown by parol and establish a trust: Bryan v. Douds, 213 Pa. 221, 110 Am. St. Rep. 544, 62 Atl. 828; 5 Am. & Eng. Ann. Cas. 171; Booth v. Lenox, 45 Fla. 191, 34 South. 566; Gen. Stats. 1906, sec. 2452; Phillips v. Hardenburg, 181 Mo. 463, 80 S. W. 891. Where, as in this case, the lessees for turpentine purposes of land upon which an execution has been levied, upon being applied to for a loan to prevent a sale of the land, orally agree with some of the heirs of the execution debtor that the lessees will bid in the land at the execution sale, upon payment by the heirs of the amount with interest, the lessees would reconvey the land to the heirs, and pay them the usual rent for turpentine purposes while the lands were held under the sheriff's deed, and the land alleged to be worth three thousand dollars is bought in for two hundred and fifty dollars, and thereafter profitably used by the purchasers as it had been previously used, and where it was agreed that fifty dollars due as rent at the execution sale should be credited on the purchase price, a trust in favor of the heirs is thereby created which a court of equity will enforce: See notes and authorities cited in Bryan v.

[774] Douds, 5 Am. & Eng. Ann. Cas. 173; 15 Am. & Eng. Ency. of Law, 2d ed., 1189; Wright v. Gay, 101 Ill. 233; Parker v. Catron, 120 Ky. 145, 117 Am. St. Rep. 575, 85 S. W. 740; 4 Current Law, 1734.

The bill alleges that Ansel W. Kirkland applied to Jordan & Patrick to loan the estate of G. B. Kirkland, deceased, a sufficient sum to pay off the judgment obtained against the administrator of the estate as such and thereby prevent a sale; that said Jordan & Patrick agreed to make the loan, but stated that inasmuch as all the heirs except one were under age, they could not convey any title or make security, but that if the heirs would agree that Jordan & Patrick bid the land in at the sale, "that whatever amount they had to pay for the same, that if the complainants would repay this amount with interest, that they, the said Jordan & Patrick, would reconvey the said lands to the said complainants and pay them the usual rent for the turpentine privileges while they so had them under said sheriff's deed; this was agreed to, and in pursuance thereof the said Jordan & Patrick did bid in the lands." These, with other allegations, are sufficient as against the stated demurrer. The amount paid by Jordan & Patrick is shown, the interest, in the absence of agreement or waiver, is fixed by law, and where no time is agreed on for redemption a reasonable time is implied. It does not appear that the time is unreasonable. The allegations of tender are definite and comprehensive.

The transcript does not show that the objections taken to testimony were called to the attention of the court to be ruled upon: Skinner v. Campbell, 44 Fla. 723, 33 South. 526; Stockton v. National Bank of Jacksonville, 45 Fla. 590, 34 South. 897. Testimony made incompetent by the statute, section 1095, Revised Statutes of [775] 1892, and section 1505, General Statutes of 1906, should be disregarded by the trial court and by this court: Tunno v. Roberts, 16 Fla. 738; Stewart v. Stewart, 19 Fla. 846; Edwards v. Rives, 35 Fla. 89, 17 South, 416; Withers v. Sandlin, 44 Fla. 253, 32 South. 829. However, even if the evidence objected to on the ground that witnesses, being parties complainant, could not testify as to communications had with a person then deceased, be wholly disregarded, there is sufficient evidence given by other competent witnesses, including the defendant, upon the controverted points, to sustain the decree. This being so, no harm results to the defendant who is appellant here.

Under the third and fourth assignments of error it is urged that no proof was made of the death of J. C. Jordan, a member of the alleged firm of Jordan & Patrick, and therefore a decree against Patrick alone is erroneous. The answer of the defendant Patrick "admits that said J. C. Jordan died before the institution of this suit." It was then unnecessary to prove the death of J. C. Jordan.

The witnesses, including the defendant, gave evidence sufficient to sustain the decree of the court that the purchase at the sale was made with the understanding between some of the heirs of the execution debtor and the purchasers at the execution sale that the lands would be reconveyed to the heirs upon the payment of the amount of the indebtedness with interest, and was made under circumstances alleged in the bill of complaint, which raised a trust in favor of the heirs; therefore, the decree is affirmed.

Shackleford, C. J., and Cockrell, J., concur.

Taylor, Hocker and Parkhill, JJ., concur in the opinion.

The Effect of a Parol Agreement to Purchase Land at a judicial sale for the benefit of a person other than the purchaser is discussed in the note to McCoy v. McCoy, 102 Am. St. Rep. 236. In Bryan v. Douds, 213 Pa. 221, 110 Am. St. Rep. 544, it is held that a parol agreement to purchase land at execution sale, and resell it, and, after deducting the purchase money and expenses, to pay the balance to the execution defendant, is within the statute of frauds, and cannot be enforced. But according to Schmidt v. Beiseker, 14 N. Dak. 587, 116 Am. St. Rep. 706, if one person employs another as his agent to personally appear at a public sale of land, to bid in, purchase it and take title thereto in the name of the principal, but to pay for it with such agent's money, the principal to repay him upon ascertaining the amount paid for the land and to also pay him a fixed compensation for his services, and such agent bids in and takes title to the land in his own name and then refuses to convey to his principal, the contract is one of agency merely, not relating to a sale of, or to an interest in, lands, and is not within the statute of frauds, and the remedy of the principal is an action at law for damages for a breach of the contract.

Parol Trusts in Land are discussed in the note to Insurance Co. of Tennessee v. Waller, 115 Am. St. Rep. 774.

INDEX TO THE NOTES.

Adverse Possession, boundaries of deed as controlling, 305.
constructive where the possessor has no color of title, 302, 303.
distinct tracts, what are for the purposes of, 306.
of a part may be by tenant or agent and yet extend to the whole, 305.
of a part under a contract void by the statute of frauds, 303.
of a part under a writing describing the whole extends to the entire tract, 304.
of a part under the claim of a gift of the whole, 303.
of a part where another possessor holds the residue, 306.
of a part where the possessor has no conveyance, 302, 303.
of a part without any purpose to claim the residue, 305.
of one of two or more contiguous tracts described in the same deed, 307.
of one or more distinct tracts does not extend to the others, 306.
Appeal and Error, divorce, appeal from, representatives who must be brought in after the death of a party, 243.
divorce, effect of death of party pending an appeal from, 231, 243.

Carrier of Passengers, conductor, whether bound to inquire into alleged mistake in a ticket, 731.
expulsion, right of passenger to resist, 730.
forcible resistance by passenger, right of denied when a mistake has been made in the ticket, 731.
forcible resistance to wrongful expulsion of a passenger, when authorized, 728.
resistance to wrongful expulsion, extent to which may be carried, 735.
stopover privileges, right to rely on the statement of an agent concerning, 731.
ticket, face of, passenger, when bound by, 728.
ticket, mistake in, duty of passenger in case of, 728, 731.
ticket, mistake in, forcible resistance to expulsion because of, 729.
ticket, mistake in, holder of, when should submit to expulsion and seek damages by action, 728.
ticket, mistake in, resistance of passenger because of, cases sustaining, 729.
Corporations, books of, admissibility in evidence in controversy with members, 858, 859.

Corporations, by-laws and minute-books of, when admissible in evidence, 857, 858.
mandamus against to compel the performance of their duties, 513-515.
Covenant of Seisin, actual seisin, whether supports, 452, 453.
assignment of the right to recover upon, 449, 456.
breach of occurs at the making or not at all, 447.
breach of, proof in actions to recover for, 464.
breach of, what constitutes, 451.
continuous breaches of, 450.
damages for breach of, evidence of, 465.
damages for partial breach of, 463.
damages, measure of in actions for breaches of, 457-464.
damages, measure of when the grantee buys in the outstanding title, 464.
damages, nominal for breaches of, 461-463.
deficiency in the amount of property, whether constitutes a breach of, 455.
definitions of, 443, 444.
does not extend to title held by the grantee, 445.
does not run with the land, 448.
dower rights do not constitute a breach of, 453.
easements do not constitute a breach of, 454.
encumbrances do not constitute a breach of, 453.
estate less than in fee does not support, 452.
form of, 446.
implies seisin of an indefeasible estate, 444, 445.
is a covenant for title, 443, 444.
is implied in leases, 444.
is personal, 448.
partial breach of, damages recoverable for, 463.
railroad rights of way, whether constitute breaches of, 454.
statutory modifications of the rule respecting, 450.
title sufficient to satisfy or support, 445.
title without possession, whether supports, 452, 453.
what satisfies, 445.
whether implied in a bargain and sale deed, 446.
whether implied in an assignment of a lease, 444.
whether synonymous with covenant of right to convey, 446.
who liable to actions upon breach of, 457.
who may maintain actions for breaches of, 455.

Damages, measure of in actions for breaches of covenants of seisin, 457-464.
Definition of covenant of seisin, 443, 444.
Divorce, abatement of suit for by the death of a party, 234, 235.
appeal from, effect of the death of a party during the pendency of, 243.
appeal from, representative who must be brought in after the death of a party, 243.
collateral attack upon decree of by stranger thereto, 248, 249.

Divorce, collateral attack upon decree of by survivor, 245-249.
death of a party, appeal, effect of upon right of, 231.
death of a party, attack upon decree of, motion or petition for after, 233-237.
death of a party, collateral attack upon decree of after, 245.
death of a party, effect of upon a suit to obtain relief from decrees of, 237-242.
death of a party, fraud, evidence of after must be clear and convincing, 240.
death of a party, marital relation cannot be affected after by any appeal or other proceeding, 244, 245.
death of a party, representatives of, when must be brought before the court on appeal or writ of error, 232, 233.
death of a party, writ of error, prosecution of after, 231-233.
death of a party terminates suits for, 230.
estoppel of surviving party to question, 245, 246.
fraud as a ground of relief from after the death of a party, 237.
jurisdiction to set aside decrees of, 236.
laches in not applying for relief from until after the death of a party, 234, 240.
legislative, effect of upon rights of property, 247.
relief from in equity, when will be granted after the death of a party, 237-242.
stranger to, when may attack decree of, 242.
suit for is purely personal, 236.
who may attack decrees of after the death of a party, 242.

Dower Rights, existence of does not constitute a breach of covenant of seisin, 453.

Easements, existence of does not constitute a breach of covenant of seisin, 453.

Encumbrances, existence of does not constitute a breach of covenant of seisin, 453.

Evidence, books, admissibility of to show that act not referred to in was not done, 847, 848.
books and reports showing quantity and quality of materials used, manufactured or produced, 851.
books, entries in constituting part of the res gestae, 847.
books, entries in made by employés who cannot be found or produced, 846.
books, entries in must have been made in the regular course of business, 843.
books, entries in which fail to refresh the memory of the witness, 844.
books made up from reports, 845, 851.
books other than of account, general admissibility of, 842, 848.
books, testimony necessary to support, 846, 847.
books of rules of corporations, admissibility of, 855.
check-books, admissibility of, 852.
check-books, stubs of, admissibility of, 852.

Evidence, corporations, books of in a controversy with members, admissibility of, 858, 859.
corporations, by-laws and minute-books of, admissibility of, 858.
diaries, admissibility of, 853.
field-books used in mining operations, admissibility of, 854.
herd-books, admissibility of, 857.
hotel registers, admissibility of, 852.
inventories, admissibility of, 852.
inventories of stock, admissibility of, 852.
livestock registers, admissibility of, 857.
loose slips of paper, whether admissible, 848.
memoranda, admissibility of with the paper on which made, 844, 845.
memoranda as secondary evidence, when admissible, 842.
memoranda, general admissibility of, 842.
memoranda, prerequisites to the admissibility of, 849.
memoranda, witness, when may testify from, 843-848.
memoranda which fail to refresh the memory of the witness, 844.
minute-books of lodges and corporations, admissibility of, 858.
negotiable instruments, burden of proof in action upon, 814, 817.
note-books of surveyors, admissibility of, 855.
note registers, admissibility of, 851.
payrolls, admissibility of, 849.
reports of employés, admissibility of, 855.
scaling-books, admissibility of, 851.
statements of customers' bank accounts made up from account-books, 854.
stock exchange books, admissibility of, 852.
stubs and stub-books, admissibility of, 852.
summarizations of results of examinations, 855.
tables representing the business of a corporation, admissibility of, 855.
time-books, admissibility of, 849, 850.
time slips, admissibility of, 849, 850.
train-sheets and reports admissibility of, 856.
Exemption from Execution of wearing apparel depends on the statutes, 43.
of wearing apparel does not authorize its being set off to the widow, 44.
of wearing apparel, garments, articles not in use as, when included within, 44.
of wearing apparel, goods not yet made into garments, whether included within, 44.
of wearing apparel, jewelry is not included within, 44.
of wearing apparel, jewelry, when included within, 45, 46.
of wearing apparel, watches, whether included within, 45, 46.
Lost Negotiable Instruments. See Stolen Negotiable Instruments.

Mandamus against corporations to compel the performance of their duties, 513-515.
against school boards and teachers, 518.
against telephone corporations, 515.
against water companies, 515.
assessments or taxation, control of by, 521.
corporations, duties of which are enforceable by, 513-515.
courts may be compelled by to exercise their jurisdiction, 521.
discretion, abuse of, when may be prevented, 505, 506.
doubt as to matter of law, when will not justify the refusal of, 494, 495.
duty, impossible cannot be enforced by, 495.
duty involving the exercise of judgment or discretion, performance of, extent which may be compelled by, 504.
duty, ministerial, performance of, when compellable by, 499.
duty must be positive, not discretionary merely, 493.
duty not official will not be enforced by, 495.
duty of a political or governmental character, compelling the performance of by, 509.
duty resulting from an office, trust or station, compelling the performance of by, 509.
duty to be enforced by must be specific and not complicated nor involving a series of acts, 496.
duty to be enforced, when need not consist of a single act, 496.
duty to be performed is necessary to authorize the issuing of, 493.
duty to the performance of which supervision of the court is necessary, whether may be enforced by, 496.
election boards, duties of which may be compelled by, 517.
judicial action, extent to which may be compelled by, 503-505.
judicial acts, what are within the meaning of the rule of, 505.
judicial officers, action of, when may be compelled by, 502.
legislative duties, compelling performance of by, 509, 510.
misconception of law, compelling notwithstanding, 507.
right to be enforced must be clear and positive, 494, 495.
to compel action where the nonaction was due to a mistake or misconception of the law, 508.
to compel a court to proceed with a trial, 503.
to compel elections and the canvassing of votes, 517.
to compel examining boards of physicians and dentists to act, 516.
to compel payment of demands, 519.
to compel the approval of official bonds, 518.
to compel the construction of public improvements, 518.
to compel the granting or refusing of licenses, permits or certificates, 515.
to compel the issuing of building permits, 516.
to compel the issuing of certificates of incorporation, 516.
to compel the exercise of a discretion, 521.
to compel the levying of assessments, 520, 521.
to compel the making of a contract, 497.
to compel the performance of a duty imposed by law, 497.
to compel the performance of a series of duties, 497.

Mandamus, to compel the performance of a ministerial duty by an executive officer, 498.
to compel the payment of claims, 520, 521.
to compel the Secretary of State to attest the signature of the governor, or to affix the seal of the state, 499.
to compel the signing of an ordinance passed by a municipal body, 499.
to compel the signing of statutes or ordinances duly enacted, 511.
to enforce a public right or duty, 497.
to enforce contract rights, 511, 512.
to keep inferior bodies or tribunals within their jurisdiction, 497.
to prevent a gross abuse of discretion, 505.
to try title to public office, 518.
whether a prerogative writ, 497.
will not issue to compel the doing of an act which will involve an official in litigation, 493.
Mortgages, negotiability of promissory notes, when destroyed by conditions in, 205-209.

Negotiable Instruments, amount, uncertainty in which destroys negotiability, 203.
attorneys' fees, stipulations for which destroy negotiability, 207-211.
certificates of deposit payable on return properly indorsed, 195.
condition retaining title to property, whether destroys negotiability, 194.
conditions destroying negotiability, cases illustrating, 193.
conditions for the return of property which destroy negotiability, 195.
conditions which do not destroy negotiability, cases illustrating, 194.
contingencies and uncertainty in payment, conditions respecting not permissible, 192.
contingencies which are certain to happen do not destroy negotiability of, 203.
contingencies which may never happen destroy negotiability of, 202.
date of payment, certainty required in, 199.
destroying by provisions making conditions as to payments, 193.
direction to charge to a particular account does not destroy negotiability, 196.
discounts, provisions for which destroy negotiability, 204.
exchange, provisions for, whether and when destroy negotiability, 212-214.
extension of time for payment, option of, whether destroys negotiability, 201.
fund out of which payment is to be made, mention of, when does not destroy negotiability, 196.
interest, stipulations for increase of on uncertain conditions, whether destroy negotiability, 204.

Negotiable Instruments, interest, uncertainty in the amount of, when destroys negotiability, 204.
money, foreign, stipulations for payment in, 198, 199.
money in which may be made payable, 197, 198.
mortgages given to secure, stipulations in concerning payment of taxes and insurance, 205, 206.
mortgages given to secure, stipulations in which destroy negotiability, 208, 209.
option of a party to have an extension of time, whether destroys negotiability, 201.
option to declare due before maturity, does not destroy negotiability, 200.
option to pay before maturity does not destroy negotiability, 200.
payable on or before a specified date, 200.
payment in commodities other than money, stipulations for destroy negotiability, 197.
payment out of a specified fund, stipulations for, whether destroy negotiability, 196.
payment, time of, uncertainty in which will destroy negotiability, 199, 200.
stipulations for waiver of homestead and exemption rights, whether destroy negotiability, 195.
title to property sold, stipulations concerning, whether destroy negotiability, 194, 195.
waivers of rights in which do not impair negotiability, 195, 196.
See Stolen Negotiable Instruments.

Quo Warranto, citizens and taxpayers as relators, 635.
common-law rule respecting, when still prevails, 634.
corporation, private, offices in, title to, whether may be questioned by private person, 646.
corporation, private, right of to act, whether may be questioned by private persons as relators, 643-646.
defeated candidate who is not entitled to the office, whether can proceed by, 640.
discretion of the court in granting leave to private persons to proceed by, 635.
history, origin and purpose of, 633.
municipal corporations, title of to their corporate franchises cannot be questioned at the relation of a private person, 640-643.
office claimants as relators, 638.
office, title to, whether may be contested by a defeated candidate, 640.
private persons as relators or applicants for, 634-650.
private persons as relators, discretion of the trial court in proceeding at the instance of, 650.
private persons, discretion of the court in granting leave to apply for, 653.
private persons must have an interest in the controversy or they cannot maintain an application for, 635.

Quo Warranto, private persons, public office, cases holding that they may not question title of the incumbent by, 637.
private persons, right of to proceed by in the name of the attorney general, 648.
private persons, right of to proceed by when the attorney general refuses to act, 649.
private persons, right of to proceed by with the consent of the attorney general, 648.
private persons, when may proceed by against persons usurping an office, 635-638.
private persons, whether may proceed against municipal corporations, 640-643.
private persons, whether may question the right of an officer of a private corporation to act, 646.
private persons, whether may question the right of private corporations to act, 643-646.
private persons who are not taxpayers, and taxpayers who are not citizens, 637.
statutory regulation of, 634.
to question title to a public office, citizens and taxpayers, when may maintain, 635.

Seisin. See Covenant of Seisin.

Statute of Frauds, beneficial effects of, 394.
earnest, whether may be regarded as a part payment, 394.
part payment, accepted at a date subsequent to the contract, 404.
part payment, agreement to cancel indebtedness, whether may constitute, 399.
part payment, agreement to pay a debt due to a third person, 400.
part payment, at what time must be made, 403-405.
part payment by check, 400.
part payment by giving a promissory note, 401.
part payment cannot consist of a mere agreement to pay or to give a credit on account, 398.
part payment, effect of as taking cases out of, 394.
part payment, forfeit money deposited as, whether may constitute, 402.
part payment generally takes case out of, 395-397.
part payment, in what may be, 397.
part payment need not be in money, 397.
part payment, parol agreement, whether may amount to, 399.
part payment, part performance distinguished from, 397, 398.
part payment, time when must be made is controlled by statute, 405.
part payment to an agent, 400, 401.
part payment, unaccepted tender cannot constitute, 402.
part payment, what deemed to be for the purpose of taking a case out of, 395.

Stolen Negotiable Instruments, bankers, rights of respecting, 803.
bills of exchange, rights of purchasers of, 804, 805.
bills of lading, 817.

Stolen Negotiable Instruments, bona fide purchasers of, rights of, 813.
bonds of the United States, 814.
bonds, public and private, 815, 816.
burden of proof in actions upon, 814, 817.
canceled before loss or theft of, 814, 815.
certificates of deposit, 817.
checks, certified, enforcement of, 816.
conflict of laws respecting, 805.
coupons belonging to bonds, 816.
delivery of, decisions holding it to be essential, 808-813.
delivery of, decisions holding it not to be essential, 805-808.
English law respecting, 803, 804.
forged indorsement of does not transfer title, 814.
gross negligence in purchasing, 804.
held as collateral security, 814.
history and development of the law of in England, 803.
issued without authority, 815.
national courts, rules of respecting, 804.
negotiable by delivery, 813.
negotiable by indorsement, 813-815.
state warrants, rules applicable to, 808.
United States, when bound by, 808.
Streets, abutting property owners, business purposes for which may use, 350-352.
abutting property owners, rights of in, 344-346.
abutting property owners, rights of in, in addition to the general public, 344, 345.
abutting property owners, rights of in sidewalks, 345.
abutting property owners, right of to use for loading and unloading goods, 349, 350.
are held in trust for the public, 345.
areaways in, power of municipalities to authorize, 348.
automobiles remaining in, whether may be authorized by a municipality, 354.
bay windows, whether may be authorized, 346.
booths and stands in for the sale of commodities, right of municipality to authorize, 352.
bridges and viaducts in or over, power of municipalities to authorize, 347.
building materials, right to deposit and keep in, 351.
buildings, use of for moving, 351.
business in, power of municipalities to authorize, 350, 352.
coal-holes in, power of municipalities to authorize, 348.
drinking fountains in, power of municipalities to authorize, 347.
encroachments and obstructions in which a municipality may authorize, 348, 349.
fairs and carnivals in may be authorized by a municipality, 353.
fences in, power of municipalities to authorize, 348.
fireworks, exhibition of in may be authorized by a municipality, 354.

Streets, goods, loading and unloading and keeping of in which a municipality may authorize, 349, 350.
grass plots in, power of a municipality to authorize, 351, 352.
hacks, right of to stand in may be authorized by a municipality, 354.
hydrants in, power of a municipality to authorize, 347.
markets in, whether may be authorized, 346-353.
municipal corporations, power of to authorize use of for private purposes, 345.
platforms in, power of municipalities to authorize, 348.
private purposes, grants of for by municipalities, 345.
produce stands in, whether may be authorized by municipality, 353.
pumps in, power of a municipality to authorize, 347.
railways in, power of municipalities to authorize, 346.
scales for weighing commodities, whether may be maintained in, 353.
shade trees in, right of municipalities to authorize, 351, 352.
sidewalks are parts of, 345.
stairs in, power of municipality to authorize, 348.
stepping-stones in, right of a municipality to authorize, 348.
telegraph and telephone lines, power of municipalities to authorize in, 346.
structures which a municipality may authorize to be erected and maintained in, 346.
uses to which may be appropriated, 345.
wheels, shops and eating-houses upon, whether may be maintained in, 353.

INDEX.

ABSENTEES.

See Executors and Administrators.

ACKNOWLEDGMENT.

See Deeds, 4.

ADOPTION.

ADOPTION OF ADULT.—The word "child," as used in an adoption statute without limitation as to age, has reference to the child as a relational status, and does not control the age of the subject of adoption. Hence under such statute an adult may be the subject of adoption. (Ala.) Sheffield v. Franklin, 37.

See Wills, 21, 22.

ADVERSE POSSESSION.

1. **ADVERSE POSSESSION—Under Colorable Title.**—If one occupies a portion of a parcel of land under colorable title acquired by deed delivered and recorded, his occupancy extends to the whole of the land included in the deed. (Me.) Hornblower v. Banton, 300.

2. **ADVERSE POSSESSION—Colorable Title—Presumption.**—One in possession of land under a paper title, containing a specific description by metes and bounds, and notoriously exercising control and dominion over the premises, is presumed to be doing so to the extent of his claim, but such presumption must be limited to circumstances which would reasonably create it, and cannot, without evidence to support it, be extended to distinct lots held under different deeds, though the colorable title may be in the same person, nor even to separate contiguous tracts of land described in the same deed. (Me.) Hornblower v. Banton, 300.

3. **ADVERSE POSSESSION — Constructive Possession.**—Unless lots claimed under adverse possession are inclosed by a common fence and embraced under one general description in the deed, or in some such way merged in one parcel so that the occupation of a portion thereof could not be reasonably referred to anything less than the whole tract, the rule of constructive possession is not applicable. (Me.) Hornblower v. Banton, 300.

4. **THE CONSTRUCTIVE POSSESSION of Wild Land** is in the owner of the fee unless there is an adverse possession in some one else. (Fla.) Richbourg v. Rose, 1061.

5. **ADVERSE POSSESSION of Turpentine—Timber Land.**—The occupation of pine land, by annually making turpentine on it, is such an actual possession as will oust a constructive possession by one claiming merely under a superior paper title. (Fla.) Richbourg v. Rose, 1061.

6. **ADVERSE POSSESSION.—The Effect of Color of Title,** when an entry is made and possession taken and held in accordance with it,

is to define the extent of the possession claimed; but the entry and possession must be proved by acts sufficient to constitute such adverse entry and possession. (Fla.) Richbourg v. Rose, 1061.

7. **ADVERSE POSSESSION—Misleading Instruction.**—An instruction that "If the jury should find from the evidence that has been introduced before them that the plaintiff was the owner of pine trees located upon lands described in the declaration by a conveyance from persons who derived title to the land by title from the United States government, and that the defendants were in possession, at the time of the institution of this suit, or crude turpentine in the boxes located on this land, and they were not there with the plaintiff's consent—that is, they were not in possession with the plaintiff's consent—then the jury should ascertain how much of the turpentine there was, and its value, and render a verdict for the plaintiff for the amount so found," is erroneous and misleading, in that it excludes the contention of defendants that they were in adverse possession, claiming under color of right and were not trespassers. (Fla.) Richbourg v. Rose, 1061.

8. **ADVERSE POSSESSION by Purchaser of Property at a Tax Sale.**—During the time when property is subject to redemption from a tax sale, the possession of the purchaser is not, and cannot be, adverse to the owner, and the statute of limitations cannot commence to run against the latter. (Utah) Salt Lake Investment Co. v. Fox, 865.

9. **ADVERSE POSSESSION—A Mortgagee in Possession.**—The fact that the grantee of the purchaser at an invalid foreclosure sale may in equity be deemed a mortgagee in possession does not make him such in fact so that his possession is not adverse to the mortgagor. (N. D.) Brynjolfson v. Dagner, 595.

10. **LIMITATIONS OF ACTIONS—Prescriptive Title, When does not Arise as Against the State.**—Tide-lands situated in a navigable bay and constituting part of the waterfront thereof are property devoted to a public use, of which private persons cannot obtain title by prescription, and the statute of limitations does not apply to an action by the state or its agents to recover such property from one using it for a private purpose not consistent with the public use. (Cal.) People v. Kerber, 93.

11. **LIMITATION OF ACTIONS—Conflict Between the Statutes and the Constitution.**—The provisions of a state constitution are of higher force than the statute of limitations or the statute defining the manner of acquiring title to property by adverse occupancy. If a state constitution prohibits the granting or sale of certain classes of property to private persons, such persons cannot acquire prescriptive title thereto by their occupancy under a claim of ownership. The statute of limitations, as to such property, must be regarded as inoperative after the adoption of the state constitution. (Cal.) People v. Kerber, 93.

Note.

Adverse Possession, boundaries of deed as controlling, 305.
constructive where the possessor has no color of title, 302, 303.
distinct tracts, what are for the purposes of, 306.
of a part may be by tenant or agent and yet extend to the whole, 305.
of a part under a contract void by the statute of frauds, 303.
of a part under a writing describing the whole extends to the entire tract, 304.
of a part under the claim of a gift of the whole, 303.

Adverse Possession of a part where another possessor holds the residue, 306.
of a part where the possessor has no conveyance, 302, 303.
of a part without any purpose to claim the residue, 305.
of one of two or more contiguous tracts described in the same deed, 307.
of one or more distinct tracts does not extend to the others, 306.

AGENCY.

See Principal and Agent.

ALIMONY.

See Divorce, 6-9.

ANIMALS.

1. **ANIMALS, Owners of, When not Made Answerable for Injuries Due to Their Being on the Highways.**—A statute making it unlawful to suffer cattle to run at large is not presumed to have for its object the safety of travelers on the public highways, and therefore does not render the owners of such animals liable for injuries suffered by their being in such highway, where no liability existed at the common law. (Ohio St.) Marsh v. Koons, 688.

2. **ANIMALS, Liability of Owner of Cattle for Injuries Resulting to Traveler on Public Way.**—The owner of a cow which was lying in a public highway is not answerable for injuries suffered by a person riding in a vehicle who was thrown therefrom because his horse was scared by the cow getting up from such lying position. (Ohio St.) Marsh v. Koons, 688.

See Bailment; Waters and Watercourses, 9, 10.

APPEAL AND ERROR.

1. **APPEAL AND ERROR.—The Death of One of the Parties in Error After the Petition in Error is Filed** and summons issued does not abate the proceedings, nor render any other or further assignment of error necessary. (Wyo.) Field v. Leiter, 997.

2. **APPEAL AND ERROR—Substitution Because of the Death of the Plaintiff in Error.**—On the death of a trustee, who is a defendant in the cause and also one of the plaintiffs in error, during the pendency of the proceeding in error, it is proper to substitute his successor in the trust, to have the same rights and liabilities as the decedent. (Wyo.) Field v. Leiter, 997.

3. **APPEAL—Necessity for Objections.**—Where no objections were made to testimony before the trial court, the appellate court will not review the rulings thereon. (Fla.) Patrick v. Kirkland, 1096.

4. **APPEAL—General Assignment of Error.**—An assignment of error that the whole of a charge to the jury is erroneous is too general, and raises no question that the appellate court is bound to consider. (Conn.) Dalton v. Knights of Columbus, 116.

5. **APPEAL AND ERROR.—Striking Out Papers Improperly Sent Up.**—If the papers and journal entries in a case between the same parties other than that appealed from are certified and returned to the appellate court, they will be stricken out and directed to be returned to the clerk of the court so certifying them. (Wyo.) Union Stockyards Nat. Bank v. Maika, 1032.

6. **APPEAL—Harmless Error.**—Where there is sufficient competent evidence in the record to sustain the decree, it will be affirmed,

although the record also contains incompetent evidence. (Fla.) Patrick v. Kirkland, 1096.

7. **HARMLESS ERROR—Admission of Incompetent Testimony.**—Where there is sufficient evidence given by competent witnesses upon a controverted point to sustain the decree, the admission of evidence objected to on the ground that the witnesses, being parties to the suit, could not testify as to communication had with a person deceased at the time of the trial, constitutes harmless error. (Fla.) Patrick v. Kirkland, 1096.

8. **APPEAL AND ERROR—Evidence, When Will not be Considered.**—In an action at law, the appellate court will not consider inconsistencies in the testimony of the witnesses for the respondent, because they go on to the weight of the evidence and the credibility of the witnesses. (Utah) Eureka Hill Mining Co. v. Bullion Beck etc. Co., 835.

9. **APPEAL AND ERROR.**—Where there is substantial evidence to support the finding of the trial court, it will not be set aside on appeal. (Utah) Eureka Hill Mining Co. v. Bullion Beck etc. Co., 835.

10. **APPEAL.—Where the District Court Certifies a Question to the Supreme Court** for review, under the North Dakota statute, it should make a brief statement of the facts established, but should not return the evidence; no questions of fact are reviewable by the supreme court under such proceedings, but only questions of law. (N. D.) Grand Forks County v. Frederick, 621.

11. **APPEAL—Trial De Novo.—The Supreme Court has the Power,** under section 7229, Revised Codes, finally to determine the issues between the parties by trying the case de novo on the same evidence submitted to the district court. (N. D.) Mosher v. Mosher, 654.

Note.

Appeal and Error, divorce, appeal from, representatives who must be brought in after the death of a party, 243.
divorce, effect of death of party pending an appeal from, 231, 243.

ARCHITECT'S CERTIFICATES.

See Building Contracts.

ARREST.

1. **ARREST—Right of Officer to Take Property—Return.**—An officer making an arrest and taking articles of property to be used as evidence of the crime is not required to make return upon such taking upon his warrant. (Me.) Getchell v. Page, 307.

2. **ARREST—Right to Take Property in Possession.**—An officer making an arrest upon a warrant upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The title to the property remains in the owner, but the lawful possession is temporarily in the officer for evidentiary purposes. (Me.) Getchell v. Page, 307.

3. **ARREST—Right to Take Property in Possession.**—If an officer having authority to execute a warrant issued for the search and seizure of intoxicating liquors, finds such liquors and arrests the owners, he may also take and keep such property therewith and all articles reasonably connected as may be reasonably used as evidence of the guilt of the person arrested. (Me.) Getchell v. Page, 307.

ASSAULT.

EVIDENCE—Burden of Proof of Self-defense on the Part of Persons Committing an Assault.—When, in an action for personal injuries inflicted on the plaintiff by the defendants, they admit the assault and injury and claim to have acted in self-defense, the plaintiff is not bound to prove in the first instance that he was not the aggressor. The burden of proving self-defense rests on the defendants. (Cal.) Marriott v. Williams, 87.

ASSIGNMENTS.

1. **CONTRACTS.—Executory Contracts are Assignable Except Such as** call for the performance of personal services or involve personal credit or trust; and this exception may be waived by the party for whose benefit it exists, and it does not apply when the contract is entirely objective in its nature and gives clear indication that the personality of the other party was in no way considered. (N. C.) Atlantic etc. R. R. Co. v. Atlantic etc. Co., 550.

2. **CONTRACTS—Assignment of Contracts to Furnish Wood.**—A contract to furnish wood to a railway company for use in its engines is assignable by that company to its lessee; and if the lessee, after using wood furnished under the assigned contract, refuses to receive the remainder, it is liable to the lessor in damages which have been recovered against it by the contractor for breach of the contract. (N. C.) Atlantic etc. R. R. Co. v. Atlantic etc. Co., 550.

See Judgments, 1, 2.

ASSOCIATION.

1. **ATHLETIC ASSOCIATION—Liability for Injury to Spectator.**—Where a voluntary athletic association, composed of the undergraduates and alumni of a university, obtain permission from the regents to erect a bleacher on the field, it and its officers, not the regents, are the proper parties defendant to an action by a spectator at a football game for injuries received from the collapse of the structure, owing to its negligent construction. (Mich.) Scott v. University of Michigan Athletic Assn., 423.

2. **ATHLETIC ASSOCIATION—Liability for Fall of Bleacher.**—The managers of a university athletic association who erect a stand to which they charge an admission fee to view a game of football are in the position of proprietors of a public resort, and it is their duty to see that the structure is in a fit and proper condition for such use, and to exercise a high degree of care to prevent disaster. They are not insurers of safety; they do not contract that there are no unknown defects not discoverable by the use of reasonable means, but they do contract that except for such defects the stand is safe. (Mich.) Scott v. University of Michigan Athletic Assn., 423.

See Benefit Associations.

ATHLETIC ASSOCIATIONS.

See Association.

ATTACHMENT.

1. **ATTACHMENT, at What Time may Issue.**—Under the provisions of section 4302, Revised Statutes, a writ of attachment may

issue at the time of issuing the summons or at any time thereafter. (Idaho) Ridenbaugh v. Sandlin, 175.

2. **ATTACHMENT, Premature Issuing of, What is.**—A writ of attachment issued prior to the issuance of any summons or to the appearance of the defendant in the case would be subject to discharge on motion on the ground that the same was improperly issued. (Idaho) Ridenbaugh v. Sandlin, 175.

3. **ATTACHMENT—Irregularity in the Issuing of the Summons, Effect of.**—Where the plaintiff has commenced his action by filing his complaint, and demands of the clerk the issuance of a summons, and the clerk, in compliance therewith, issues what purports to be a summons, and thereafter issues a writ of attachment, the latter writ will not be quashed merely because the summons was irregular or in some respects failed to comply with the provisions of section 4140, Revised Statutes, or is in some respect vulnerable to the assault of a motion to quash. (Idaho) Ridenbaugh v. Sandlin, 175.

4. **ATTACHMENT Supported by Summons Which Might be Quashed on Motion.**—The vitality and efficiency of a writ of attachment cannot in all cases and at all hazards be tested by the strength of the summons to withstand a motion to quash. (Idaho) Ridenbaugh v. Sandlin, 175.

5. **ATTACHMENT, Mistake of the Clerk Which will not Destroy.**—The fact that the clerk makes a mistake in drawing a summons, and in some respect fails to comply with the statutory requirements, will not alone and of itself render the process as though no summons whatever had been issued, so as to subject the writ of attachment to dissolution on the grounds that no summons had been issued at the time of the issuance of the writ. (Idaho) Ridenbaugh v. Sandlin, 175.

6. **ATTACHMENT—Funds in Custody of Law.**—Money deposited in court in an action of interpleader and directed by the court to be paid to a third person is not subject to foreign attachment, with the usual consequence that judgment may be followed by scire facias proceedings to appropriate the fund. (Conn.) Shelton v. Wolthausen, 131.

7. **FOREIGN ATTACHMENT.—Equitable Interests are not the Subjects** of foreign attachment, save as special statutes may have made them so. (Conn.) Shelton v. Wolthausen, 131.

ATTORNEY AND CLIENT.

1. **ATTORNEY AND CLIENT—Void Contract.**—A contract between client and attorney is void if made without a fair and full disclosure by the attorney of the facts on which it is predicated. (Iowa) Donaldson v. Eaton & Estes, 275.

2. **ATTORNEY AND CLIENT—Contracts Between.**—As between attorney and client a settlement, though voluntarily made, will be inquired into by the courts, and money or property procured by the attorney will be restored to the client if he has been imposed upon. (Iowa) Donaldson v. Eaton & Estes, 275.

3. **ATTORNEY AND CLIENT—Evidence—Burden of Proof.**—The burden is on an attorney to show that in any contract or settlement with his client or dealing with his client's property he has acted in fairness and good faith, with a disclosure of all the facts. (Iowa) Donaldson v. Eaton & Estes, 275.

4. **ATTORNEY AND CLIENT—Contracts Between.**—An attorney who acts in bad faith and seeks to secure his personal advantage to the prejudice of his client may be denied any compensation for his service. (Iowa) Donaldson v. Eaton & Estes, 275.

5. **ATTORNEYS AT LAW—Contingent Fees, Contracts for.**—An attorney and client may lawfully agree upon compensation to the attorney contingent upon the amount to be recovered, and such contract may be a valid consideration for the assignment of an interest in the judgment if already obtained, and may be enforced in equity. (Ohio St.) Davy v. Fidelity etc. Ins. Co., 694.

6. **ATTORNEY AND CLIENT, Contract Containing Express or Implied Assignment of the Cause of Action.**—If a contract between an attorney and client contains an express or implied assignment of an interest in the subject of the litigation, or otherwise limits the right of the client to settle or compromise with his adversary without the consent of anybody else, such limitation makes the statute voidable at the option of the client, and its illegality may be pleaded as a defense in any action founded upon the contract, and the claim may be settled or compromised without the consent of the client and without creating any liability in favor of the attorney against the party so settling or compromising. (Ohio St.) Davy v. Fidelity etc. Ins. Co., 694.

7. **ATTORNEYS AT LAW, Contract with—Entirety of.**—A contract between an attorney and his client for the prosecution of a claim by the former and that the latter shall have no power to settle or compromise his claim without the consent of the attorney is entire and indivisible, and if this stipulation is invalid, there can be no recovery on the contract. (Ohio St.) Davy v. Fidelity etc. Ins. Co., 694.

8. **ATTORNEY AND CLIENT—Contract for Fees, When cannot Make the Adverse Party Answerable.**—If, by the terms of a contract between an attorney and his client, the former becomes entitled to a share of the recovery, and the adversary is deprived of the right to settle or compromise without the consent of the attorney, and the latter becomes entitled to a specified share in the amount to be recovered, such contract is indivisible and wholly void as against such adversary, and no recovery can be sustained against him by the attorney, because of his settlement of the demand sued upon. (Ohio St.) Davy v. Fidelity etc. Ins. Co., 694.

See Champerty; Witnesses, 2-4.

AUTOMOBILES.

See Highways; Master and Servant, 9, 10.

BAGGAGE.

See Carriers, 29-33.

BAILMENT.

1. **BAILMENT—Liability for Death of Animal.**—Where a person hires a horse, without any special contract, the law imposes on him the duty to take ordinary care of the animal; and in case of its death without his fault, he is not responsible. (N. D.) Grady v. Schweinler, 674.

2. **BAILMENT—Liability for Death of Animal.**—Where a person hires a horse and agrees positively and unequivocally to pay for the animal if he is unable to return it for any reason, he is liable for the death of the horse while in his possession, though without his fault. (N. D.) Grady v. Schweinler, 674.

3. **BAILEE—Unauthorized Use of Property.**—One who hires a horse to drive to a certain place is liable for an injury to the animal while being driven by him or by others with his consent to a different

place, although the injury is due to accident and not negligence; and a third person who so uses the horse with knowledge of the purpose for which it was hired is under a similar liability. (Conn.) Palmer v. Mayo, 123.

BALLOTS.

See Elections.

BANKRUPTCY.

1. **BANKRUPTCY—Conclusiveness of Recital of Fraud in Judgment.**—Recitals in a judgment that recovery against the defendant was because of fraud in obtaining goods and failing to return them is conclusive on that point in subsequent proceedings by him to restrain an execution sale, on the ground that the judgment has been satisfied by his discharge in bankruptcy. (Wash.) Nichols v. Doak, 942.

2. **BANKRUPTCY—Judgment of Fraud in Obtaining Goods.**—Where a judgment against a bankrupt recites that recovery was because of his fraud in obtaining goods, and orders a recovery of damages on account of the fraud, it will be presumed on collateral attack that the court found that a return of the property was impossible or impracticable, and, the judgment will not be held defective in form because not in the alternative. (Wash.) Nichols v. Doak, 942.

3. **BANKRUPTCY.—A Judgment for Damages Because of Fraud** in obtaining goods is not affected by bankruptcy proceedings, and becomes a lien on the property thereafter acquired by the bankrupt. (Wash.) Nichols v. Doak, 942.

BANKS AND BANKING.

In General.

1. **BANKING—Check, Failure to Present Within a Reasonable Time.**—A bona fide purchaser, without notice, of a check invalid because delivered on Sunday, loses the right to maintain an action thereon against the payee and indorser by failure to present it within a reasonable time for payment. (Mass.) Gordon v. Levine, 361.

2. **FORGED CHECK—Recovery of Money Paid.**—The drawees who have by mistake paid a forged check may recover the money paid unless the person receiving it has been misled to his prejudice by the failure of the drawees to detect the forgery; and the burden of showing that he has been so misled or prejudiced rests on him. (N. D.) Bank of Lisbon v. Bank of Wyndmere, 588.

Garnished Bank.

3. **BANKS—Garnished Bank—Liability for Paying Out Funds.**—A bank that pays out the funds of a depositor, when it is garnished, under execution against a judgment debtor bearing the same name as the depositor, is liable to the latter for the amount of the payment. (R. I.) O'Neil v. New England Trust Co., 740.

Savings Banks.

4. **SAVINGS BANKS, By-Laws and Rules of, When Reasonable.**—The by-laws of a savings bank requiring presentation of the passbook and notice to the bank in the case of loss of the book as a condition precedent to payment are reasonable, and, when brought to the notice of the depositor, become part of the contract between him and the bank. (Ohio St.) Hough Ave. etc. Banking Co. v. Anderson, 707.

5. **SAVINGS BANKS, Duties of, in Making Payment.**—Notwithstanding any contract between a savings bank and its depositors, it

must exercise good faith and reasonable care in making payment, so that payments shall be made only to persons entitled to receive them. (Ohio St.) Hough Ave. etc. Banking Co. v. Anderson, 707.

6. **SAVINGS BANK, When Liable, Though Payment has been Made to a Person Presenting a Passbook.**—If a passbook is presented by a person not claiming to be the depositor, but to have a written order from the latter for the payment of the money, and payment is made thereon without comparing the signature with that of the depositor, the bank is guilty of negligence, and remains liable to him if the order is a forgery, notwithstanding the rules printed in the passbook, declaring that the book must be presented for the purpose of having payments entered therein, and that the company will not be held liable for loss sustained where the depositor has not given notice of his book being stolen or lost, and that payment upon presentation of the book shall be a discharge of the company for the amount paid. (Ohio St.) Hough Ave. etc. Banking Co. v. Anderson, 707.

BASTARDS.

See Descent and Distribution; Wills, 23, 24.

BAY WINDOWS.

See Easements, 3, 4.

BENEFIT ASSOCIATIONS.

1. **BENEFIT SOCIETY—Beneficiaries Belonging to "Immediate Family."**—Under a clause in the charter of a benefit society limiting the persons who may be named beneficiaries to those who belong to the "immediate family" of the insured, he may name as his beneficiary an adult daughter living with him as one of his household. (Conn.) Dalton v. Knights of Columbus, 116.

2. **BENEFIT SOCIETY—Beneficiaries not Members of Family.**—Where the charter and constitution of a beneficial order provide for the payment of a benefit on the death of a member to his family or "as he may direct," he may designate whom he will as his beneficiary, and is not limited in his choice to members of his family. (R. I.) Supreme Council Catholic Knights of America v. Fitzpatrick, 752.

3. **BENEFIT SOCIETY—Ultra Vires Contract.**—The fact that a benefit society transcends its powers in issuing a certificate to a beneficiary not a member of the family of the member does not render the contract ineffectual under the statutes of Rhode Island. (R. I.) Supreme Council Catholic Knights of America v. Fitzpatrick, 752.

BETTERMENTS.

See Landlord and Tenant, 4.

BILLS AND NOTES.

Negotiability of Instruments.

1. **BILLS AND NOTES—State Coupon Bonds.**—A coupon bond of the state, valid in its inception, is a negotiable security, and the state issuing it incurs the same responsibility which attaches to an individual or a corporation in a like case. (S. C.) Ehrlich v. Jennings, 795.

2. **NEGOTIABILITY OF NOTE, When Destroyed by Provision Respecting the Title to Property.**—A recital in a title-retaining note that the title to the property for which it is given shall remain in the

payee, and that he shall have the right to take possession of it when he may deem himself insecure, even before maturity of the note, renders such instrument non-negotiable under the provisions of sections 1 and 5 of an act relating to negotiable instruments, approved March 30, 1903 (Sess. Laws 1903, p. 380). (Idaho) Kimpton v. Studebaker Bros. Co., 185.

3. **NEGOTIABILITY OF INSTRUMENT, Destruction of by Making Time of Payment Uncertain.**—A promissory note containing a stipulation whereby the sureties, guarantors, indorsers and makers waive notice of the granting of any extension of time for payment and waive the right of defense on the ground that extension has been made without notice to them or either of them, is not a "negotiable promissory note" within the meaning and intent of the negotiable instrument law of this state. (Idaho) Union Stock Yards Nat. Bank v. Bolan, 146.

Transfer of Non-negotiable Paper.

4. **A NON-NEGOTIABLE NOTE, Although Assigned or Transferred Before Maturity and for Full Value,** is subject to all legal defenses which might have been interposed against it in the hands of the original payee. (Idaho) Kimpton v. Studebaker Bros. Co., 185.

5. **BILLS AND NOTES.—If a Note is Non-negotiable, the Indorser Holds It Subject** to all equities, counterclaims and defenses that existed between the maker and the payee. (Idaho) Union Stock Yards Nat. Bank v. Bolan, 146.

Bona Fide Holders.

6. **BILLS AND NOTES—Bona Fide Purchaser.**—Knowledge that a note was given in consideration of an executory agreement of the payee which has not been performed will not deprive the indorsee of the character of a bona fide holder, unless he also has notice of such agreement and its breach. (Iowa) McNight v. Parsons, 265.

7. **BILLS AND NOTES—Bona Fide Purchaser—Consideration.**—A bank receiving negotiable paper in consideration of credit upon its books, which credit is not absorbed by an antecedent indebtedness or exhausted by subsequent withdrawals, is not a purchaser in due course of business. (Iowa) McNight v. Parsons, 265.

8. **BILLS AND NOTES—Conditional Delivery—Fraud—Defense.** If a person to whom the conditional delivery of a note has been made puts it in circulation in violation of that agreement, such act is a fraud, and constitutes a good defense to an action thereon by one who is not a bona fide holder. (Iowa) McNight v. Parsons, 265.

9. **BILLS AND NOTES—Bona Fide Purchaser—Burden of Proof.** The title of any person who negotiates an instrument in breach of faith or under circumstances amounting to a fraud is defective, and the burden is cast upon the holder to show that he or some other person through whom he claims acquired the paper innocently. (Iowa) McNight v. Parsons, 265.

10. **BILLS AND NOTES—Bona Fide Purchasers—Evidence.**—The evidence of the cashier of a bank that he or the bank purchased a note before maturity is not necessarily sufficient to enable the court to say as a matter of law that the bank received it in good faith, nor does it negative notice or knowledge on the part of the other officers of the bank, that the note was not received in good faith. (Iowa) McNight v. Parsons, 265.

11. **BILLS AND NOTES—Notice of Infirmity.**—Notice which will invalidate a note in the hands of an indorsee is actual knowledge of

its infirmity, or of such facts that his action in taking the paper amounts to bad faith, but if the facts shown have any fair tendency to show bad faith, the question remains one of fact, and not of law, especially if the evidence of fraud is sufficient to put the burden of showing good faith on the holder. (Iowa) McNight v. Parsons, 265.

Stolen Instruments.

12. **BILLS AND NOTES—Title to Stolen Negotiable Instruments.** The title of a bona fide holder of a stolen negotiable instrument acquired before maturity is good against the world. (S. C.) Ehrlich v. Jennings, 795.

13. **BILLS AND NOTES—Stolen Coupon Bonds—Liability for.**—The state is liable for a coupon bond issued by it in the hands of an innocent holder before maturity, though it had been surrendered for cancellation and stock issued therefor, even if stolen before cancellation, and put in circulation by the person by whom it was stolen. (S. C.) Ehrlich v. Jennings, 795.

Payment—Authority to Receive.

14. **PAYMENT, Authority to Receive—Presumption.**—The burden rests upon the person making the payment of a negotiable instrument to prove that he to whom such payment was made was authorized to receive it, though it was by its terms payable in his office. (Ohio St.) Hoffmaster v. Black, 679.

15. **PAYMENT, Authority to Receive.—The Fact that a Negotiable Instrument is Made Payable at the Office of a Designated Person** does not constitute him the agent to receive such payment, when he is not in possession of the instrument nor of the mortgage given to secure it. (Ohio St.) Hoffmaster v. Black, 679.

16. **PAYMENT—Authority to Receive Principal is not Implied from the Reception of Interest.**—There is no presumption from the collection of interest by the payee who has ceased to be the holder of a note and the payment thereof by him to the latter that such original payee had authority to receive payment of the principal. (Ohio St.) Hoffmaster v. Black, 679.

See Sunday.

BLEACHER.

See Associations.

BONDS.

CONSTITUTIONAL LAW—Stolen Bonds—Increase of State Debt.—The recognition by the state of a stolen coupon bond as a valid obligation in the hands of an innocent holder does not increase the state debt under a provision of a state constitution prohibiting the legislature from increasing the state debt without a vote of the people. (S. C.) Ehrlich v. Jennings, 795.

See Bills and Notes.

BOUNDARIES.

DEEDS—Boundaries—Artificial Pond.—Under a deed bounding the land therein surveyed by an artificial pond which has been in existence long enough to become a permanent body of water and is still being kept up and maintained as such, the line of the land conveyed does not extend to the thread of the stream from whose waters

the pond was formed, but only to the low-water mark of the pond at the date of the deed. (N. C.) Patapsco Guano Co. v. Bowers-White Lumber Co., 473.

BUILDING CONTRACTS.

1. **BUILDING CONTRACT—Days of Grace.**—Under a stipulation in a building contract that "if the work is pushed a few days grace will be allowed," it is not for the court to say that thirteen days of delay are the days of grace contracted for, for the question depends upon the character of the work, the time required to do it, and all the circumstances surrounding the transaction. (Mich.) Ross v. Loescher, 418.

2. **BUILDING CONTRACT—Conclusiveness of Architect's Certificate.**—Where a building contract makes the determination of the architect as to what is required of the contractor by the plans and specifications conclusive upon him, a construction that such determination is not likewise conclusive upon the owner should not be adopted unless imperatively required by the terms of the contract. (Mich.) Young v. Stein, 412.

3. **BUILDING CONTRACT—Conclusiveness of Architect's Certificate.**—An architect's certificate of the performance of a building contract, made as the agent of the owner, binds the latter, in the absence of fraud or collusion, as much as though he himself had signed. (Mich.) Young v. Stein, 412.

4. **BUILDING CONTRACT—Conclusiveness of Architect's Certificates.**—The certificate of an architect, made as agent of the owner, estops the latter from raising the question of a failure on the part of the contractor to comply with the plans and specifications, so far as such failure is not the result of bad workmanship or materials, which the building contract expressly excepts. (Mich.) Young v. Stein, 412.

BUILDING PERMITS.

See Municipal Corporations, 3, 4.

CARRIERS.

Of Passengers.

1. **CARRIERS OF PASSENGERS—Employé as Passenger—Liability for Negligence.**—If a carrier of passengers employs a person and assigns him to a place of labor some distance from his home, giving him in addition to his wages tickets which entitle him to ride to and from his work, he is, while riding upon such a ticket to or from his employment, a passenger, and the railroad company employing him is liable to him for an injury received without his fault and caused by its negligence. (Me.) Hebert v. Portland R. R. Co., 297.

2. **CARRIERS OF PASSENGERS—Negligence—Pleading.**—In an action to recover for negligence, where the relation between the parties is that of passenger and carrier, a general allegation against the latter of negligence is sufficient, without particular specification. (Me.) Hebert v. Portland R. R. Co., 297.

3. **A CARRIER OF PASSENGERS is Held to the Exercise of the Highest Degree of Care** for their safety and transportation, and liable for any injuries sustained by them in the course of transportation through the failure to exercise such care. (Cal.) Bonneau v. North Shore R. R. Co., 68.

4. **CARRIERS, Negligence of, Prima Facie Evidence of.**—A passenger makes out a prima facie case against a carrier when he shows

that he was injured by an accident happening to the train in which he was riding in the course of its operation by the carrier. (Cal.) Bonneau v. North Shore R. R. Co., 68.

5. **CARRIER'S NEGLIGENCE—Burden of Proof.**—A carrier must assume the burden of proof in an action by a passenger to recover for injuries suffered by an accident happening on the train on which he was riding, in the course of its operation by the carrier, to rebut the presumption of negligence arising from the accident. (Cal.) Bonneau v. North Shore R. R. Co., 68.

6. **CARRIERS, Burden of Proof as to the Cause of an Accident.** In an action to recover for injuries suffered by a passenger from the overturning of a car, it is not error to instruct the jury that the carrier must show that the overturning was the result of inevitable casualty, or of some cause which human care and foresight could not prevent, and if the carrier does not explain how the overturning occurred, the presumption of negligence remains. The only explanation which such an instruction calls for is that the accident was the result of some cause other than the negligence of the carrier. (Cal.) Bonneau v. North Shore R. R. Co., 68.

7. **CARRIERS—Negligence, Instruction as to Burden of Proof.**—In an action by a passenger to recover for injuries suffered from the overturning of a car, an instruction is not erroneous which states that the plaintiff was a passenger of the defendant, and that the car in which he was riding was derailed and overturned without his fault, is all that the plaintiff need establish, in the first instance, in order to entitle him to recover for such injuries as may have been proximately caused him thereby, and that when the plaintiff has done this, the legal presumption arises that the derailment or overturning was through the negligence of the defendant, and the burden of proving that there had been no negligence is cast on the defendant. (Cal.) Bonneau v. North Shore R. R. Co., 68.

Interurban Railways.

8. **INTERURBAN RAILROADS—Duty to Provide Platforms—Negligence.**—An interurban railway company operating a car which, for the accommodation of passengers, is stopped at highway crossings where they desire to alight need not provide a passenger platform at each of such crossings, but must exercise at least reasonable care to enable a passenger to alight with as little danger as practicable, and if the car is stopped and he is thereby invited to alight, at a place more hazardous than that at which the car might conveniently have been stopped, the railway company is negligent. (Iowa) McGovern v. Interurban Ry. Co., 215.

9. **INTERURBAN RAILWAYS — Negligence, Contributory.**—A passenger on an interurban car which is stopped for him to alight at a highway crossing may reasonably assume that the car has been stopped in the portion of the highway where he is invited to alight, unless warned of danger, and he is not conclusively negligent in accepting the invitation to alight at a place which is in fact unsafe. (Iowa) McGovern v. Interurban Ry. Co., 215.

10. **INTERURBAN RAILWAYS — Negligence, Contributory.**—A passenger on an interurban railway does not assume the risk involved in stopping the car for him to alight at more dangerous place than that where it is usually stopped. (Iowa) McGovern v. Interurban Ry. Co., 215.

11. **INTERURBAN RAILWAYS—Negligence—Assumption of Risk.** An interurban railway owes a duty to a passenger to furnish him a safe place to alight at his destination, and is not relieved of such

duty by knowledge on the part of such passenger that it had not previously been discharging such duty as to himself or other passengers. (Iowa) McGovern v. Interurban Ry. Co., 215.

12. **INTERURBAN RAILWAYS—Negligence.**—A contract by an interurban railway to carry a passenger to a specific destination implies a duty on its part to furnish such passenger a safe place to alight at such destination, and a failure to perform such duty is negligence. (Iowa) McGovern v. Interurban Ry. Co., 215.

13. **INTERURBAN RAILWAYS—Negligence—Question for Jury.** In general, it is not the duty of the employés of an interurban railway company to give passengers assistance in alighting at their destination, but, under special circumstances, such duty may arise, and it is then a question which may properly be submitted to the jury. (Iowa) McGovern v. Interurban Ry. Co., 215.

14. **INTERURBAN RAILWAYS — Negligence, Contributory.**—A passenger on an interurban railway is not negligent in failing to ascertain that the place where he is invited to alight is dangerous, or the distance from the step to the ground. (Iowa) McGovern v. Interurban Ry. Co., 215.

15. **INTERURBAN RAILWAYS—Negligence—Measure of Recovery by Married Woman.**—A married woman, seeking to recover from an interurban railway company, for injury received through its negligence is entitled to recover in her own right for physical pain, suffering and mental anguish suffered, but not for the loss of her earning capacity. (Iowa) McGovern v. Interurban Ry. Co., 215.

Street Railways.

16. **STREET RAILROADS—Contributory Negligence in Coming in Contact with a Pole.**—It is not negligence per se, on the part of a passenger on a street-car, not to anticipate that a pole may be permitted to stand so near the railroad track that he cannot, in an erect position and careful manner, pass from one seat in the car to another over the running-board without danger of injury from collision with such pole. (Me.) Cameron v. Lewiston etc. Ry. Co., 315.

17. **STREET RAILROADS—Duty to Anticipate the Customs of Passengers.**—A street railway is a public corporation and its great experience makes it familiar with the habits of people riding on its cars, and with their natural tendency, with or without reason, to move from seat to seat, and with such special means of knowledge, it should be held to anticipate that a passenger riding upon one of its cars may, at any place along the line, and while the car is in motion, undertake to change his seat. (Me.) Cameron v. Lewiston etc. Ry. Co., 315.

18. **STREET RAILROADS—Negligence—Duty to Passengers.**—It establishes a safer rule of law to require street railroads to exercise a degree of care sufficient for the protection of their passengers with respect to poles and other obstacles along their right of way when such protection involves only a question of pecuniary outlay, than to hold that such railroad company may be permitted, for the mere purpose of saving expenditure, to continue the maintenance of a structure which may be calculated, sooner or later, to result in the injury or death of a passenger. (Me.) Cameron v. Lewiston etc. Ry. Co., 315.

19. **STREET RAILROADS—Negligence in not Removing Pole.**—The exercise of due care of a railroad to its passenger requires that the latter should have moved a pole along its right of way to such a distance from the tracks as would have enabled the passenger to have moved from seat to seat along the running-board of the car

without injury; and it has no right to continue the pole in such close proximity to the car as to injure such passenger and subject future passengers to constant menace of injury or death. (Me.) Cameron v. Lewiston etc. Ry. Co., 315.

20. **STREET RAILROADS—Negligence—Duty of Passengers to Anticipate Danger.**—A passenger standing upon the running-board of a street-car for the purpose of changing his seat is no more bound to anticipate the dangerous proximity of a pole to the car than a passenger riding on the running-board because the seats are full. (Me.) Cameron v. Lewiston etc. Ry. Co., 315.

21. **STREET RAILROADS — Negligence — Proximity of Obstructions.**—It is negligence for a street railway company to permit permanent obstructions to stand so near its tracks that passengers getting on or off its cars or riding thereon are in danger of coming in contact therewith, and it is for the jury to determine whether a given obstruction is so situated. (Me.) Cameron v. Lewiston etc. Ry. Co., 315.

22. **STREET RAILROADS—Negligence—Chartered Rights as Defense.**—The chartered rights of a street railroad company, and the location of its tracks and poles give it the right to exist but not to destroy. They can under no circumstances exempt it from the consequence of its negligent acts. (Me.) Cameron v. Lewiston etc. Ry. Co., 315.

23. **STREET RAILROADS—Passengers—Contributory Negligence.** Whether or not it constitutes contributory negligence for a passenger on a street-car to ride on the running-board thereof while it is in motion is a question for the jury to determine. (Me.) Cameron v. Lewiston etc. Ry. Co., 315.

24. **STREET RAILWAYS—Passengers—Contributory Negligence.** Unless a passenger riding on the running-board of a moving street-car had knowledge that poles on the right of way were in such close proximity to the track as to be dangerous to one thus riding, he cannot be charged with contributory negligence. (Me.) Cameron v. Lewiston etc. Ry. Co., 315.

25. **STREET RAILROADS—Negligence—Notice as Defense.**—A notice upon the back of the seat of a street-car reading, "Avoid accidents; wait until the car stops," refers to passengers attempting to alight from moving cars and not to passengers riding on the running-board of such car. (Me.) Cameron v. Lewiston etc. Ry. Co., 315.

26. **CARRIERS—Excessive Damages for Expelled Passenger.**—A verdict of one hundred and seventy-five dollars for rejecting a valid transfer and expelling the passenger from a street-car is not excessive, where on two previous occasions, and under similar circumstances, his transfer had been refused and another fare exacted, which fare had subsequently been refunded by the carrier. (R. I.) Arnold v. Rhode Island Co., 721.

27. **CARRIERS—Right of Passenger to Resist Expulsion.**—If a passenger on a street-car is entitled to transportation, and presents to the conductor the evidence of his right which the company has established for that purpose, he may lawfully resist expulsion and recover in a suitable action against the company for damage caused by the violence of its servants. (R. I.) Arnold v. Rhode Island Co., 721.

28. **CARRIERS.—If a Transfer Offered by a Passenger** upon a street-car was good for passage upon the car where he offered it, according to the rule and practice of the railway company, it is immaterial whether the statute had compelled it to enact such a rule and establish such a practice. Its obligation to the public had been estab-

lished by its own course of dealing, and so had become binding upon it by its voluntary act, whether it exceeded the requirement of the statute or not. (R. I.) Arnold v. Rhode Island Co., 721.

Baggage Checks.

29. **RAILWAYS—Statute Requiring the Affixing of Checks to Baggage.**—Under the provisions of section 2674, Revised Statutes, a railroad corporation doing business in this state is required to affix a check to every parcel of baggage received by it, and to deliver a duplicate thereof to the passenger or person delivering the same, and if such check is refused on demand therefor, the railroad company is liable in the sum of twenty dollars to such person, and, in addition thereto, cannot collect any fare or toll from such passenger. (Idaho) Tarr v. Oregon Short Line R. R. Co., 151.

30. **RAILWAYS—Failure to Give Checks for Baggage Entitles the Passenger to Refuse Payment of Fare.**—Where a railroad company has no night agent at a station to receive and check baggage, but stops its train at such station and takes on a passenger and his baggage, and after the passenger boards the train and demands a check for his baggage, and declines to pay his fare or deliver up his ticket until he receives such check, and the employés of the company in charge of the train neglect and refuse to deliver a baggage check, and, on the contrary, eject the passenger from the train, the railroad company will be held liable in damages for the tort so committed. (Idaho) Tarr v. Oregon Short Line R. R. Co., 151.

31. **RAILWAYS—Passenger, Right of to Insist upon Baggage Checks Before Surrendering His Ticket.**—Where a passenger purchases a ticket, and on the arrival of the train at the station points out to the conductor and brakeman his baggage, and they receive the same and take it on board the train, and the passenger boards the same train for the purpose of transportation to another station on the line of the company's road, and demands of the conductor on the train a baggage check, he is entitled to receive such check before delivering up his ticket or paying his fare, and on failure to receive such baggage check and refusal to pay his fare until he does receive it, he does not thereby become a trespasser on such train, and the employés of the company have no right to eject him from the train until they have either delivered to him his baggage check or until he has reached the station to which he notified the employés receiving the baggage that he desired the same checked. (Idaho) Tarr v. Oregon Short Line R. R. Co., 151.

32. **RAILWAYS—Penalty Requiring Free Transportation of Passenger Because of the Failure to Check His Baggage.**—Under the provisions of section 2674, the liability to furnish the passenger free transportation to the point of his destination in case of refusal to deliver him a check for his baggage is as much a part of the penalty for refusal to check the baggage as is the twenty dollars' cash penalty named therein. (Idaho) Tarr v. Oregon Short Line R. R. Co., 151.

33. **RAILWAYS—Fourteenth Amendment, Penalties, When not Forbidden by.**—The requirement of section 2674, Revised Statutes, that a railroad company shall not collect toll or fare from a passenger when it fails, neglects or refuses to deliver the passenger a check for his baggage, is valid and binding upon such company as a part of the penalty for its failure and neglect to comply with the statute, and is in no sense a taking of property without due process of law within the inhibition of the fourteenth amendment to the constitution of the United States. (Idaho) Tarr v. Oregon Short Line R. R. Co., 151.

Connecting Railroads.

34. **CARRIERS, CONNECTING—Loss of Freight—Liability for.**—If the last carrier collects freight charges on the whole number of packages of an interstate shipment and marks the packages "four sacks short," he is presumed to be liable for the missing packages. (S. C.) Charles v. Atlantic Coast Line R. R. Co., 762.

35. **CARRIERS—Connecting Lines—Loss of Freight—Burden of Proof.**—Evidence showing the amount of freight charges collected, the number of packages shipped, and the initials of the consignor, and that the consignee had bought but one bill of goods of the consignor, casts the burden of proof, as between connecting carriers, on the last carrier, to show that any loss of goods did not occur on its line. (S. C.) Charles v. Atlantic Coast Line R. R. Co., 762.

36. **CARRIERS — Connecting Lines — Evidence.**—In an action against the last of connecting carriers to recover for the loss of goods shipped, the bill of lading issued by the first carrier and the bill of the goods shipped are inadmissible, without more. (S. C.) Charles v. Atlantic Coast Line R. R. Co., 762.

37. **CARRIERS, TERMINAL—Evidence.**—In an action against a terminal carrier for the loss of goods, the contract of purchase is a collateral matter, and parol evidence is admissible to prove it without producing the written order and its acceptance. (S. C.) Charles v. Atlantic Coast Line R. R. Co., 762.

38. **CARRIERS—Constitutional Law.**—A statute making each carrier the agent of its connecting carrier, from whom it receives freight, and making such agent liable for the default of its connecting carrier, is not unconstitutional as being in contravention of the fourteenth amendment to the national constitution, as denying to common carriers the equal protection of the laws. (S. C.) Venning v. Atlantic Coast Line R. R. Co., 768.

39. **CARRIERS—Failure to Adjust Loss—Application of Statute.** A statute providing a penalty for a failure to pay or adjust a loss or damage to freight within a certain time must be construed to apply only to a loss or damage to freight occurring on the line of the railroad sued within the state. (S. C.) Venning v. Atlantic Coast Line R. R. Co., 768.

See Commerce.

Note.

Carrier of Passengers, conductor, whether bound to inquire into alleged mistake in a ticket, 731.
expulsion, right of passenger to resist, 730.
forcible resistance by passenger, right of denied when a mistake has been made in the ticket, 731.
forcible resistance to wrongful expulsion of a passenger, when authorized, 728.
resistance to wrongful expulsion, extent to which may be carried, 735.
stopover privileges, right to rely on the statement of an agent concerning, 731.
ticket, face of, passenger, when bound by, 728.
ticket, mistake in, duty of passenger in case of, 728, 731.
ticket, mistake in, forcible resistance to expulsion because of, 729.
ticket, mistake in, holder of, when should submit to expulsion and seek damages by action, 728.
ticket, mistake in, resistance of passenger because of, cases sustaining, 729.

CATTLE.

See Animals.

CAVEAT EMPTOR.

See Executors and Administrators, 2.

CERTIORARI.

1. **CERTIORARI.—The Action of a Probate Court** may be reviewed on certiorari. (R. I.) Bennett v. Randall, 743.

2. **CERTIORARI—Discretion in Issuing.**—The issuance of the writ of certiorari is not a matter of strict right, but is discretionary with the court. (R. I.) Bennett v. Randall, 743.

3. **CERTIORARI—Harmless or Formal Errors.**—The writ of certiorari will not be granted to correct merely harmless, technical or formal errors, which are not shown to have resulted prejudicially or to have caused substantial injustice. (R. I.) Bennett v. Randall, 743.

4. **CERTIORARI—Examination on the Return of Citation.**—It is a common practice to examine the case upon return of the citation to determine before issuing a writ of certiorari whether it is necessary to prevent substantial wrong. (R. I.) Bennett v. Randall, 743.

5. **CERTIORARI — Irregularity in Appointing Guardian.**— Certiorari will not issue to review the proceedings of a probate court appointing a general guardian for an insane person, on the ground that there was no prior appointment of a guardian ad litem, where the guardianship has been an advantage rather than a detriment to the incompetent. (R. I.) Bennett v. Randall, 743.

6. **CERTIORARI.—The Action of a Probate Court** may be reviewed on certiorari. (R. I.) Brown v. Probate Court of Warwick, 747.

7. **CERTIORARI—Whether a Matter of Right.**—The issuance of the writ of certiorari is not a matter of strict right, but is discretionary with the court. (R. I.) Brown v. Probate Court of Warwick, 747.

8. **CERTIORARI.—One Who has been Guilty of Laches** will generally be refused a writ of certiorari. (R. I.) Brown v. Probate Court of Warwick, 747.

9. **CERTIORARI—Review of Guardianship Proceedings.**—The writ of certiorari to review the appointment of a guardian for an incompetent person will be refused where no harm has come to the incompetent from such appointment, and he has permitted the decree to stand unquestioned for over eight years and until after the death of the guardian. (R. I.) Brown v. Probate Court of Warwick, 747.

CHAMPERTY AND MAINTENANCE.

1. **CHAMPERTY—Contract Between Attorney and Client—Divorce.**—A contract between a married man and his attorney with reference to the procurement of the annulment of his marriage and the settlement of the wife's alimony, involving a lump sum agreed by the husband to be paid to his client in consideration of such annulment being granted and the alimony being settled, is champertous and void as against public policy. (Iowa) Donaldson v. Eaton & Estes, 275.

2. **CHAMPERTY AND MAINTENANCE.—A Deed is Void** when made in violation of the statute denouncing the sale or purchase of pretended titles. (N. D.) Brynjolfson v. Dagner, 595.

See Attorney and Client.

CHARITIES.

1. **A CHARITABLE TRUST is a Gift for the Benefit of Persons,** either by bringing their hearts and minds under the influence of education or religion, by relieving their bodies of disease, suffering or constraint, by assisting to establish them for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public, or some class of the general public, indefinite as to names and numbers. (Cal.) Estate of Lennon, 58.

2. **WILLS—Bequests for Masses.**—A bequest to the bishop of a Catholic church of a specific sum "to have the same amount of masses celebrated as soon as possible" for the soul of the testator is not a bequest for a charitable use, and is valid. It does not fall within the provisions of the statute restricting devises and bequests for charitable uses. (Cal.) Estate of Lennon, 58.

3. **WILLS—Bequests for Superstitious Uses.—Bequests are not Prohibited as Superstitious** if they are mere observances of any ceremonial, the efficacy of which is recognized by the church of which the donor is a member. "No religious observances can be deemed as a matter of law superstitious." (Cal.) Estate of Lennon, 58.

CHATTEL MORTGAGES.

1. **CHATTEL MORTGAGE—Discharge by Tender.**—The tender of the amount due under a chattel mortgage prior to foreclosure discharges the lien. (Wash.) Thomas v. Seattle Brewing etc. Co., 945.

2. **CHATTEL MORTGAGE—Tender of Amount Due.**—Where goods are sold under a chattel mortgage after tender of the amount due, they may be recovered in replevin, although the tender was not kept good nor the money brought into court. (Wash.) Thomas v. Seattle Brewing etc. Co., 945.

3. **CHATTEL MORTGAGE.—A Tender of the Amount Due** under a chattel mortgage, in order to discharge the lien, must be fairly made and intentionally refused. (Wash.) Thomas v. Seattle Brewing etc. Co., 945.

4. **CHATTEL MORTGAGE.—A Tender of the Amount Due on a Chattel Mortgage** may be made by a person to whom the mortgagor has sold the property. (Wash.) Thomas v. Seattle Brewing etc. Co., 945.

CHECKS.

See Banks and Banking; Sunday.

COLLATERAL SECURITY.

See Pledges.

COLOR OF TITLE.

See Adverse Possession.

COMMERCE.

1. **CONSTITUTIONAL LAW—Interstate Commerce.**—A statute providing that a penalty be paid the consignee by a carrier doing business within the state, for failure to admit and pay a claim for loss of freight while in its possession, within a certain time, is not unconstitutional as an unlawful interference with interstate commerce, even as applied to an interstate shipment. (S. C.) Charles v. Atlantic Coast Line R. R. Co., 762.

2. **CARRIERS — Interstate Commerce — Constitutional Law.**—A statute which makes each carrier the agent of its connecting carrier, from whom it receives freight, and makes each such agent liable for

the default of its connecting carrier, is unconstitutional, as an unlawful interference with the interstate commerce clause of the constitution of the United States. (S. C.) Venning v. Atlantic Coast Line R. R. Co., 768.

COMPROMISE.

1. **COMPROMISE—Necessity of Dispute.**—A compromise can be made, as a matter of law, only when the parties disagree among themselves as to their respective rights. (N. D.) Silander v. Gronna, 616.

2. **COMPROMISE.—A Promise to Pay a Sum as a Release of a** contract is not necessarily a compromise of a disputed right or question. (N. D.) Silander v. Gronna, 616.

3. **COMPROMISE.—To Compromise a Dispute is to Adjust It by** mutual concessions; each party must yield something. (N. D.) Silander v. Gronna, 616.

CONDITIONS.

See Deeds, 7, 8.

CONFLICT OF LAWS.

See Limitation of Actions.

CONSPIRATORS.

See Evidence, 5.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW—Limitation of Legislative Power.**—It is beyond the power of the legislature to exempt any person or corporation from the operation of the general law of the state, or to impose special conditions or limitations upon rights of action against persons or corporations. (Me.) Milton v. Bangor Ry. etc. Co., 293.

2. **CONSTITUTIONAL LAW—Impairment of Obligation.**—All legislative acts which work an impairment of the obligation of a contract, whether by directly changing its terms or indirectly by rendering it ineffective and of less value through a change of remedies, are forbidden by the constitution. (N. D.) Blakemore v. Cooper, 574.

3. **CONSTITUTION—Application to New Conditions.**—Constitutions do not deal in details, they compromise general principles and general directions which are intended to apply to all new facts that may come into being, and that may be brought within these general principles or directions. (N. D.) Johnson v. Grand Forks County, 662.

4. **CONSTITUTIONAL LAW.—Due Process of Law** and the equal protection of the laws are secured if the laws operate upon all alike, and do not subject the individual to an arbitrary exercise of the powers of the government. (Ala.) Miller v. Mayor of Birmingham, 31.

See Commerce; Executors and Administrators, 3; Evidence, 13, 14; Taxation, 5.

CONTEMPT.

1. **FREEDOM OF PRESS.—It is the Right of a Newspaper,** as of any citizen, in public or in private, to discuss the opinions of a court, to criticise their reasoning or to question by sober argument the soundness of their conclusions, but not to misstate these conclusions. (R. I.) In re Providence Journal Co., 755.

2. **NEWSPAPER CONTEMPT—Publication of Court Decisions.**—When a newspaper takes up the task of informing the public of the decisions of courts, it holds itself out to be equipped with suitable instruments for that work; the task, though a very proper one, is self-assumed, and is undertaken at the peril of the publisher. (R. I.) In re Providence Journal Co., 755.

3. **NEWSPAPER CONTEMPT—Publication of Court Decisions.**—A newspaper of general circulation which, through the recklessness or incompetence of persons in its service, publishes an editorial misstating an opinion that has been rendered by the supreme court, may be adjudged guilty of contempt. (R. I.) In re Providence Journal Co., 755.

4. **CONTEMPT.—An Actual Criminal Intent is not Essential** to constitute the publication of articles a contempt of court. (Conn.) State v. Howell, 141.

5. **CONTEMPT.—A Proceeding for Contempt is not a Criminal Prosecution,** although it is of a criminal nature. (Conn.) State v. Howell, 141.

6. **CONTEMPT—Absence of Wrongful Intent.**—The publication of articles in a newspaper may constitute a contempt of court for which the editor and manager may be punished, although he may have no actual knowledge of the contents of the articles nor any actual intent to interfere with justice or bring disrespect upon the court. Absence of wrongful intent may be considered in mitigation of the offense but not as an excuse therefor. (Conn.) State v. Howell, 141.

7. **CONTEMPT—Publication not Reaching Court or Jury.**—The publication of articles referring to a pending trial and circulated in the neighborhood may constitute a contempt of court, though they do not actually reach the eyes of the court or jury. (Conn.) State v. Howell, 141.

8. **CONTEMPT — Publication of Court Proceedings.**— A newspaper article printed two days before a trial has begun but after the case has been assigned for trial, which assumes to state the evidence to be produced by witnesses upon the trial, with improper comment thereon and reflections upon the parties to the action, and improperly expresses an opinion as to the right of the controversy, the purpose of the article being the disparagement of the defense and the intimidation of the witnesses who might support it, constitutes a contempt of court. (Conn.) State v. Howell, 141.

9. **CONTEMPT—Publication of Court Proceedings.**—An article published in a newspaper pending a trial, purporting to be an account of what occurred at the trial, which takes sides, improperly comments on the evidence, expresses opinions upon the merits of the case and the effect that should be produced by the witnesses, which contains statements calculated to intimidate possible witnesses and also states, as facts and evidence as to what occurred upon the trial, matters not given in evidence and not occurring upon the trial, constitutes a contempt of court. (Conn.) State v. Howell, 141.

CONTRACTS.

Consideration.

1. **CONTRACTS—Compromise as a Consideration.**—A compromise cannot be a sufficient consideration for a promise where there has been no dispute between the parties. (N. D.) Silander v. Gronna, 616.

2. **CONTRACTS—Absence of Consideration.**—A promise to pay money to release a void contract is without consideration. (N. D.) Silander v. Gronna, 616.

Interpretation.

3. **CONTRACTS—Rules of Interpretation.—The Object of All Rules** of interpretation is to arrive at the intention of the parties as it is expressed in the contract; in arriving at this intent the contract must be considered as a whole, and the words are prima facie to be given their ordinary meaning. (N. C.) Atlantic etc. R. R. Co. v. Atlantic etc. Co., 550.

4. **CONTRACTS—Interpretation in Light of Circumstances.**—In the interpretation of a contract the facts and attendant circumstances established by parol testimony may be considered. (N. C.) Atlantic etc. R. R. Co. v. Atlantic etc. Co., 550.

Validity.

5. **CONTRACTS—Mutual Mistake of Law.**—A contract entered into by the parties under a mutual mistake of law is not enforceable. (N. D.) Silander v. Gronna, 616.

6. **CONTRACTS—Purchase of Editorial Columns.**—A contract whereby a newspaper agrees to devote its editorial columns to promote the interests of a railroad company is against public policy, and not enforceable. (N. C.) King v. Raleigh etc. R. R. Co., 546.

7. **CONTRACTS—Agreement to Aid Election.**—A contract to aid in carrying an election for a bond issue is against public policy, and not enforceable. (N. C.) King v. Raleigh etc. R. R. Co., 546.

Rescission, Breach and Damages.

8. **CONTRACTS—Damages for Breach by Assignee.**—Where a judgment is recovered against the assignor of a contract for the purchase of cordwood on account of the assignee's breach thereof, the assignor may recover from the assignee the amount of the judgment, together with his costs and attorney fees incurred in resisting the original suit. (N. C.) Atlantic etc. R. R. Co. v. Atlantic etc. Co., 550.

9. **CONTRACTS—Rescission for Fraud.**—If one person takes advantage of another by making a promise upon a sufficient consideration which he does not intend fully and faithfully to perform, it is such a fraud as entitles the latter to cancel the contract and recover the property given up under it with interest thereon. (N. C.) Braddy v. Elliott, 523.

10. **CONTRACTS—Rescission—Fraud—Evidence.**—In an action for the rescission for fraud of a contract making promises not intended to be performed by the promisor, his subsequent acts may be submitted to the jury as some evidence of his original intent, when they tend to indicate it. (N. C.) Braddy v. Elliott, 523.

See Building Contracts; Sunday.

CONVEYANCES.

See Deeds.

CORPORATIONS.

De Facto Corporation.

1. **CORPORATIONS, DE FACTO—Right to Attack Existence.**—If there has been a bona fide effort to comply with the law to effectuate an incorporation, and the persons affected thereby have acquiesced therein, and have exercised all of the functions pertaining to the corporation, it becomes a de facto corporation, whose corporate existence cannot be litigated in actions between private individuals, nor be-

tween private individuals and assumed corporation. (W. Va.) Board of Education v. Berry, 975.

2. **CORPORATIONS, DE FACTO—Existence of, How Shown.**—To establish the existence of a de facto corporation only a charter or law authorizing the existence of the corporation must be shown and used under such authority. (W. Va.) Board of Education v. Berry, 975.

3. **CORPORATIONS, DE FACTO—Existence—Right to Question.** If a corporation exists de facto, it may exercise the powers assumed, and the question of its having a right to exercise them will be deemed one which can be raised only by the state. (W. Va.) Board of Education v. Berry, 975.

Foreign Company.

4. **FOREIGN CORPORATION—Error in Striking Out Plea of Failure to Appoint an Agent and File Copy of Articles.**—Where the indorsee of a promissory note sues the maker thereof, and the defendant sets up as one of his defenses that the payee was a foreign corporation doing business in this state, and that it failed to comply with the constitution and statutes of the state in designating an agent upon whom service of process could be made, and in filing copies of its articles of incorporation, it is error for the court to strike such defense from defendant's answer. (Idaho) Union Stock Yards Nat. Bank v. Bolan, 146.

Note.

Corporations, books of, admissibility in evidence in controversy with members, 858, 859.
by-laws and minute-books of, when admissible in evidence, 857, 858.
mandamus against to compel the performance of their duties, 513-515.

COSTS.

1. **JUDGMENTS—Jurisdiction on Dismissing Appeal.**—An appellate court in dismissing an appeal for want of jurisdiction has no power to render judgment for costs of suit. (W. Va.) Bice v. Boothsville Tel. Co., 986.

2. **JUDGMENTS—Power to Award Costs.**—A statute authorizing the court to give or refuse costs upon any motion, other than a judgment for money, or upon an interlocutory order or proceeding, empowers the court to render judgment for such costs only as are incident to the motion, if any, and not the costs in the suit. (W. Va.) Bice v. Boothsville Tel. Co., 986.

COUNTY OFFICERS.

1. **COUNTY OFFICERS—Breach of Duty—Remedy.**—If county commissioners do not keep their county courthouse in good and sufficient repair, nor offer nor propose to do so, they are indictable for a breach of duty, and entitled to a trial by jury. (N. C.) Ward v. Commissioners of Beaufort County, 489.

2. **COUNTY OFFICERS—Breach of Duty—Remedy.**—The building and keeping in proper repair of a county courthouse is part of the ministerial duties of the county commissioners, and is not subject to the supervision of the courts. (N. C.) Ward v. Commissioners of Beaufort County, 489.

COURTS.

1. **JURISDICTION Over Sovereigns.**—Courts have no jurisdiction to proceed with a suit against the sovereign of another state or to in-

terfere with its property of a public nature. (Mass.) Mason v. Intercolonial Ry. of Canada, 371.

2. **JURISDICTION Affecting the Property of a Sovereign—Duty of Court to Dismiss Action on Suggestion.**—If an action is commenced against a foreign railway and attempts are made to garnish credits belonging to it, the court, on the suggestion by an attorney that the railway described is the property and operated by the British crown in right of the government, will dismiss the action. (Mass.) Mason v. Intercolonial Ry. of Canada, 371.

COVENANTS.

Of Seisin.

1. **DEEDS.—Covenants of Seisin** in a deed extend only to guarantee the bargainee against any title existing in a third person and which might defeat the estate granted, and does not embrace a title that may be already in the grantee. (N. C.) Eames v. Armstrong, 436.

2. **DEEDS—Breach of Covenants of Seisin—Measure of Damages.** Generally, the purchase money is the measure of damages for the breach of a covenant of seisin; yet if the covenantee perfects his title for a less sum, his recovery is limited to the amount paid. (N. C.) Eames v. Armstrong, 436.

3. **DEEDS—Covenants of Seisin—Right to Sue for Breach.**—If the grantee in a deed with covenants of seisin procures the deed to clear the title to the property which his wife had formerly held subject to a tax deed to the grantor, and thereafter both husband and wife convey the land to another, whose possession is never disturbed, the husband cannot recover for an alleged breach of the grantor's covenant of seisin. (N. C.) Eames v. Armstrong, 436.

4. **DEEDS.—Covenants of Seisin are Covenants of Indemnity,** and do not run with the land. (N. C.) Eames v. Armstrong, 436.

Implied Covenants.

5. **DEEDS—Implied Covenants of Right of Way.**—A conveyance of part of a lot with a private right of way over the grantor's land to an adjoining alley contains an implied covenant as to the existence of such alley, which the grantor is estopped to deny. (Iowa) Talbert v. Mason, 259.

6. **DEEDS—Implied Covenants—Alleys—Measure of Damages for Breach of Covenants.**—If a deed is given with a private way annexed, and it is agreed that the grantee shall have the right to pass over such way on the grantor's land to an adjoining public alley, and no such alley exists, the measure of damages is the market value of the land with such way annexed, together with such value as it would have had if the public alley in fact existed. (Iowa) Talbert v. Mason, 259.

Note.

Covenant of Seisin, actual seisin, whether supports, 452, 453.
assignment of the right to recover upon, 449, 456.
breach of occurs at the making or not at all, 447.
breach of, proof in actions to recover for, 464.
breach of, what constitutes, 451.
continuous breaches of, 450.
damages for breach of, evidence of, 465.
damages for partial breach of, 463.
damages, measure of in actions for breaches of, 457-464.
damages, measure of when the grantee buys in the outstanding title, 464.

Covenant of Seisin, damages, nominal for breaches of, 461-463.
deficiency in the amount of property, whether constitutes a breach of, 455.
definitions of, 443, 444.
does not extend to title held by the grantee, 445.
does not run with the land, 448.
dower rights do not constitute a breach of, 453.
easements do not constitute a breach of, 454.
encumbrances do not constitute a breach of, 453.
estate less than in fee does not support, 452.
form of, 446.
implies seisin of an indefeasible estate, 444, 445.
is a covenant for title, 443, 444.
is implied in leases, 444.
is personal, 448.
partial breach of, damages recoverable for, 463.
railroad rights of way, whether constitute breaches of, 454.
statutory modifications of the rule respecting, 450.
title sufficient to satisfy or support, 445.
title without possession, whether supports, 452, 453.
what satisfies, 445.
whether implied in a bargain and sale deed, 446.
whether implied in an assignment of a lease, 444.
whether synonymous with covenant of right to convey, 446.
who liable to actions upon breach of, 457.
who may maintain actions for breaches of, 455.

CRIMINAL LAW.

1. **CRIMINAL LAW—Malice.**—An instruction that before the accused can be convicted the jury must be satisfied beyond a reasonable doubt that the act was done unlawfully, intentionally, and with malice aforethought, is erroneous in the use of the words "malice aforethought," as they are not necessarily synonymous with the word "maliciously" as used in the statute. (Ala.) Green v. State, 17.

2. **CRIMINAL LAW—Discharge of the Jury.**—The trial court has the right, without prejudicing a future prosecution, to discharge the jury in a criminal case, where it appears that, after reasonable time for deliberation has elapsed, a verdict has not been agreed upon, and there is no probability of an agreement. (Wyo.) Hovey v. Sheffner, 1037.

3. **CRIMINAL LAW.—The Discharge of the Jury** at a time when the court is without power to set or make an order discharging them has the same effect as their discharge without any reason or necessity existing therefor. (Wyo.) Hovey v. Sheffner, 1037.

4. **CRIMINAL LAW.—The Legal Effect of the Discharge of the Jury Without a Verdict and After the Accused has been Placed in Jeopardy** is neither greater nor less where the act is erroneous because void, than where it is erroneous for any other reason. (Wyo.) Hovey v. Sheffner, 1037.

5. **CRIMINAL LAW—Jurisdiction.—Though the Jury has been Discharged in a Criminal Prosecution After the Accused has been Placed in Jeopardy and Without Sufficient Reason,** still the court retains jurisdiction to proceed with the cause and to commit the prisoner to the custody of the sheriff for further trial, and if it does so, its action cannot be questioned by habeas corpus. (Wyo.) Hovey v. Sheffner, 1037.

DAMAGES.

Penalty or Liquidated Damages.

1. **DAMAGES—Penalty or Liquidated Damages.**—Courts will disregard the express stipulation of parties to a contract as to the damages for the breach thereof, only in those cases where it is obvious from the contract before them, and the whole subject matter, that the principle of compensation has been disregarded. (Mich.) Ross v. Loescher, 418.

2. **DAMAGES—Penalty or Liquidated Damages.**—In cases where it is difficult accurately to determine the damages which one party may suffer by the failure of the other to perform his contract, the parties themselves may agree upon such sum as in their judgment will be ample compensation for the breach. (Mich.) Ross v. Loescher, 418.

3. **DAMAGES—Penalty or Liquidated Damages.**—A stipulation in a contract for repairing a dwelling-house to forfeit twenty dollars a day for failure to complete the work within a prescribed time when cold weather is coming on, is not per se excessive and, as a matter of law, penalty. (Mich.) Ross v. Loescher, 418.

4. **DAMAGES—Penalty or Liquidated Damages.**—The use of the word "forfeit" does not necessarily imply a penalty. (Mich.) Ross v. Loescher, 418.

Elements and Measure of Damages.

5. **DAMAGE, Action for, When Only Nominal can be Shown.**—A land owner may maintain an action, without showing present actual damage to his land, if he proves that an injurious effect is produced upon the property by the act complained of, such as to diminish its value, if, by the lapse of time, the defendant might acquire the right to continue the act. (Mass.) Stimson v. Brookline, 382.

6. **DAMAGES—Evidence of Loss of Time.**—Where a party claims special damages for loss of time, he must prove both the amount of time lost and its value. The jury must be governed by the evidence. (Idaho) Tarr v. Oregon Short Line R. R. Co., 151.

7. **DAMAGES for Personal Injuries—Evidence of Earnings of the Plaintiff.**—In an action to recover for injuries suffered by the plaintiff while a passenger on the defendant's railway train, he may be permitted to prove that at the time of the accident, and for many years prior thereto, he was an insurance solicitor and what were the commissions earned by him for several years. (Cal.) Bonneau v. North Shore R. R. Co., 68.

8. **DAMAGES for Personal Injuries—Verdict for, When not Excessive.**—In an action for personal injuries suffered by the plaintiff when a passenger on the defendant's railway train, a verdict for seven thousand five hundred dollars cannot be held excessive when the evidence shows that he was damaged upward of two thousand dollars for expenses, including nursing, medical attendance and loss of time, and aside from pain and suffering endured from his injuries, and that they were of a permanent character, and materially impaired his capacity for the future pursuit of his vocation as a solicitor of insurance. (Cal.) Bonneau v. North Shore R. R. Co., 68.

9. **EVIDENCE of the Defendants' Wealth at the Time of the Trial** is admissible where the plaintiff asks for exemplary damages. (Cal.) Marriott v. Williams, 87.

10. **DAMAGES FOR ASSAULT, Mitigation of by Evidence of Defamatory Articles Published by the Plaintiff.**—In an action by the publisher of a newspaper to recover damages for an assault upon and shooting of him, in which the defendants pleaded, in mitigation

of damages, the publication by plaintiff of defamatory articles, it is proper for the court to instruct the jury that these articles cannot be considered in reduction of actual damages accruing from the plaintiff's pain and physical injuries, loss of time and moneys expended, or for any other element of actual damages, but only in reduction of or setoff against exemplary damages. (Cal.) Marriott v. Williams, 87.

11. **DAMAGES—Burden of Proof to Mitigate.**—The burden of proving omission of duty, on the part of the plaintiff, to mitigate the damages, rests upon the defendant. (W. Va.) Huntington Easy Payment Co. v. Parsons, 954.

12. **DAMAGES—Mitigation—Burden and Sufficiency of Proof.**—Evidence offered to establish a defense, operating to mitigate damages, must tend to prove all the essential facts, or it is properly excluded. (W. Va.) Huntington Easy Payment Co. v. Parsons, 954.

Mental Suffering—Fright.

13. **DAMAGES—Evidence of Mental and Physical Pain, When not Required.**—As to mental and physical pain and suffering and humiliation, evidence need not be offered as to its value. This is a question entirely for the jury. (Idaho) Tarr v. Oregon Short Line R. R. Co., 151.

14. **DAMAGES, Mental Suffering as an Element of.**—The mental suffering for which damages can be recovered is limited to that which results to the person injured as the necessary or natural consequence of the physical injury, but sentiments of grief, sorrow and mourning which are aroused by extraneous causes, thoughts and reflections are excluded. (Mass.) Sullivan v. Old Colony St. Ry. Co., 378.

15. **DAMAGES—Mental Suffering, When too Remote.**—A woman cannot be permitted to recover for sorrow and anguish endured as the result of the death of her child claimed to be due to injury received by her seven months before its conception and fourteen months before its birth. (Mass.) Sullivan v. Old Colony St. Ry. Co., 378.

16. **NEGLIGENCE—Damages Resulting from Fright, When not Recoverable.**—In an action for negligence, unaccompanied by any act of wantonness or intentional wrong, there can be no recovery for the alleged physical injury caused by mere fright or shock. (Ohio St.) Miller v. Baltimore etc. R. R. Co., 699.

See Contracts, 8-10; Death; Fraud, 3-6; Sales, 6-8; Telegraphs and Telephones.

Note.

Damages, measure of in actions for breaches of covenants of seisin, 457-464.

DEATH.

1. **DEATH—Time Limited for Bringing Action.**—A provision in a statute giving a right of action for wrongful death "to be brought within one year," is not a statute of limitations which must be pleaded, but it is a condition annexed to the cause of action which the plaintiff must prove in order to make out a prima facie case. (N. C.) Gulledge v. Seaboard Air Line Ry. Co., 544.

2. **DEATH—Time Limited for Bringing Action.**—The fact that no administrator was appointed for the estate of one whose death has been caused by negligence is no excuse for not bringing an action therefor within the one year prescribed by statute. (N. C.) Gulledge v. Seaboard Air Line Ry. Co., 544.

3. **DEATH OF SON, Damages for.**—The measure of damages in an action for the death of a son claimed to have been due to the negligence of the defendant railway company is not the pecuniary

value of his life, but what was the pecuniary loss suffered by the plaintiffs. This is not limited to mere contribution in money, but may consist of the various elements that enter into the domestic relations of parent and child living in one family, or otherwise. (Utah) Rogers v. Rio Grande Western Ry. Co., 876.

See Appeal and Error, 1; Divorce, 10, 11.

DEEDS.

Attestation.

1. **DEEDS — Attestation — Substantial Compliance with Statute Sufficient.**—Although the phrase commonly used to denote that the persons signing a deed are witnesses is "signed, sealed and delivered in the presence of," the statute does not require any particular form of words for such attestation clause, and any phrase which clearly denotes that the persons signing were witnesses is sufficient. (Fla.) Richbourg v. Rose, 1061.

2. **DEEDS—Attestation.**—A deed properly delivered is not invalid because the attestation clause recites that it was signed and sealed only, without reciting that it was delivered. (Fla.) Richbourg v. Rose, 1061.

3. **DEEDS—What Constitutes a Sufficient Attestation.**—Where the concluding clause recites, "In witness whereof we hereunto set our hands and seals," and under those words on the left-hand side of the page, in the place where the names of witnesses to the execution of a deed are usually found, appear the word or letters "Wit.," and the names of two persons underneath, the deed shows substantially and clearly upon its face that it was signed and sealed in the presence of the two persons whose names so appear. (Wyo.) Richbourg v. Rose, 1061.

Acknowledgment and Delivery.

4. **AN UNACKNOWLEDGED DEED is Good** as between the parties; it conveys at least an equitable title. (Wash.) Matson v. Johnson, 924.

5. **DEEDS.—An Actual Manual Delivery of a Deed** is not essential to its execution where there is an intention on the part of the grantor to consummate the conveyance and vest title in the grantee. (Wash.) Matson v. Johnson, 924.

6. **DEEDS—Absence of Manual Delivery.**—A deed executed by a father to his minor children, during his last sickness, may be effective without manual delivery where he intends to convey the property to them. (Wash.) Matson v. Johnson, 924.

Conditions and Restrictions.

7. **DEEDS, Conditions in Against the Sale of Liquors.**—A condition in a conveyance that intoxicating liquors shall not be sold on the premises conveyed is lawful and enforceable. (Cal.) Burdell v. Grandi, 61.

8. **DEEDS, Conditions in Against Sale of Intoxicating Liquors Intended Merely to Create a Monopoly.**—If a person subdivides his lands into town lots, which he sells, inserting a condition in each deed against selling intoxicating liquors on the premises conveyed, and providing that the estate granted shall be forfeited on a breach of the condition, and the object of the grantor is merely to reserve to himself, or in favor of property not sold by him, a monopoly of the sale of such liquors, the condition is void as against public policy, and its breach does not work a forfeiture. (Cal.) Burdell v. Grandi, 61.

After-acquired Title.

9. **DEEDS—Estoppel Against Grantee.**—A grantee is estopped from setting up title previously acquired against his vendor. (N. C.) Eames v. Armstrong, 436.

Quitclaim Deed.

10. **DEEDS, QUITCLAIM—After-acquired Title.**—If one not having title to land gives a mere quitclaim deed thereof, with only a covenant of nonclaim, such covenant does not operate to pass an after-acquired title. (Me.) Manson v. Peaks, 311.

11. **DEEDS, QUITCLAIM—Effect of Recital.**—A recital in a quitclaim deed of the land sold as "being part of the land purchased by me of the town of Foxcroft," is not a covenant by the grantor that he was then the owner of the title to the land. (Me.) Manson v. Peaks, 311.

See Boundaries; Covenants; Records; Taxation, 11-20.

DE FACTO CORPORATION.

See Corporations, 1-3; Municipal Corporations, 1.

DEFINITIONS.

See Words and Phrases.

Note.

Definition of covenant of seisin, 443, 444.

DESCENT AND DISTRIBUTION.

SUCCESSION—Inheritance by Illegitimate from Mother.—The effect of the statutes of North Carolina has been to legitimatize an illegitimate child as to his mother, where there has been no legitimate issue, and to make him the heir of her body, or her issue or child. (N. C.) Harrell v. Hagan, 539.

DIVORCE.

In General.

1. **DIVORCE—Contract to Procure—Public Policy.**—A contract with reference to procuring a divorce or to facilitate its procurement is void as against public policy. (Iowa) Donaldson v. Eaton & Estes, 275.

2. **DIVORCE—Cruelty Caused by Objectionable Language.**—The habitual use of profane language and the telling of obscene stories by a woman to her husband in the presence of his children and third persons may constitute ground for divorce where his characteristics are such that this course of conduct causes him humiliation and mental suffering. (N. D.) Mosher v. Mosher, 654.

3. **DIVORCE.—A Continuous Course of Fault-finding, Threats,** and other acts persisted in by a woman to aggravate and annoy her husband, may, though each act is trifling in itself, occasion grievous mental suffering. (N. D.) Mosher v. Mosher, 654.

4. **DIVORCE—Statements by One Spouse Provoked by Other.**—Statements or insinuations by a man reflecting on his wife are not ground for divorce when they have been provoked by her own improper behavior. (N. D.) Mosher v. Mosher, 654.

5. **DIVORCE.—A Condonation is Revoked and the Original Cause of Divorce** revived where the offending party resumes her former improper conduct. (N. D.) Mosher v. Mosher, 654.

Alimony and Maintenance.

6. **DIVORCE—Allowance of Alimony and Suit Money by Supreme Court.**—The supreme court has inherent power at all times after appeal to allow the wife from the estate of her husband the means necessary to enable her to prosecute or defend an action of divorce. (N. D.) Mosher v. Mosher, 654.

7. **DIVORCE—Allowance for Cost of Appeal.**—The Supreme Court will not deny the application of a wife for an allowance from her husband's estate to effect her appeal from a decree of divorce, simply because she has been able to effect the appeal without it. (N. D.) Mosher v. Mosher, 654.

8. **ALIMONY—Enforcement in Another State.**—An order awarding temporary alimony and suit money, which is subject to modification in the discretion of the court, cannot be enforced by action in another state. (Wash.) Van Horn v. Van Horn, 940.

9. **DECREE FOR MAINTENANCE — Enforcement in Other States.**—A decree for the payment of future alimony or maintenance which is inconclusive in its character by reason of the reservation to the court which made it of the unrestricted right to change or annul it at discretion, and which is not enforceable in the state of its origin otherwise than by special processes exclusive of execution, and of judgment thereon and execution, is not one creating such a debt of record as will entitle it to or justify extraterritorial enforcement. (Conn.) Sistare v. Sistare, 102.

Attack on Decree After Death.

10. **JUDGMENTS—Divorce—Attack After Death of Parties.**—After the death of one or more of the parties to a decree of divorce, it may be assailed the same as any other decree for fraud in so far as property rights are directly affected. (Iowa) Wood v. Wood, 223.

11. **JUDGMENT—Divorce—Attack After Death of Parties.**—An administrator, or the heir of a party divorced and since deceased, may prosecute an application for the modification or vacation of the judgment, or for a new trial, when, such judgment directly affects the interests of the parties. (Iowa) Wood v. Wood, 223.

Note.

Divorce, abatement of suit for by the death of a party, 234, 235.
appeal from, effect of the death of a party during the pendency of, 243.
appeal from, representative who must be brought in after the death of a party, 243.
collateral attack upon decree of by stranger thereto, 248, 249.
collateral attack upon decree of by survivor, 245-249.
death of a party, appeal, effect of upon right of, 231.
death of a party, attack upon decree of, motion or petition for after, 233-237.
death of a party, collateral attack upon decree of after, 245.
death of a party, effect of upon a suit to obtain relief from decrees of, 237-242.
death of a party, fraud, evidence of after must be clear and convincing, 240.
death of a party, marital relation cannot be affected after by any appeal or other proceeding, 244, 245.
death of a party, representatives of, when must be brought before the court on appeal or writ of error, 232, 233.
death of a party, writ of error, prosecution of after, 231-233.
death of a party terminates suits for, 230.
estoppel of surviving party to question, 245, 246.

Divorce, fraud as a ground of relief from after the death of a party, 237.
jurisdiction to set aside decrees of, 236.
laches in not applying for relief from until after the death of a party, 234, 240.
legislative, effect of upon rights of property, 247.
relief from in equity, when will be granted after the death of a party, 237-242.
stranger to, when may attack decree of, 242.
suit for is purely personal, 236.
who may attack decrees of after the death of a party, 242.
Dower Rights, existence of does not constitute a breach of covenant of seisin, 453.

EASEMENTS.

1. **EASEMENT Over Lands of Another, Duty of Maintaining, Who must Assume.**—As a general principle of law, it is the duty of an individual or the public entitled to an easement or right of way over the lands of another to keep up, maintain and protect such easement or right of way, and the presumption as to such duty and obligation arises as one of law, and where it is sought to maintain an action on the theory that such duty rests upon the owner of the fee, it is necessary for the plaintiff to plead and prove the facts from which the duty or obligation arises. (Idaho) City of Bellevue v. Daly, 179.

2. **PRIVATE WAY—Implied Easement in Light.**—An express grant of a private way carries no implied grant of a right to have light and air pass over the way to any greater extent than is necessary for the reasonable enjoyment of the right of passage. (Conn.) Bitello v. Lipson, 126.

3. **PRIVATE WAY—Projection of Bay Window.**—The owner of the fee to a private driveway will not be enjoined from projecting a bay window therein which does not obstruct the passageway nor affect the supply of light and air therein, so as to prevent persons entitled thereto from passing along it in vehicles and otherwise with comfort and convenience. (Conn.) Bittello v. Lipson, 126.

4. **PRIVATE WAY—Projection of Bay Window.**—In determining whether the owner of the fee should be enjoined from projecting a bay window over a private driveway, on the ground that the window may directly interfere with the complainant's use of the way, the proper question is not what use the complainant might possibly attempt to make of the way, but what uses can he reasonably be expected to have occasion to make it. (Conn.) Bitello v. Lipson, 126.

See Covenants, 5, 6.

Note.

Easements, existence of does not constitute a breach of covenant of seisin, 453.

EATING-HOUSE.

See Municipal Corporations, 6.

EDITORIAL COLUMNS.

See Contracts, 6.

EJECTMENT.

1. **EJECTMENT—Right of Vendor to Maintain.**—The vendor of land under an executory contract which reserves in him the legal record title, but which gives the vendee the right to possession, can-

not maintain ejectment against a stranger in possession of a strip of the land. (Mich.) Kuite v. Lage, 421.

2. **EJECTMENT—Right of Vendee to Maintain.**—Vendees who take possession of land under an executory contract of sale which reserves the legal title to the vendor may maintain ejectment against one who ousts them from the land. (Mich.) Kuite v. Lage, 421.

3. **EJECTMENT—Right to Maintain**—Plaintiff to maintain the action of ejectment must have the legal title to the property sought to be recovered, and he must recover upon the strength of his own title, and not upon the weakness of the title of his adversary. (W. Va.) Hagan v. Holderby, 960.

ELECTIONS.

1. **ELECTIONS.—A Primary Election is an "Election" Within** the constitutional provision which prescribes the qualifications of voters at "any election." (N. D.) Johnson v. Grand Forks County, 662.

2. **ELECTIONS—Qualification of Voters and Officers.**—When the constitution of a state has prescribed qualifications for voters and defined the qualifications of an officer, it is not competent for the legislature to add to or in any way alter such qualifications, unless the power to do so is conferred by the constitution itself. (N. D.) Johnson v. Grand Forks County, 662.

3. **ELECTIONS—Fees for Placing Name on Ballot.**—A statute requiring candidates to pay two per cent of the annual salary of the office as a condition to having their names printed on the official primary ballot is unconstitutional. (N. D.) Johnson v. Grand Forks County, 662.

See Contracts, 7.

EMINENT DOMAIN.

1. **EMINENT DOMAIN—Floatage of Logs as Public Use.**—The right of log-driving companies to erect splash dams in a stream to create artificial freshets, thereby injuring the property and shore rights of riparian owners, may be acquired by condemnation proceedings under the power of eminent domain. (Wash.) Kalama Electric Light etc. Co. v. Kalama Driving Co., 948.

2. **EMINENT DOMAIN—Insufficiency of Property Condemned.**—A condemnation proceeding cannot be resisted on the ground that the rights sought are insufficient to enable the petitioner to transact its public business without using additional property belonging to the defendants. (Wash.) State v. Superior Court, 927.

3. **EMINENT DOMAIN—Property Subject to Condemnation.**—Riparian rights and privileges appurtenant to land bordering on a navigable stream are property which may be condemned without an appropriation of the land itself. (Wash.) State v. Superior Court, 927.

4. **EMINENT DOMAIN—Description of Property.**—If a boom company's plat is made from the government field-notes showing the stream as meandered, and the contiguous lands, it will authorize the condemnation of an unmeandered slough that extends into these lands, within the statutory requirement that the plat or survey actually shows so much of the shore line of the waters and the lands contiguous as are proposed to be appropriated. (Wash.) State v. Superior Court, 927.

5. **EMINENT DOMAIN—Absence of Attempt to Purchase.**—One who institutes proceedings to restrain a corporation from interfering with his property cannot thereafter object to condemnation of the property by the corporation on the ground that it did not first en-

deavor to obtain by purchase the rights and privileges it seeks to appropriate. (Wash.) State v. Superior Court, 927.

6. **CONSTITUTIONAL LAW.—Private Property cannot be Taken for a Private Use,** either with or without compensation. (W. Va.) Hench v. Pritt, 966.

7. **EMINENT DOMAIN—Public Use—Question of Law.**—The question of what is a public use is always one of law, and though deference will be paid to the legislative judgment, as expressed in enactments providing for an appropriation of property, it will not be conclusive. (W. Va.) Hench v. Pritt, 966.

8. **CONSTITUTIONAL LAW—Taking Private Property for Private Use.**—A statute, in so far as it attempts to confer the power and right of eminent domain upon the owners, or lessees of timber or timber lands, to be exercised by them in the condemnation of lands for rights of way for their private benefit and not for the public use is unconstitutional, null and void. (W. Va.) Hench v. Pritt, 966.

EMPLOYER'S LIABILITY.

See Master and Servant.

Note.

Encumbrances, existence of does not constitute a breach of covenant of seisin, 453.

EQUITY.

1. **EQUITY—Pleading—Exhibits.**—Documents made exhibits with a bill in chancery and as parts thereof are of controlling force in case of a variance between them and such bill. (W. Va.) Board of Education v. Berry, 975.

2. **LACHES.—In Applying the Doctrine of Laches,** or the rule of estoppel by acquiescence, no fixed time will be taken as controlling, but the facts in each particular case must govern the court's decision. (N. D.) State v. Nohle, 628.

3. **EQUITY.—The Defendant in Equity may Avail Himself** of every legal defense not inequitable in its nature. (Mich.) Smith v. Werkheiser, 406.

See Judgments, 17-19.

ESTATES.

See Wills, 14-16.

ESTATES OF DECEDENTS.

See Executors and Administrators.

ESTOPPEL.

ESTOPPEL BY DEED.—The Grantor in a Warranty Deed who holds a prior mortgage on the premises can assert no rights as mortgagee against his grantors; and one thereafter acquiring the mortgage from him is in no better position unless he can show himself entitled to the protection due innocent purchasers. (N. D.) Brynjolfson v. Dagner, 595.

EVIDENCE.

In General.

1. **EVIDENCE—Judicial Notice—Public Law.**—The courts of the state will take judicial notice of a public law, and it need not be put in evidence. (W. Va.) Board of Education v. Berry, 975.

2. **EVIDENCE—Written Instruments—Parol Evidence to Vary.**—As between the original parties, the delivery of a written instrument which is in form a complete contract will not exclude parol evidence that such delivery was conditional and that it was not to become a binding obligation upon the maker until the performance or discharge of such condition precedent. (Iowa) McNight v. Parsons, 265.

3. **EVIDENCE.**—Expert evidence, that plaintiff's injuries are due to some external violence, such as that which plaintiff suffered, is admissible, and does not usurp the functions of the jury. (Iowa) McGovern v. Interurban Ry. Co., 215.

4. **EVIDENCE—Best and Secondary.—Parol Evidence that a Given Note** was secured by a mortgage on real estate is inadmissible where no reason is advanced for not producing the instrument or an authenticated copy of it. (N. D.) Brynjolfson v. Dagner, 595.

5. **EVIDENCE—Conspirators.**—The acts and declarations of a conspirator in the absence of the alleged co-conspirator can be received in evidence against the latter only after the fact of the conspiracy has been established. (Ohio St.) Hammond v. State, 684.

6. **EVIDENCE—Certificate of Clerk of Court.**—A certificate of a clerk of court that the record of his court will show certain facts cannot be received as evidence of such facts. (W. Va.) Hagan v. Holderby, 960.

7. **EVIDENCE.—Facts Admitted** by the answer need not be proved. (Fla.) Patrick v. Kirkland, 1096.

8. **EVIDENCE.—Where Testimony is Made Incompetent by statute,** it should be disregarded by both the trial court and appellate courts. (Fla.) Patrick v. Kirkland, 1096.

9. **EVIDENCE — Order of Introduction — Discretion.—The trial** court is authorized to regulate the order of introduction of evidence, and its discretion in this matter will not be reviewed on appeal unless clearly abused. (Fla.) Richbourg v. Rose, 1061.

10. **EVIDENCE in an Action for Personal Injuries Inflicted by the Defendants Tending to Show Their Acquittal in a Criminal Prosecution.**—In an action to recover damages for personal injuries suffered by the plaintiff at the hands of the defendants, if the plaintiff, on cross-examination, testifies to the criminal prosecution of the defendants for the assault, and that he was the prosecuting witness, it is proper for the court to refuse to admit evidence of their acquittal, because the only legitimate purpose of proving the prosecution was to show the feelings of the plaintiff against the defendants. (Cal.) Marriott v. Williams, 87.

Weight and Credibility.

11. **TRIAL—Credibility of Witness.**—On the question as to whether a bank received a note in good faith, the credibility of the testimony of its cashier to that effect is for the jury to determine. (Iowa) McNight v. Parsons, 265.

12. **WITNESSES' CREDIBILITY.**—If testimony of a person is offered to overcome an unfavorable presumption or to satisfy the proof cast on the person offering it, the question of its credibility and weight is for the jury to determine. (Iowa) McNight v. Parsons, 265.

Statute Prescribing Force of Facts as Evidence.

13. **CONSTITUTIONAL LAW—Statute Making Reputation Evidence.**—A provision in a statute respecting trusts and unlawful combinations providing that in prosecutions thereunder the character of the trust or combination alleged may be established by proof of de-

fendant's general reputation as such is unconstitutional and void. (Ohio St.) Hammond v. State, 684.

14. **EVIDENCE, Limitation upon—Power of the Legislature Respecting.**—The legislature may not arbitrarily create a conclusive presumption of guilt against an accused as to any element of crime charged by giving an artificial and evidentiary force to certain facts which otherwise would be wholly irrelevant and inconclusive. (Ohio St.) Hammond v. State, 684.

Declarations—Res Gestae.

15. **EVIDENCE—Acts and Declarations of Injured Person, When not Admissible.**—In an action to recover damages for personal injuries inflicted by the defendants by beating and shooting plaintiff, the fact that he asked his wife immediately afterward to come where he lay and lock the door of that room and also the door of another room, and that she immediately did so, is not admissible as part of the res gestae. It tends to show the plaintiff's fear either that the defendants would follow and inflict further injury, or would annoy his wife, and is therefore immaterial, but not prejudicial, and its admission does not warrant a reversal. (Cal.) Marriott v. Williams, 87.

16. **EVIDENCE—Res Gestae.—The Declarations** of the superintendent of a grain elevator that he had sent a boy into a bin for the purpose of removing a board obstructing the flow of grain, made within a few minutes afterward and before his death, are admissible as part of the res gestae. (Iowa) Meier v. Way, Johnson, Lee & Co., 254.

Books—Time-books.

17. **EVIDENCE, Time-book as.**—Time-books containing the names of the men, usually written in by the timekeeper, showing the number of days each employé worked in a given month, are admissible, in connection with the testimony of the employés, as bearing on the question of the accuracy of the recollection of the several witnesses, but are not evidence as to the number of days they were at work. (Utah) Eureka Hill Min. Co. v. Bullion Beck etc. Co., 835.

18. **EVIDENCE.—Memoranda in the Time-books** to indicate the capacity and place in which employés work are not admissible, where the attention of the witnesses has not been directed to the memoranda and opportunity afforded them to explain or deny the same. (Utah) Eureka Hill Min. Co. v. Bullion Beck etc. Co., 835.

19. **EVIDENCE, Books Kept by a Private Corporation.**—Where books are kept by a private corporation solely for its own purposes and in the administration of its internal affairs, they are not admissible against third persons as evidence of isolated collateral facts in an action between the corporation and a stranger. (Utah) Eureka Hill Min. Co. v. Bullion Beck etc. Co., 835.

Typewritten Letters.

20. **EVIDENCE—Typewritten Letters.**—A reply letter received by due course of mail is admissible in evidence without specific proof of the genuineness of the signature attached thereto, although the whole body of the letter, including the name of the one purporting to be the writer, is typewritten. (Me.) Lancaster v. Ames, 286.

21. **EVIDENCE—Typewritten Letters.—Presumption of Genuineness** of a reply letter wholly typewritten, including the signature, received in due course of mail may be strengthened by the contents of the letter itself. (Me.) Lancaster v. Ames, 286.

Note.
Evidence, books, admissibility of to show that act not referred to in was not done, 847, 848.
books and reports showing quantity and quality of materials used, manufactured or produced, 851.
books, entries in constituting part of the res gestae, 847.
books, entries in made by employés who cannot be found or produced, 846.
books, entries in must have been made in the regular course of business, 843.
books, entries in which fail to refresh the memory of the witness, 844.
books made up from reports, 845, 851.
books other than of account, general admissibility of, 842, 848.
books, testimony necessary to support, 846, 847.
books of rules of corporations, admissibility of, 855.
check-books, admissibility of, 852.
check-books, stubs of, admissibility of, 852.
corporations, books of in a controversy with members, admissibility of, 858, 859.
corporations, by-laws and minute-books of, admissibility of, 858.
diaries, admissibility of, 853.
field-books used in mining operations, admissibility of, 854.
herd-books, admissibility of, 857.
hotel registers, admissibility of, 852.
inventories, admissibility of, 852.
inventories of stock, admissibility of, 852.
livestock registers, admissibility of, 857.
loose slips of paper, whether admissible, 848.
memoranda, admissibility of with the paper on which made, 844. 845.
memoranda as secondary evidence, when admissible, 842.
memoranda, general admissibility of, 842.
memoranda, prerequisites to the admissibility of, 849.
memoranda, witness, when may testify from, 843-848.
memoranda which fail to refresh the memory of the witness, 844.
minute-books of lodges and corporations, admissibility of, 858.
negotiable instruments, burden of proof in action upon, 814, 817.
note-books of surveyors, admissibility of, 855.
note registers, admissibility of, 851.
payrolls, admissibility of, 849.
reports of employés, admissibility of, 855.
scaling-books, admissibility of, 851.
statements of customers' bank accounts made up from account-books, 854.
stock exchange books, admissibility of, 852.
stubs and stub-books, admissibility of, 852.
summarizations of results of examinations, 855.
tables representing the business of a corporation, admissibility of, 855.
time-books, admissibility of, 849, 850.
time slips, admissibility of, 849, 850.
train-sheets and reports admissibility of, 856.

EXCHANGE OF PROPERTY.

1. **ESTATES—Condition—Breach—Damages.**—Upon failure of a person to an exchange of lands to comply with his agreement to erect buildings on the property exchanged, and which was the consideration for the exchange, the opposite party is entitled to recover as damages the value of the buildings which were to have been erected, with

interest thereon from the date of the exchange. (N. C.) Braddy v. Elliott, 523.

2. **ESTATES — Exchange of Land — Breach of Condition.**—If structures placed upon land by a grantee in consideration of land deeded to him are not fit for dwellings when completed, as agreed, they cannot be regarded as even a partial compliance with the terms of the agreement. (N. C.) Braddy v. Elliott, 523.

3. **ESTATES UPON CONDITION—Right of Re-entry.**—A recital in a deed that in consideration thereof the grantee is to convey to the grantor a tract of land and erect certain buildings thereon, does not constitute the estate of the grantee one upon condition, in the absence of an express reservation in the deed of a right of re-entry of the grantor upon failure to perform the agreement. (N. C.) Braddy v. Elliott, 523.

4. **ESTATES—Failure of Consideration — Damages.**—If persons exchange lands under an agreement and for the consideration that one shall build for the other certain houses, and he fails to do so, in the absence of fraud in procuring the contract, the other is left to his remedy in damages, when they afford adequate compensation. (N. C.) Braddy v. Elliott, 523.

EXECUTIONS.

1. **EXECUTIONS—Defect in not Running in Name of State.**—An execution commencing, "State of Washington, Clallam County, ss: To the sheriff of Clallam County, Greeting," will not be held void, when no objection was made to the confirmation of the sale, because it does not run in the name of the state. (Wash.) Pederson v. Lease, 922.

2. **EXECUTIONS—Doctrine of Idem Sonans.**—Where one is sued as "Peter Pederson," but execution is issued against "Peter Peterson," by which latter name he is well known in the community, the case is controlled by the rule of idem sonans, and the execution sale will be upheld. (Wash.) Pederson v. Lease, 922.

3. **EXECUTIONS.—That Fact that an Execution does not State** the amount actually due and does not command the sheriff to levy on real property upon which the judgment is a lien will not invalidate the sale if no objection to confirmation was made and the purchaser has held possession and paid taxes upon the property for over twelve years. (Wash.) Pederson v. Lease, 922.

See Frauds, Statute of, 4, 5.

EXECUTORS AND ADMINISTRATORS.

1. **ESTATES OF DECEDENTS — Ancillary Administration — Debts Due Citizens of Foreign Countries, Whether can be Recognized.** If ancillary administration is had in this state of the estate of a debtor dying in another state or country, the claim of a citizen of a foreign state can be recognized, allowed and enforced, there being no provision in the statute declaring otherwise. (Cal.) McKee v. Dodd, 82.

2. **EXECUTOR'S SALE.—The Rule of Caveat Emptor** applies in all its vigor to sales by executors, and purchasers acquire only the interest of the estate. (Wash.) Matson v. Johnson, 924.

3. **CONSTITUTIONAL LAW—Absentees, Statutes Providing for the Distribution of Estates of.**—A statute authorizing the taking possession of the property of an absentee and placing it in charge of a receiver, to be kept until fourteen years after the disappearance of such absentee, and its distribution after that time to the persons and in the proportions to and in which it would have been distributed if the absentee had died intestate on the day fourteen years after his

disappearance, is not unconstitutional. (Mass.) Nelson v. Blinn, 364.

See Judgments, 1, 2; Partition.

EXEMPTIONS.

1. **EXEMPTIONS—Jewelry as Wearing Apparel.**—A gold ring and watch and chain may be set apart to the widow as exempt from execution under a statute providing that "all of the wearing apparel of the decedent" is exempt from seizure. (Ala.) Phillips v. Phillips, 40.

2. **EXEMPTIONS—Furniture.**—A silver card receiver and a piano may be set apart to the widow of a decedent as exempt from execution as "household furniture necessary for the use and comfort of the family." (Ala.) Phillips v. Phillips, 40.

Note.

Exemption from Execution of wearing apparel depends on the statutes, 43.
of wearing apparel does not authorize its being set off to the widow, 44.
of wearing apparel, garments, articles not in use as, when included within, 44.
of wearing apparel, goods not yet made into garments, whether included within, 44.
of wearing apparel, jewelry is not included within, 44.
of wearing apparel, jewelry, when included within, 45, 46.
of wearing apparel, watches, whether included within, 45, 46.

EXPERT TESTIMONY.

See Evidence, 3.

FINDINGS.

See Trial, 12.

FIRES.

See Negligence, 1.

FORGED CHECKS.

See Banks and Banking, 2.

FRANCHISE.

See Street Railways, 3-6.

FRAUD.

In General.

1. **FRAUD.**—Circumstantial Evidence may support a finding of fraud if it is reasonably sufficient to satisfy the court or jury. (N. C). Tuttle v. Tuttle, 481.

2. **FRAUD—Means of Discovering Falsity of Statements.**—The fact that the books of a newspaper business are placed at the disposal of a prospective purchaser does not deprive him of the right to rely on the statements of the seller as to the circulation and advertising receipts of the paper, which statements prove false; a defrauded person does not owe to the person who defrauds him an obligation to use diligence to discover the fraud. (Mich.) Smith v. Werkheiser, 406.

Relief and Damages.

3. **FRAUD.—The Measure of Damages for Misrepresenting the Circulation** and advertising receipts of a newspaper, made by the owner to effect a sale thereof, is the difference between the represented value and the actual value as indicated by the cash receipts of the business. (Mich.) Smith v. Werkheiser, 406.

4. **FRAUD—Right of Purchaser to Damages.—The Purchaser of a Newspaper** may recover damages against the seller for his false statements concerning the circulation and advertising receipts of the paper. (Mich.) Smith v. Werkheiser, 406.

5. **FRAUD—Right to Recoup Damages.—The Purchaser of a Newspaper,** when sued for the unpaid balance, may recoup the damages caused by the false representations of the seller as to the circulation and advertising receipts of the paper, whether the suit is brought by the seller or by his assignee with notice. (Mich.) Smith v. Werkheiser, 406.

6. **FRAUD—Equitable Relief from Sale Procured by.**—Where a sale of a newspaper has been effected by false statements of the vendor, equity will enjoin the enforcement of the mortgage given for part of the purchase price, and decree a cancellation of the mortgage and notes, where the damages from the fraud exceed the mortgage indebtedness. (Mich.) Smith v. Werkheiser, 406.

See Bankruptcy; Contracts, 9, 10.

FRAUDS, STATUTE OF.

1. **STATUTE OF FRAUDS.—A Sale of Growing or Standing Timber** is a contract concerning an interest in land and within the statute of frauds. (Fla.) Richbourg v. Rose, 1061.

2. **STATUTE OF FRAUDS.—Part Payment, to Take a Contract for the Sale** of goods out of the statute of frauds, need not be in money. (Mich.) Driggs v. Bush, 389.

3. **STATUTE OF FRAUDS—Part Payment.—The Baling of Hay by the Purchaser Thereof,** in pursuance of an oral contract of sale, constitutes a sufficient part payment to take the transaction out of the statute of frauds. (Mich.) Driggs v. Bush, 389.

4. **PAROL TRUST in Land Bought at Execution Sale.**—A mere parol agreement without consideration to buy in land at an execution sale and to reconvey it to the judgment debtor upon payment of the purchase price and interest may not create a trust in favor of the judgment debtor, but where there is in the transaction an element of equity arising from fraud, confidential relation, refraining from bidding at the sale or from further protection of the property from sale, gross inadequacy of the purchase price, the supplying by the debtor of a part of the purchase money, or otherwise, such circumstances may be shown by parol and establish a trust. (Fla.) Patrick v. Kirkland, 1096.

5. **PAROL TRUST in Land Bought at Execution Sale—Facts Constituting.**—Where the lessees for turpentine purposes of land upon which an execution has been levied, upon being applied to for a loan to prevent a sale of the land, orally agree with some of the heirs of the execution debtor that the lessees will bid in the land at the execution sale, and upon payment by the heirs of the amount with interest, the lessees would reconvey the land to the heirs, and pay them the usual rent for turpentine purposes while the lands were held under the sheriff's deed, and the land alleged to be worth three thousand dollars is bought in for two hundred and fifty dollars, and thereafter profitably used by the purchasers as it had been previously used, and where it was agreed that fifty dollars due as rent at the execution sale

should be credited on the purchase price, a trust in favor of the heirs is thereby created, which a court of equity will enforce. (Fla.) Patrick v. Kirkland, 1096.

FREEDOM OF PRESS.
See Contempt.

FRIGHT.
See Damages, 16.

GAMING.

1. GAMING.—Buying Stock on Margins is a gambling transaction, and void. (Me.) Lancaster v. Ames, 286.

2. GAMING—Buying Stock on Margins—Enforcement of Contract.—If money is advanced to another for the express purpose of buying stock on margins, the promise of the person to whom it is advanced to repay it or be accountable for it, is void for want of sideration, and cannot be enforced. (Me.) Lancaster v. Ames, 286.

GARNISHMENT.

1. GARNISHMENT.—Money in the Hands of Special Commissioners arising out of a case in chancery, belonging to a judgment debtor, and which the court has directed such commissioners to pay over to him is subject to garnishment. Such money is not in the custody of the law. (W. Va.) Boylan v. Hines, 983.

2. GARNISHMENT.—A Credit can Acquire No Greater Right to the Effects of the Defendant in the Hands of the Garnishee, or to any debt owing from the garnishee to the defendant or against the garnishee, than the defendant himself had at the time of the garnishment, unless it may be in cases of voluntary or fraudulent conveyances. He can only succeed in putting himself into the position with respect to the effects of debts attached that the defendant occupied. (Conn.) Shelton v. Wolthausen, 131.

See Banks and Banking, 3.

GRADING GRAIN.
See Sales, 9.

GUARDIAN AND WARD.

1. GUARDIAN.—The Superior Court has Jurisdiction to Appoint guardians for insane persons wholly independent of its jurisdiction to commit to hospitals for the insane, and the validity of an order appointing a guardian depends in no manner upon the validity of the previous adjudication of insanity. (Wash.) Donaldson v. Winningham, 937.

2. GUARDIAN.—The Service of Notice of the Application for the Appointment of a guardian of an insane person upon him and upon the person having his custody is jurisdictional, so that in the absence thereof all subsequent proceedings are void. (Wash.) Donaldson v. Winningham, 937.

See Certiorari, 9.

HABEAS CORPUS.

1. HABEAS CORPUS—Errors of the Committing Court.—In a proceeding by habeas corpus, the court is not concerned with mere errors of law not affecting the jurisdiction of the court making the or-

der under which the prisoner is held. (Wyo.) Hovey v. Sheffner, 1037.

2. **THE WRIT OF HABEAS CORPUS is not Endowed with the Functions of a Writ of Error** or other proceeding for the correction of error. (Wyo.) Hovey v. Sheffner, 1037.

3. **THE WRIT OF HABEAS CORPUS does not Bring Up the Record**, if any, wherein the commitment has occurred. Hence, the revisory or appellate jurisdiction of the court to which the writ is returnable is not invoked. (Wyo.) Hovey v. Sheffner, 1037.

4. **HABEAS CORPUS—Irregularities in the Committing Court.**—The writ of habeas corpus is not designed to interrupt the orderly administration of the criminal laws by a competent court acting within the limits of its jurisdiction. Mere irregularities or errors not affecting the jurisdiction of the trial court, do not authorize the discharge of the accused on habeas corpus. (Wyo.) Hovey v. Sheffner, 1037.

5. **HABEAS CORPUS.—Jurisdiction to Render the Particular Judgment Must Exist** or the prisoner may be discharged on habeas corpus, though the court had jurisdiction of the subject matter and the person. (Wyo.) Hovey v. Sheffner, 1037.

6. **HABEAS CORPUS.—Improper Discharge of the Jury After the Accused has been Placed in Jeopardy** does not furnish any ground for his release on habeas corpus. It is a defense which may be presented to the court in the original prosecution, and may be there found sufficient to entitle the accused to an acquittal, but it does not deprive the court of jurisdiction to proceed further, so that the accused is entitled to be released on habeas corpus without trial. (Wyo.) Hovey v. Sheffner, 1037.

7. **HABEAS CORPUS.—The Discharge of the Jury on a Sunday or Other Nonjudicial Day in a Criminal Case After the Accused has Been Placed in Jeopardy,** conceding it to amount to an acquittal, does not entitle him to release on habeas corpus. If the discharge has the effect insisted upon, it may be presented to the court by some proper pleading or other proceeding as a ground for the acquittal from any further prosecution. (Wyo.) Hovey v. Sheffner, 1037.

HAWKERS AND PEDDLERS.

1. **PUBLIC STREETS, Rights of Hawkers and Peddlers Therein.** A license to a peddler or hawker gives him no authority to set up a lunch wagon within the limits of a highway, or to commit any obstruction in the public streets. (Mass.) Commonwealth v. Morrison, 338.

2. **HAWKERS AND PEDDLERS** are persons who travel about, either on foot or in wagons, and generally, though not necessarily, by outcry, sign or advertisement, attracting attention to their wares. (Mass.) Commonwealth v. Morrison, 338.

3. **HAWKERS and PEDDLERS, Who are not.—One Who Conducts His Business at a Fixed Place** and from a room which, though set upon wheels and removed at certain hours, has the characteristics of an eating-house, is not a hawker or peddler, as those terms are used in the law. (Mass.) Commonwealth v. Morrison, 338.

HIGHWAYS.

1. **AUTOMOBILES are not Carriages** within the meaning of a statute requiring cities and towns to keep public ways reasonably safe at all seasons for travelers with their horses, teams and carriages. (Mass.) Doherty v. Inhabitants of Ayer, 355.

2. **AUTOMOBILES, Duty to Make Highways Safe for.**—If a public way is reasonably safe and convenient for travel generally, a town or city is not liable for the failure to make special provisions required for the safety and convenience of persons using automobiles. (Mass.) Doherty v. Inhabitants of Ayer, 355.

3. **HIGHWAYS, Condition of Land Adjacent to.**—If an accident happens outside of the limits of a highway, the town is not liable, as there is no obligation to keep in repair land outside of the boundaries of a way, where there is no such dangerous condition as calls for the erection of a barrier to keep travelers from passing out of the road. (Mass.) Doherty v. Inhabitants of Ayer, 355.

4. **AUTOMOBILES—Persons Traveling on a Public Highway Without Registration or License.**—One who travels on the public streets without proper registration of the vehicle and without a license to operate it is without remedy for injury caused by defects in the way. (Mass.) Doherty v. Inhabitants of Ayer, 355.

5. **AUTOMOBILES—Presumption in Favor of Registration and Licensing of.**—One using a public highway with his automobile will be presumed to have been duly registered and licensed, and will not be denied the right to recover for injuries due to a defect in the highway, on the ground that he has not offered evidence of registration of licensing. (Mass.) Doherty v. Inhabitants of Ayer, 355.

See Animals.

HOLIDAYS.

TRIAL—Legal Holiday—Objection.—An objection to the trial of a criminal case on a legal holiday, to be available on appeal, must be made when the case is called for trial on such holiday, and the statement of the trial judge, made on the day before, that he knew of no law which prevented a court from trying a case on a legal holiday, is immaterial. (S. C.) State v. Cook, 788.

HOMESTEAD.

In General.

1. **HOMESTEAD—Necessity of Declaration.**—There is not homestead right in property acquired in Washington since the passage of the act of 1895, unless the declaration of homestead is executed and filed as therein provided. (Wash.) Donaldson v. Winningham, 937.

2. **HOMESTEAD—Head of a Family, Who is Within the Meaning of the Laws Exempting.**—Under the statutes of Washington, a wife, as well as her husband, must be regarded as the head of a family, for the purpose of asserting their rights to the exemption of the homestead, though he has not deserted her, and is not absent nor infirm. (Utah) Volker-Scowcroft Lumber Co. v. Vance, 828.

3. **HOMESTEAD, Plea of, When Sufficient—Failure to Select or File Declaration of.**—An answer averring that the defendant who makes it was the head of a family, to wit, the wife of the person designated, and that the real property described in the complaint was at all times specified their homestead, and, with the improvements, does not exceed the homestead exemption, is sufficient, though it does not state any declaration or other formal selection of the property as a homestead. (Utah) Volker-Scowcroft Lumber Co. v. Vance, 828.

4. **HOMESTEAD—Conveyance by Husband Alone.**—A contract to convey a homestead made by the husband alone is without validity, and damages cannot be recovered against him for its breach. (N. D.) Silander v. Gronna, 616.

Mechanics' Liens.

5. **HOMESTEAD—Unconstitutionality of Statute Attempting to Make Subject to Mechanics' Liens.**—Under a constitution declaring that the legislature shall provide by law for the selection by each head of a family an exemption of a homestead, together with the appurtenances and improvements, a statute purporting to make the homestead subject to mechanics' liens is unconstitutional and void. (Utah) Volker-Scowcroft Lumber Co. v. Vance, 828.

6. **HOMESTEAD—Mechanics' Liens, When not Consented to by a Contract for the Construction of a Dwelling.**—A contract for the construction of a dwelling or other improvements on property constituting a homestead is not a waiver of the exemption of such property from mechanics' liens for improvements, unless the contract, in express terms, stipulates to such exemption. (Utah) Volker-Scowcroft Lumber Co. v. Vance, 828.

HOMICIDE.

1. **HOMICIDE in Defense of a Relative.**—One who undertakes to assist a near relative who is in danger of death or great bodily harm at the hands of an antagonist, acts at his peril if the person assisted was actually at fault in provoking the difficulty. (S. C.) State v. Cook, 788.

2. **HOMICIDE—Self-defense.**—If one person interferes in behalf of another, who is the aggressor, to prevent his being killed, and there is opportunity to retreat after the interference, and advantage is not taken of it, the person interfering can claim no greater right than the other, and neither of them can invoke the doctrine of self-defense. (S. C.) State v. Cook, 788.

HOSPITAL.

See Nuisance, 9.

IDEM SONANS.

See Executions, 2.

ILLEGITIMATES.

See Bastards.

INJUNCTION.

EQUITY JURISDICTION—Injunction—Criminal Proceedings. If a criminal prosecution under an invalid law destroys civil property or property rights and their enjoyment, a court of equity may properly enjoin the criminal prosecution. (W. Va.) Fellows v. City of Charleston, 990.

See Nuisances, 8, 9.

INSANITY.

See Judgments, 11.

INSTRUCTIONS.

See Trial, 3-10.

INSURANCE.

Fire Insurance.

1. **INSURANCE Against Fire—Property Removed.**—Though a policy insuring personal property against destruction by fire contains a rider granting permission to remove such property to another build-

ing, and that the policy shall attach to and cover all property in both locations during removal, if the property is removed and stored in another building, with a view to its subsequent removal to the building designated in the rider, such property is not covered by the policy, and no recovery can be had for its loss from the peril insured against. (Mass.) Palatine Ins. Co. v. Kehoe, 375.

2. **INSURANCE, Right to Recover Money Paid Under Policy Where the Payment was Induced by False Representations.**—In an action to recover money paid under a policy of insurance, such payment cannot be regarded as a waiver of the right to recover, where it was induced by false representations of the insured regarding material matters. (Mass.) Palatine Ins. Co. v. Kehoe, 375.

3. **INSURANCE, Ratification of Invalid Policy, What Amounts to.**—If, after a loss, the insurer requests the assured to make or procure an assignment, which is accordingly made, and payment is afterward made by the assured to the assignee, this is a ratification of the payment so made. (Mass.) Palatine Ins. Co. v. Kehoe, 375.

Accident Insurance.

4. **INSURANCE AGAINST ACCIDENT — Notice of Injury as a Condition Precedent.**—Under a policy insuring against injury by accident, providing written notice of the injury is given within a time specified, such notice is a condition precedent, in the absence of which no liability arises. (Mass.) Hatch v. United States Casualty Co., 332.

5. **INSURANCE AGAINST ACCIDENT—Notice of Injury, What is and When must be Given.**—Under a policy insuring against accident, providing written notice is given within ten days after the injury, the time for giving such notice begins to run on the happening of the accident, though the person is not aware until long afterward that a serious consequence will ensue. Hence, the time of giving such notice cannot be postponed until the death of the insured, on the ground that not till then had the injury occurred within the meaning of the policy. (Mass.) Hatch v. United States Casualty Co., 332.

6. **INSURANCE, ACCIDENT—Reasonableness of Condition Requiring Notice.**—A condition in a policy insuring against injury by accident requiring a notice of the injury to be given within ten days of such accident is reasonable. (Mass.) Hatch v. United States Casualty Co., 332.

See Benefit Associations; Taxation, 5.

INTEREST.

INTEREST—Rate When not Agreed upon.—Where a person agrees to pay interest but no rate is stated, the rate fixed by law prevails. (Fla.) Patrick v. Kirkland, 1096.

INTERPLEADER.

1. **INTERPLEADER—Funds in Custody of Law.**—Where parties to an action of interpleader pay into court the fund involved, the money passes into the custody of the law. The court alone has authority over it, which authority can be exercised only through proceedings in, or relating to, the pending cause. (Conn.) Shelton v. Wolthausen, 131.

2. **INTERPLEADER—Funds in Custody of Law.**—Where funds have been deposited in court in an action of interpleader, a stranger to the proceedings who claims a right concerning the fund should apply to intervene in the action and present his claim. (Conn.) Shelton v. Wolthausen, 131.

3. **INTERPLEADER—Funds in Custody of Law.**—Where a fund has been paid into court in an action of interpleader, and the court has ordered the clerk to hold the same to await the result of the pending suit, and directs the manner of its payment upon the conclusion of the suit, an action of interpleader by the clerk against persons claiming an interest in the fund is misconceived and irregular. His duty is to comply with the order. (Conn.) Shelton v. Wolthausen, 131.

INTERSTATE COMMERCE.

See Commerce.

INTERURBAN RAILWAYS.

See Carriers, 8-15.

INTOXICATING LIQUORS.

INTOXICATING LIQUORS Sent C. O. D., Sale of, Where Deemed to have been Made.—If the terms of a sale of intoxicating liquors are agreed upon between the vendor and purchaser, and they are delivered to an express company for shipment C. O. D. to the purchaser, the sale is deemed made at the place of shipment, and the vendor is not guilty of selling such liquors where they are so received. (Ohio St.) State v. Mullin, 710.

See Deeds, 7, 8.

JEWELRY.

See Exemptions.

JOINT TORTS.

See Torts.

JUDGMENT.

Assignment by Administrator.

1. **JUDGMENTS—Assignment by Administrator.**—A judgment in favor of an intestate may be assigned by his administrator in writing, and the assignee may maintain an action thereon in his own name. (Me.) Manson v. Peaks, 311.

2. **JUDGMENTS—Assignment by Administrator—Collateral Attack.**—If a judgment in favor of an intestate is assigned in writing by his administrator, and the assignee thereof obtains judgment thereon, the validity of the assignment cannot be collaterally attacked by the judgment debtor. (Me.) Manson v. Peaks, 311.

Death of Party.

3. **JUDGMENT—Death of Party—Effect of Decree.**—The status of a person while living cannot be affected by a judgment entered after his death, as it can only affect the property rights of others. (Iowa) Wood v. Wood, 223.

Conclusiveness and Res Judicata.

4. **JUDGMENTS—Res Judicata.**—If there is a breach of an indivisible contract to convey certain tracts of land, a judgment for specific performance as to one of the tracts is a bar to an action for the specific performance of the contract to convey another of the tracts. (Wash.) Collins v. Gleason, 891.

5. **JUDGMENTS—Res Judicata—Breach of Indivisible Contract.**—For one breach of an indivisible contract there can arise but one cause of action, and if in such action the plaintiff does not demand the en-

tire relief to which he is entitled, he is estopped and cannot afterward complain. (Wash.) Collins v. Gleason, 891.

6. **JUDGMENTS—Res Judicata—Estoppel.**—Failure of a defendant to plead a former judgment as res judicata does not estop him from setting up that defense by motion, for judgment on the pleadings, if the plaintiff sets up the former judgment in a reply. (Wash.) Collins v. Gleason, 891.

7. **JUDGMENTS—Res Judicata—Breach of Indivisible Contract.**—If a person seeking the specific enforcement of a contract for the conveyance of land discovers, before the entry of the judgment granting the relief prayed for, a failure to convey other lands as required by the contract, but fails to ask the additional relief in an amended complaint, the judgment is a bar to another suit for specific performance concerning the lands not conveyed by the contract. (Wash.) Collins v. Gleason, 891.

8. **JUDGMENTS—Res Judicata—Estoppel.**—If a person inadvertently or by reason of negligence or mistake, and without fault or fraud of the adverse party, takes a judgment for less than he is entitled to recover, he is estopped from bringing a second action for the residue. (Wash.) Collins v. Gleason, 891.

9. **JUDGMENT — Conclusiveness of Former Adjudication.** — A judgment on the merits is a bar to a subsequent action between the same parties upon an identical cause of action, and the court will not consider in the latter action an allegation that the verdict was directed in the former action on grounds not affecting the merits. (R. I.) H. F. Watson Co. v. Citizens' Concrete Co., 749.

10. **JUDGMENT—Conclusiveness of Adjudication.**—The judgment of a court having jurisdiction of the subject matter and of the person, though erroneous, is conclusive upon the parties until set aside in a direct proceeding instituted for that purpose. (R. I.) H. F. Watson Co. v. Citizens' Concrete Co., 749.

Relief and Setting Aside.

11. **JUDGMENT—Insanity—Limitation for Time for Attack.**—The disability of an insane person terminates with his death, and a proceeding to vacate a judgment fraudulently obtained against him must be commenced within one year thereafter. (Iowa) Wood v. Wood, 223.

12. **JUDGMENTS—Setting Aside for Fraud.**—A decree will not be set aside on the sole ground that an issue directly raised by the pleadings has been decided on perjured testimony. (Iowa) Wood v. Wood, 223.

13. **JUDGMENTS—Annulment for Fraud.**—If a decree of divorce is obtained on false allegations and proof of the insanity of the defendant at the time of the marriage, and such issue has been previously adjudicated against the plaintiff by the same court and the fact thereof fraudulently concealed, such a fraud is perpetrated upon the court as justifies it in annulling the decree. (Iowa) Wood v. Wood, 223.

14. **JUDGMENT—Time for Seeking Relief from Void Decree.**—Relief from a judgment void for want of service may be had on motion after the expiration of the statutory limitation of one year without the showing of merits and excuse required where jurisdiction has attached. (N. D.) Skjelbred v. Shafer, 614.

15. **JUDGMENT—Relief After Term Time.**—The right to apply for the amendment or opening of a judgment exists after term time in North Dakota; there are no terms of court in that state in the common-law sense. (N. D.) Dedrick v. Charrier, 608.

16. **JUDGMENT—Relief from by Successful Party.**—The right to have a judgment set aside on the ground of mistake is not confined

to the unsuccessful party; excusable mistakes may be remedied on behalf of successful litigants. (N. D.) Dedrick v. Charrier, 608.

Equitable Relief.

17. **JUDGMENTS—Vacation—Equitable Relief.**—If a person embodies in a usurious note a power of attorney to confess judgment, and judgment is confessed without notice to him, though in other respects the judgment is as valid as any other judgment, yet as the power of attorney is a part of the usurious contract, a court of equity will vacate the judgment and purge the transaction of usury. (Ala.) Hightower v. Coalson, 20.

18. **JUDGMENT—Relief Against in Equity.**—In a suit for equitable relief against a default judgment, on the ground that the defendant was misled by the statements of the plaintiff's attorney, an averment that the attorney gave the defendant to understand that no action had been, or would be, commenced, is sufficient without stating the precise language which misled. (Conn.) Lithuanian Brotherhelp Society v. Tunila, 138.

19. **JUDGMENT—Relief Against in Equity.**—Where, in an action against a benefit society, service is made on its secretary, a foreigner ignorant of our language, who, supposing the summons and complaint to be a notice to call at the office of the plaintiff's attorney, does so, and the attorney, though with no intent to mislead, gives him to understand that no action has been or will be commenced, a default judgment thereafter taken against the society, which has no knowledge of the proceedings, will be relieved against in equity upon the showing of a meritorious defense. (Conn.) Lithuanian Brotherhelp Society v. Tunila, 138.

See Bankruptcy.

JUDICIAL NOTICE.

See Evidence.

JUDICIAL SALES.

1. **JUDICIAL SALES—Notice to Purchaser.**—The purchaser at a judicial sale is charged with notice of every fact appearing upon the face of the record affecting the title acquired by him. (W. Va.) Board of Education v. Berry, 975.

2. **JUDICIAL SALE—Direct or Collateral Attack.**—Where an action is brought against the former owner to recover property or to quiet a title acquired at a judicial sale, a cross-complaint by him attacking the validity of the judgment under which the sale was made is a direct and not a collateral attack. (Wash.) Donaldson v. Winningham, 937.

JURISDICTION.

See Courts.

JURY.

JURY TRIAL—Violation of Municipal Ordinances.—The constitutional guaranty of a trial by jury does not apply to the violation of a municipal ordinance, unless the violation of such ordinance is also a violation of the criminal laws of the state. (Ala.) Miller v. Mayor of Birmingham, 31.

See Criminal Law, 2-4.

LACHES.

See Equity.

LANDLORD AND TENANT.

In General.

1. **LANDLORD AND TENANT—Breach by Landlord—Measure of Damages.**—If a lessor fails to give possession at the commencement of the term, the measure of damages is founded upon equitable considerations, and the lessor can recover only such damages as have directly and necessarily been caused by the defendant's wrongful act, and if the plaintiff by reasonable exertion on his part, could have prevented such damages, he is bound to do so, and, failing in this, he cannot recover them. (W. Va.) Huntington Easy Payment Co. v. Parsons, 954.

2. **LANDLORD AND TENANT—Waiver.—Acceptance of the Leased Property After the Time When the Landlord was Bound to Deliver Possession** under the terms of the lease is no waiver of the tenant's right to damages suffered by him prior to the acceptance. (W. Va.) Huntington Easy Payment Co. v. Parsons, 954.

3. **LANDLORD AND TENANT—Breach by Landlord—Tender of Possession—Damages.**—If a tender of leased property is made by a landlord to his tenant a short time after the tenant was entitled to possession, he can recover damages only for the time he was kept out of possession, if, at the time of the tender he was in a position to accept it. (W. Va.) Huntington Easy Payment Co. v. Parsons, 954.

4. **LANDLORD AND TENANT—Right to Remove Betterments—Promise of Landlord to Pay for.**—A tenant has the right to remove all betterments affixed by him, if done before the lease expires and without injury to the freehold, and the promise of the landlord to pay for them made during the duration of the lease is based upon a valuable consideration, and enforceable. (N. C.) Critcher v. Watson, 470.

Oil Lease.

5. **CONTRACTS, UNILATERAL—Cancellation.**—A lease to mine and take oil from specified land upon a small consideration and a certain royalty on the coal and oil taken therefrom, and which provides that a mine shall be begun and operated at the sole discretion of the lessee, and that no cessation of operation in mining, or availing himself in any other manner of any of the privileges of the lease, shall operate as a forfeiture thereof, such lease being signed by the lessor and not by the lessee, is a unilateral contract, voidable for want of consideration, and subject to cancellation. (Ala.) Collins v. Abel, 24.

LAST CLEAR CHANCE.

See Negligence, 4.

LEASES.

See Landlord and Tenant.

LESSEE RAILWAY.

See Railways, 2.

LETTERS.

See Evidence, 20, 21.

LICENSES.

1. **LICENSE—Whether Employé must Obtain.**—A statute providing that dealers and traders in junk shall obtain a license therefor does not require bona fide employés of such dealers to take out license. (Conn.) State v. Rosenbaum, 121.

2. **LICENSE TAXES—Selling of Milk.**—An ordinance requiring a license of fifteen dollars for each wagon peddling milk or butter is not unreasonable nor void. (Ala.) Miller v. Mayor of Birmingham, 31.

3. **LICENSE TAX—Occupation—Tax.**—An ordinance imposing a license tax on persons engaged in the dairy business is an occupation license tax and not a property tax. (Ala.) Mayor etc. of Birmingham v. Goldstein, 33.

4. **LICENSE TAX on Sale of Milk and Butter—Power to Impose.**—Power conferred on a city to license, tax and regulate all kinds of business and to inspect food products and dairies, and exact a reasonable compensation therefor, authorizes it to impose a license tax on dairymen selling milk and butter within the city. (Ala.) Mayor etc. of Birmingham v. Goldstein, 33.

5. **LICENSE TAX—On Cows—Validity.**—A municipal ordinance imposing a reasonable license tax on each cow used in the production of milk sold within the city is simply adopted for differentiating dairymen according to the amount of business done, and is valid. (Ala.) Mayor etc. of Birmingham v. Goldstein, 33.

See Hawkers and Peddlers.

LIENS.

See Mechanics' Liens.

LIGHT AND AIR.

See Easements.

LIMITATION OF ACTIONS.

In General.

1. **LIMITATIONS OF ACTIONS—Questions Presentable by Demurrer.**—The sufficiency of a petition as to whether it presents a cause of action against which the statute of limitation has run may be presented by demurrer. (Wyo.) Union Stockyards Nat. Bank v. Maika, 1032.

2. **LIMITATION OF ACTIONS—Involuntary Part Payment as the Result of a Judicial Proceeding.**—If a judgment is rendered foreclosing a mortgage and directing a sale of the property to satisfy promissory notes described therein, such sale and the application of its proceeds toward the payment of those notes do not create such part payment as arrests the running of the statute of limitations. (Wyo.) Union Stockyards Nat. Bank v. Maika, 1032.

Conflict of Laws.

3. **LIMITATIONS OF ACTIONS upon Note Executed Without the State.**—If a note executed in another state is by its terms payable therein, and the maker is a nonresident of this state when the cause of action accrues, the statute commences to run in his favor only when he comes within the state, and if afterward he leaves, the time during which he is absent is not a part of the time within which suit must be commenced. (Cal.) McKee v. Dodd, 82.

4. **LIMITATIONS OF ACTIONS—Place Where Cause of Action is Deemed to have Arisen.**—If a note is made and is payable in a state where the maker resides, and he subsequently removes to another state or country, a cause of action does not arise in the state or country where the default occurs, nor successively in each state or country into which he goes, but does arise in the state

wherein the note was made and is payable. (Cal.) McKee v. Dodd, 82.

5. **LIMITATIONS OF ACTION—Statute Respecting Cause of Action in Another State or Country, Construction of.**—A statute relating to a cause of action which has arisen in another state or a foreign country, and providing that an action cannot be maintained thereon if it is barred by the laws of such state or country, does not bar an action in this state on a promissory note which might have been barred according to the laws of some foreign country wherein the debtor may have been or resided after its execution, if it is not barred by the laws of the state wherein the note was executed and was by its terms payable. (Cal.) McKee v. Dodd, 82.

6. **LIMITATION OF ACTIONS—Conflict of Laws.**—Statutes of limitation go to the remedy and not to the cause of action. Therefore, an action upon a contract is governed by the law where it is brought. (Wyo.) Union Stockyards Nat. Bank v. Maika, 1032.

See Adverse Possession; Death; Pledges.

LIQUIDATED DAMAGES.

See Damages, 1-4.

LIQUORS.

See Intoxicating Liquors.

LOGS AND LOGGING.

See Eminent Domain, 1; Waters and Watercourses, 3.

Note.

Lost Negotiable Instruments. See Stolen Negotiable Instruments.

MAINTENANCE.

See Divorce, 6-9.

MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION—Issuance of Warrant.—An action for malicious prosecution does not lie for procuring the issuance of a warrant upon a charge not actionable per se, where no service of the warrant has been made and no judicial action has been taken in the proceeding and no special damage is alleged. (R. I.) Mitchell v. Donanski, 717.

MANDAMUS.

1. **MANDAMUS—Payment of Officer's Salary.**—Mandamus is the proper remedy to enforce the payment by a municipal corporation of an officer's salary, the amount of which is fixed. (Mich.) Granger v. French, 416.

2. **MANDAMUS—Payment of Assigned Salary.**—Mandamus lies to compel a municipality to pay an officer his salary, although he assigned it before it was earned, such assignment being void as against public policy. (Mich.) Granger v. French, 416.

3. **MANDAMUS Lies Only** to compel the performance of a specific act pointed out by law. (N. C.) Ward v. Commissioners of Beaufort County, 489.

4. **MANDAMUS will not Lie to Compel County Commissioners to** repair or build a courthouse. (N. C.) Ward v. Commissioners of Beaufort County, 489.

5. **MANDAMUS Lies to Compel a Public Officer to Perform a Plain, Ministerial Duty,** imposed by law, involving no discretionary power, to the performance of which the relator has a right, and to enforce which he has no other adequate and specific legal remedy. (S. C.) Ehrlich v. Jennings, 795.

6. **MANDAMUS to Compel Exchange of a Certificate of Stock for a State Bond.**—Mandamus will lie to compel a state officer to exchange a certificate of stock, for a state bond when such action is expressly authorized by the legislature and the relator's title to the bond is impregnable. (S. C.) Ehrlich v. Jennings, 795.

7. **MANDAMUS to Compel a State Officer** to exchange a certificate of stock for a bond is in no sense a suit against the state. (S. C.) Ehrlich v. Jennings, 795.

Note.

Mandamus against corporations to compel the performance of their duties, 513-515.
against school boards and teachers, 518.
against telephone corporations, 515.
against water companies, 515.
assessments or taxation, control of by, 521.
corporations, duties of which are enforceable by, 513-515.
courts may be compelled by to exercise their jurisdiction, 521.
discretion, abuse of, when may be prevented, 505, 506.
doubt as to matter of law, when will not justify the refusal of, 494, 495.
duty, impossible cannot be enforced by, 495.
duty involving the exercise of judgment or discretion, performance of, extent which may be compelled by, 504.
duty, ministerial, performance of, when compellable by, 499.
duty must be positive, not discretionary merely, 493.
duty not official will not be enforced by, 495.
duty of a political or governmental character, compelling the performance of by, 509.
duty resulting from an office, trust or station, compelling the performance of by, 509.
duty to be enforced by must be specific and not complicated nor involving a series of acts, 496.
duty to be enforced, when need not consist of a single act, 496.
duty to be performed is necessary to authorize the issuing of, 493.
duty to the performance of which supervision of the court is necessary, whether may be enforced by, 496.
election boards, duties of which may be compelled by, 517.
judicial action, extent to which may be compelled by, 503-505.
judicial acts, what are within the meaning of the rule of, 505.
judicial officers, action of, when may be compelled by, 502.
legislative duties, compelling performance of by, 509, 510.
misconception of law, compelling notwithstanding, 507.
right to be enforced must be clear and positive, 494, 495.
to compel action where the nonaction was due to a mistake or misconception of the law, 508.
to compel a court to proceed with a trial, 508.
to compel elections and the canvassing of votes, 517.
to compel examining boards of physicians and dentists to act, 516.
to compel payment of demands, 519.
to compel the approval of official bonds, 518.
to compel the construction of public improvements, 518.
to compel the granting or refusing of licenses, permits or certificates, 515.
to compel the issuing of building permits, 516.
to compel the issuing of certificates of incorporation, 516.

Mandamus to compel the exercise of a discretion, 521.
to compel the levying of assessments, 520, 521.
to compel the making of a contract, 497.
to compel the performance of a duty imposed by law, 497.
to compel the performance of a series of duties, 497.
to compel the performance of a ministerial duty by an executive officer, 498.
to compel the payment of claims, 520, 521.
to compel the Secretary of State to attest the signature of the governor, or to affix the seal of the state, 499.
to compel the signing of an ordinance passed by a municipal body, 499.
to compel the signing of statutes or ordinances duly enacted, 511.
to enforce a public right or duty, 497.
to enforce contract rights, 511, 512.
to keep inferior bodies or tribunals within their jurisdiction, 497.
to prevent a gross abuse of discretion, 505.
to try title to public office, 518.
whether a prerogative writ, 497.
will not issue to compel the doing of an act which will involve an official in litigation, 493.

MARGINS.
See Gaming.

MARRIAGE.
See Divorce.

MASSES.
See Charities.

MASTER AND SERVANT.

In General.

1. **MASTER AND SERVANT—Vice-principal.**—A person who is in charge of a grain elevator, and who has power to employ men and give them directions as to their work, is a vice-principal, for whose negligence the master is responsible. (Iowa) Meier v. Way, Johnson, Lee & Co., 254.

2. **MASTER AND SERVANT—Presumption as to Due Care.**—In an action to recover for the death or injury of a servant, it is presumed that he was in the exercise of due care when he received his injury. (Iowa) Meier v. Way, Johnson, Lee & Co., 254.

Dangerous Place and Appliances—Assumption of Risk and Contributory Negligence.

3. **MASTER AND SERVANT—Negligence—Dangerous Place to Work.**—It is negligence for the master to send an employé into a dangerous place to do work he is not employed to do, without warning him of the danger. (Iowa) Meier v. Way, Johnson, Lee & Co., 254.

4. **MASTER AND SERVANT—Negligence—Assumption of Risks.** The question as to whether the danger to a servant is open and obvious, and the duty to warn him thereof, is for the jury to determine. (Iowa) Meier v. Way, Johnson, Lee & Co., 254.

5. **MASTER AND SERVANT—Assumption of Risk.**—If an employé goes into a place with which he is not familiar, pursuant to a specific order from the master, the servant does not assume the risk of the danger incident to the work. (Iowa) Meier v. Way, Johnson, Lee & Co., 254.

6. **EMPLOYERS' LIABILITY—Defective Device Intended for Other Purposes.**—A railroad company with notice of a custom of brakemen to use a portion of a wood rack on a car in boarding it is bound to keep the rack reasonably safe for such use, regardless of the purpose it was originally intended to subserve. (Wash.) Sturgeon v. Tacoma Eastern R. R. Co., 934.

7. **EMPLOYERS' LIABILITY.—For a Brakeman to Attempt to Board a Moving Car** is not contributory negligence as a matter of law. (Wash.) Sturgeon v. Tacoma Eastern R. R. Co., 934.

8. **EMPLOYERS' LIABILITY—A Railroad Company cannot Avoid Liability by Imposing the Duty of Inspection,** where its employés have no reasonable opportunity therefor, as when boarding a morning. (Wash.) Sturgeon v. Tacoma Eastern R. R. Co., 934.

Negligence of Chauffeur.

9. **AUTOMOBILES—Chauffeur, Owner's Liability for Acts of.**—An automobile is not a machine of such danger as to render its owner liable for injuries to a person caused thereby, while operated by his chauffeur, not engaged directly in the line of his employment, even though the master has made it possible for him to take out and operate such machine at pleasure, and for his own purpose. (Wash.) Jones v. Hoge, 915.

10. **AUTOMOBILES—Negligence of Chauffeur—Scope of Employment.**—An automobile owner is not liable to one who is injured by the incompetency or recklessness of his chauffeur, who is operating the machine without the knowledge of such owner and not to carry out any purpose for which he was employed, but on an errand personal to himself. (Wash.) Jones v. Hoge, 915.

Breach of Contract of Employment.

11. **CONTRACT OF EMPLOYMENT—Action for Breach.**—An action is for the breach of a contract of employment rather than for wages, where a special count in the declaration sets out the contract and its breach, and a bill of particulars is filed with an item of damages claimed for the breach. (Mich.) Webb v. Depew, 431.

12. **CONTRACT OF EMPLOYMENT—Damages for Breach.**—In an action by an employé for a breach of his contract of employment, the damages are not limited to those that have accrued at the time of the trial. (Mich.) Webb v. Depew, 431.

MAYHEM.

1. **MAYHEM—What Constitutes.**—To constitute mayhem, an injury to an ear must be such as disfigures to ordinary observation, as distinguished from a wounding which simply mars the member. (Ala.) Green v. State, 17.

2. **MAYHEM.—Self-defense** is available in justification of the crime of mayhem, providing the resistance is proportionate to the injury offered. (Ala.) Green v. State, 17.

3. **MAYHEM—Self-defense—Faulty Instructions.**—Instructions asserting that if the accused and the person injured were engaged in mortal strife, and the person injured was armed with a deadly weapon and the accused was unarmed, and that while so engaged the accused bit off only a small portion of such injured person's ear, the accused must be acquitted is erroneous as not including all the elements of self-defense. (Ala.) Green v. State, 17.

4. **MAYHEM—Self-defense.**—Instruction that if the accused cut, bit, struck off, or mutilated the ear of the injured person while fighting with him in self-defense, and that, if the accused was free from fault in bringing on the difficulty, he is not guilty, is erroneous as omitting certain elements of self-defense. (Ala.) Green v. State, 17.

MILK.

See Licenses, 2-5.

MISTAKE OF LAW.

See Contracts, 5.

MORTGAGES.

1. **MORTGAGE, Effect of a Sale and Conveyance of the Property Subject to.**—On the conveyance by the mortgagor of property subject to the mortgage, he becomes, in effect, surety for the payment of the debt, and if he pays it, becomes entitled to subrogation and does not discharge it. (Mass.) North End Savings Bank v. Snow, 368.

2. **MORTGAGE—Conveyance of Property Subject to Subsequent Agreement, Effect of on the Obligation of the Mortgagor.**—On the conveyance of property subject to a mortgage, the mortgagor becomes entitled to have it applied on the payment of the mortgage debt, and any valid agreement affecting the right of foreclosure by extending the time of payment releases the mortgagor to the amount to which, by reason of such extension, the security falls short of the amount due. (Mass.) North End Savings Bank v. Snow, 368.

3. **MORTGAGE, Agreement of Third Person to Pay, When Valid.** If persons to whom premises are conveyed subject to a mortgage enter into an agreement with the mortgagee that the former will pay the interest accruing on the indebtedness, and that the latter will not foreclose as long as such payment is made, this is a valid and enforceable agreement, and one the original mortgagors are entitled to rely upon. (Mass.) North End Savings Bank v. Snow, 368.

See Adverse Possession, 9; Chattel Mortgages.

Note.

Mortgages, negotiability of promissory notes, when destroyed by conditions in, 205-209.

MUNICIPAL CORPORATIONS.

In General.

1. **CORPORATIONS, DE FACTO—Municipalities.**—If the inquiry into the existence of a municipality is merely collateral, the fact that the municipality exists de facto is all that need be proved. (W. Va.) Board of Education v. Berry, 975.

2. **MUNICIPAL CORPORATIONS—Ordinances—Presumption as to Reasonableness.**—If a question arises as to the reasonableness of a municipal ordinance which relates to a subject within the corporate jurisdiction, it is presumed to be reasonable unless the contrary appears on the face of the law itself. (Ala.) Miller v. Mayor of Birmingham, 31.

Building Permits.

3. **MUNICIPAL ORDINANCES—Building Permits.**—A city has no power to require the issuance of a permit to build a house therein, unless authority to do so is given by the legislature. (W. Va.) Fellows v. City of Charleston, 990.

4. **MUNICIPAL CORPORATIONS—Building Permits—Constitutional Law.**—A municipal ordinance requiring a permit from the city to build a house therein is a valid exercise of the police power, if such power is granted by its charter, and in no sense is it unconstitutional. (W. Va.) Fellows v. City of Charleston, 990.

Streets—Use, Obstruction and Defective Condition.

5. **PUBLIC STREETS.**—The Easement Acquired by the Public Includes every reasonable means for the transportation of persons and

of commodities and of transmission of intelligence which the advance of civilization may render suitable for a highway. (Mass.) Commonwealth v. Morrison, 338.

6. **PUBLIC STREETS—Portable Eating-house in.**—An ordinance of a municipality cannot protect from prosecution one who maintains a room on wheels at the same place within a public street, during the hours of every night, for the sale of food and drinks usually sold at lunch counters. (Mass.) Commonwealth v. Morrison, 338.

7. **MUNICIPAL CORPORATIONS—Streets—Obstructions—Liability for Authorizing or Permitting.**—If an obstruction by the projection of steps to a residence upon the sidewalk of a city is of a wrongful character and amounts to an actionable wrong, it cannot be rendered lawful by lapse of time, however great, and a city government can neither validate it by grant nor sanction it by acquiescence, and having the power, in the exercise of its ministerial functions of summary abatement, the city is responsible to an individual who is injured by its existence when the latter is himself in the exercise of due care. (N. C.) White v. City of New Bern, 476.

8. **MUNICIPAL CORPORATIONS—Streets—Liability of City.**—The governing authorities of a town are charged with the duty of keeping its streets in a reasonably safe condition, and their duty does not end with putting them in a safe and sound condition originally, but extends to keeping them so, to the extent that this can be accomplished by proper and reasonable care and continuing supervision. (N. C.) White v. City of New Bern, 476.

9. **MUNICIPAL CORPORATIONS—Streets—Obstructions—Presumed Knowledge of.**—If a wrongful obstruction of a sidewalk of a city has been known to exist for a long period of time, the city is presumed to have knowledge thereof. (N. C.) White v. City of New Bern, 476.

10. **NUISANCE, When Both Public and Private.**—An obstruction in a public street which has the effect of preventing access to the premises along the street is a private as well as public nuisance, to the same extent as one which prevents access from the premises to the streets immediately in front of the land. (Cal.) Cushing-Wetmore Co. v. Gray, 47.

11. **STREETS, Public, When Open Sufficiently to Sustain an Action for Obstructing.**—If it appears that a sufficient width along a street was open for use as a roadway, and was in fact so used, an action is sustainable for obstructing the street, although the part so used was where the sidewalk would be if any were constructed. (Cal.) Cushing-Wetmore Co. v. Gray, 47.

12. **DAMAGES for Obstructing Public Street—Value of the Time of the Plaintiff's Officers.**—In an action by a corporation to recover damages for the obstructing of a public street so that plaintiff's access to its property and business was cut off and its business destroyed, it cannot recover for the value of the time of its officers on the ground that such time was wholly occupied in defending the corporation against the attacks of the defendant and in preparation for the trial of the action, where there is also a recovery for loss of profits, expenses incurred, and the injury to plaintiff resulting from the obstruction. (Cal.) Cushing-Wetmore Co. v. Gray, 47.

Liability of Abutting Owners.

13. **MUNICIPAL CORPORATIONS—Remedy Over Against Property Owner for Negligence.**—If a trapdoor is negligently maintained in a sidewalk by a lot owner in a city for his sole use and benefit, and a person passing along the sidewalk is injured thereby, the city and the lot owner are not joint tort-feasors as between each other, and if

damages are recovered against the city for such injury, it has its remedy over against the lot owner, with notice to defend the original suit to recover the amount paid. (Wash.) City of Seattle v. Puget Sound Imp. Co., 884.

14. **NEGLIGENCE—Dangerous Premises—Unsafe Trapdoors.**—The owner of a building in a city is liable for negligence in maintaining unsafe trapdoors over an areaway, placed in the sidewalk exclusively for his benefit, if the building is in his control, although parts of it are leased to third persons. (Wash.) City of Seattle v. Puget Sound Imp. Co., 884.

Rights of Abutting Owners.

15. **EASEMENT in Public Street.**—The owner of property abutting on a public street has, by reason of such ownership, a special easement in such street for purposes of ingress and egress, which is property as much as the lot itself. (Cal.) Cushing-Wetmore Co. v. Gray, 47.

16. **NUISANCE, Public, Special Injury Warranting the Maintaining of an Action for Damages.**—One who owns real property fronting upon public streets and maintaining a business on his property may sustain an action for damages resulting from the obstruction of such streets at points not opposite his property, but so situated as to prevent all ingress and egress to and from his property and business. (Cal.) Cushing-Wetmore Co. v. Gray, 47.

Lighting Streets.

17. **MUNICIPAL CORPORATIONS—Streets—Duty to Light.**—A city is under no legal obligation to light its streets, and such obligation does not arise or exist from the fact that the city has been given the power to light them. (N. C.) White v. City of New Bern, 476.

18. **MUNICIPAL CORPORATIONS—Negligence—Failure to Light Streets.**—Neither the absence of street lights nor defective lights is in itself negligence, but is only evidence on the principal question whether, at the time and place where an injury occurred, the streets were in a reasonably safe condition. (N. C.) White v. City of New Bern, 476.

Change in Grade of Streets.

19. **MUNICIPAL CORPORATION—Change of Grade of Street, Property Owner's Right to Recover for.**—If, through grading as previously done on a street, a grade is established and property graded accordingly in such a manner as to diminish the value of property fronting thereon, the owner may recover of the municipality to the extent that such diminution exceeds the direct benefit from the improvement causing the damage, if the constitution of the state provides that private property shall not be taken or damaged for public use without just compensation. (Utah) Kimball v. Salt Lake City, 859.

20. **CONSTITUTIONAL LAW—Grade of Streets, Damage to House Built Before the Adoption of the Constitution.**—Under constitutions providing that private property shall not be taken or damaged for public use without just compensation, the fact that a house had been constructed near a public street before the adoption of the constitution does not preclude its owner from recovering all damages sustained by him from the grading of the street after the constitution went into effect. (Utah) Kimball v. Salt Lake City, 859.

21. **INTEREST ON DAMAGES.**—In an action to recover damages for the grading of a public street to the injury of a property owner, he is entitled to recover the damages sustained up to the time when the grading was completed, with interest to the date of the trial. (Utah) Kimball v. Salt Lake City, 859.

NAVIGABLE WATERS.

1. **NAVIGABLE WATERS—Tide-lands, Effect of Establishing the Location for a Seawall or Harbor Embankment.**—The action of the board of harbor commissioners establishing a line for a seawall or harbor embankment does not, in advance of the construction of such wall or embankment, operate to withdraw from public use the lands between such line and the shore, so that a prescriptive title can arise in favor of private persons as against the state. (Cal.) People v. Kerber, 93.

2. **TIDE-LANDS, Public Use and Rights in, When may be Terminated.**—The public use in lands covered by navigable waters may, by some lawful act of public authority, be discontinued, in which event the property may thereupon cease to be protected by the rules preventing the acquisition of prescriptive title. If an adverse possession can be maintained or the statute of limitations run against such land in regard to such proprietary property, it will begin from the date when the public use ceases and not before. (Cal.) People v. Kerber, 93.

NEGLIGENCE.

In General.

1. **NEGLIGENCE—Duty to Prevent Spreading of Fire.**—After discovering a fire on his premises, for which he is not responsible, the owner is not bound to use the highest degree of care, but only ordinary diligence, to prevent it from spreading to his neighbor's property. (N. D.) Baird Bros. v. Chambers, 620.

2. **NEGLIGENCE—Injury by Article Falling from Building.**—The tenant of a building is not liable for injuries suffered by a passer-by from anything thrown from a window of the building, when neither the tenant nor any of his servants is in fault. (Me.) Carl v. Young, 290.

3. **NEGLIGENCE—Accidental Death.**—An accidental death when urged in defense of an action for negligence, is a question for the jury. (Iowa) Meier v. Way, Johnson, Lee & Co., 254.

4. **NEGLIGENCE—Last Clear Chance Doctrine.**—A person who has the last clear chance or opportunity of avoiding an accident, notwithstanding the negligence of his opponent, is considered in law solely responsible for such accident. (Idaho) Pilmer v. Boise Traction Co., 161.

5. **NEGLIGENCE, Recovery Notwithstanding.**—Although the act of the one injured may have been the primary cause of the injury, yet an action for such injury may be maintained if it be shown that the defendant might, by the exercise of reasonable care and diligence, have avoided the consequences of the injured party's negligence. (Idaho) Pilmer v. Boise Traction Co., 161.

6. **NEW TRIAL.—The Court of Common Pleas** has no jurisdiction to grant a new trial of an action brought before a justice of the peace, except under the provisions of section 816 of the General Statutes. (Conn.) Lithuanian Brotherhelp Society v. Tunila, 138.

Proximate Cause.

7. **NEGLIGENCE Which is not the Proximate Cause of an Injury.**—Negligence on the part of a person which was not the proximate cause of his injury or death will not be a bar to his recovery. (Idaho) Pilmer v. Boise Traction Co., 161.

8. **NEGLIGENCE—Proximate Cause, Definition of.**—The proximate cause of an event is that which in a natural and continuous sequence, unbroken by a new cause, produces that event, and without

which that event would not have occurred. (Idaho) Pilmer v. Boise Traction Co., 161.

9. **NEGLIGENCE—Proximate Cause, When a Question for the Jury.**—What is the proximate cause of the death of a person must, in an action to recover therefor, be submitted to a jury, if two fair minds might reasonably differ on the subject. (Idaho) Pilmer v. Boise Traction Co., 161.

10. **NEGLIGENCE, Damages Recoverable Because of.**—The defendant in an action for negligence can be held liable to respond in damages only for the immediate and proximate result of the negligent act, and in determining what is the direct and proximate cause, the rule requires that the injury sustained be the natural and probable consequence of the negligence alleged. (Ohio St.) Miller v. Baltimore etc. R. R. Co., 699.

11. **NEGLIGENCE—Proximate Cause.**—In cases where losses have been sustained by reason of the negligence of another, damages may be recovered for losses that would likely or probably result where such negligence is a proximate or directly contributing cause of the loss, and the plaintiff is not at fault. (Fla.) Western Union Tel. Co. v. Milton, 1077.

12. **A PROXIMATE CAUSE is One** that leads to or produces or directly contributes to producing the result or loss. If the loss is not such as would likely or probably result from the negligence of the defendant, he is not liable, since he can ordinarily be held responsible only for the probable results of his negligence which he should have foreseen. (Fla.) Western Union Tel. Co. v. Milton, 1077.

13. **NEGLIGENCE, Action, When will Lie for.**—Proof of negligence and of injury does not warrant a recovery. In addition thereto, the party on whom rests the burden of proof must show by competent evidence that the negligence proved was the proximate cause of the injury complained of, or, where there was more than one cause, that it was at least one of the causes. (Utah) Rogers v. Rio Grande Ry. Co., 876.

14. **NEGLIGENCE, Action, When will not Lie for.**—An act or omission, to constitute negligence for which an action will lie, must directly, as its natural consequence, produce injury to another. (Utah) Edgar v. Rio Grande Western Ry. Co., 867.

Contributory Negligence.

15. **CONTRIBUTORY NEGLIGENCE Prevents a Recovery,** although otherwise a complete prima facie right to recover is shown. (Utah) Rogers v. Rio Grande Western Ry. Co., 876.

16. **NEGLIGENCE, Contributory, Failure to Plead.**—If the plaintiff's evidence shows him to have been guilty of contributory negligence, the court may direct a verdict against him, although the defendant has not pleaded such negligence. (Ohio St.) Marsh v. Koons, 688.

17. **NEGLIGENCE, CONTRIBUTORY—Burden of Proof.**—In an action to recover for the death of a human being alleged to have resulted from the negligence of the defendant, the burden of proving contributory negligence must be assumed by him. (Idaho) Pilmer v. Boise Traction Co., 161.

See Associations; Bailment; Damages; Death; Railroads; Street Railways.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

Note.
Negotiable Instruments, amount, uncertainty in which destroys negotiability, 203.
attorneys' fees, stipulations for which destroy negotiability, 207-211.
certificates of deposit payable on return properly indorsed, 195.
condition retaining title to property, whether destroys negotiability, 194.
conditions destroying negotiability, cases illustrating, 193.
conditions for the return of property which destroy negotiability, 195.
conditions which do not destroy negotiability, cases illustrating, 194.
contingencies and uncertainty in payment, conditions respecting not permissible, 192.
contingencies which are certain to happen do not destroy negotiability of, 203.
contingencies which may never happen destroy negotiability of, 202.
date of payment, certainty required in, 199.
destroying by provisions making conditions as to payments, 193.
direction to charge to a particular account does not destroy negotiability, 196.
discounts, provisions for which destroy negotiability, 204.
exchange, provisions for, whether and when destroy negotiability, 212-214.
extension of time for payment, option of, whether destroys negotiability, 201.
fund out of which payment is to be made, mention of, when does not destroy negotiability, 196.
interest, stipulations for increase of on uncertain conditions, whether destroy negotiability, 204.
interest, uncertainty in the amount of, when destroys negotiability, 204.
money, foreign, stipulations for payment in, 198, 199.
money in which may be made payable, 197, 198.
mortgages given to secure, stipulations in concerning payment of taxes and insurance, 205, 206.
mortgages given to secure, stipulations in which destroy negotiability, 208, 209.
option of a party to have an extension of time, whether destroys negotiability, 201.
option to declare due before maturity, does not destroy negotiability, 200.
option to pay before maturity does not destroy negotiability, 200.
payable on or before a specified date, 200.
payment in commodities other than money, stipulations for destroy negotiability, 197.
payment out of a specified fund, stipulations for, whether destroy negotiability, 196.
payment, time of, uncertainty in which will destroy negotiability, 199, 200.
stipulations for waiver of homestead and exemption rights, whether destroy negotiability, 195.
title to property sold, stipulations concerning, whether destroy negotiability, 194, 195.
waivers of rights in which do not impair negotiability, 195, 196.
See Stolen Negotiable Instruments.

NEWSPAPERS.
See Contracts, 6.

NONSUIT.

See Trial, 16-18.

NOTICE.

1. **"NOTICE" is Equivalent to "Information," "intelligence" or "knowledge."** (R. I.) Bova v. Norigian, 741.

2. **NOTICE.—There is No Indisputable Presumption that a Letter,** which the law does not require to be sent, is read by the recipient. (R. I.) Bova v. Norigian, 741.

See Records.

NUISANCES.

Discharge of City Sewage.

1. **NUISANCE.—Where a City Discharges Sewage into a River** so that it is carried to the premises of a lower riparian proprietor, producing noxious and unhealthful gases, the wrong is a public nuisance causing legal injury to the proprietor, although he fails to prove specific damages; and every day's continuance of the acts causing such injury renders the city liable to a suit. (Conn.) Platt Bros. v. Waterbury, 111.

2. **NUISANCE—When not Authorized by City Charter.—Where a City Discharges Sewage into a Stream** so that it is carried to the premises of a lower riparian owner, the fact that the city's charter authorizes it to construct the sewers in question and to acquire by eminent domain so much of the proprietor's land as may be necessary in sewering the city is no defense to his right to specific damages, when his property has not been condemned for such public use. (Conn.) Platt Bros. & Co. v. Waterbury, 111.

3. **NUISANCE—One Recovery, When does not Bar Another.—Where a City Discharges Sewage into a Stream** so that it is carried undiluted and unpurified to the premises of a lower riparian proprietor, he suffers a fresh invasion of his legal rights each day that such unlawful act is repeated; therefore, the recovery of a judgment is not a bar to an action for subsequently accruing injuries. (Conn.) Platt Bros. & Co. v. Waterbury, 111.

4. **NUISANCE—Discharge of Sewage—Limitation of Actions.—** An action by a riparian owner for injuries to his property occasioned by the pollution of the stream by city sewage is in the nature of an action of case rather than of trespass, and accordingly is governed by the six years' statute of limitations. (Conn.) Platt Bros. & Co. v. Waterbury, 111.

Damages and Abatement.

5. **NUISANCE, Action to Recover Damages for.—**An action at law may be maintained for damages caused by a nuisance without seeking its abatement. (Cal.) Cushing-Wetmore Co. v. Gray, 47.

6. **NUISANCE, PUBLIC—Abatement—Special Damages.—**A public nuisance may be enjoined or abated by an individual property owner who suffers injury thereby of a special nature, separate and distinct from that which the public generally sustains. (Ala.) Birmingham Ry. etc. Co. v. Moran, 21.

7. **NUISANCE, PUBLIC—Special Damages—Injunction.—**If a railroad company, operating its road on the alley of a city without authority of law, builds a fence and gate across it, thus closing it and entirely shutting off the communication of abutting lot owners with another street, this constitutes a public nuisance which they are entitled to enjoin. (Ala.) Birmingham Ry. etc. Co. v. Moran, 21.

Injunction.

8. **NUISANCE—Injunction in Advance of Injury.**—When the owner of property is about to engage in an enterprise which may or may not become a nuisance, according to the manner in which it may be conducted, courts usually will not interfere in advance to restrain the undertaking, especially when the apprehended injury is doubtful or contingent or eventual; but this rule is relaxed in cases where the threatened injury is to health rather than to comfort and convenience. (N. C.) Cherry v. Williams, 566.

9. **NUISANCE—Restraining Erection of Tuberculosis Hospital.**—The erection of a hospital for the purpose of treating patients afflicted with tuberculosis and other contagious diseases in a residence portion of a city, so as to menace the health of people living in that vicinity, may be enjoined at their suit. (N. C.) Cherry v. Williams, 566.

See Railroads, 1.

NUNCUPATIVE WILL.

See Wills, 6-8.

OFFICERS.

OFFICERS.—The Assignment by a Public Officer of his unearned salary is void as against public policy. (Mich.) Granger v. French, 416.

See Arrests; County Officers.

OIL LEASE.

See Landlord and Tenant, 5.

PARENT AND CHILD.

PARENT AND CHILD—Refusal to Support a Child Who has Never been Within the State.—Under a statute making criminal the unreasonable neglect to provide for the support of one's minor child, a father may be convicted for failure to support his child, though he and the mother, being domiciled within the state, are aliens, and the child has never been therein. (Mass.) Commonwealth v. Acker, 328.

See Adoption.

PARTIES.

1. **PARTIES—Discretion in Bringing in Additional.**—Courts have a discretion to allow additional parties to be brought in, and this discretion will not be disturbed on appeal unless it has been clearly abused. (N. D.) Dedrick v. Charrier, 608.

2. **PARTIES—Bringing in After Judgment.**—Additional parties may be brought in in a proper case even after the rendition of judgment. (N. D.) Dedrick v. Charrier, 608.

See Appeal and Error, 1, 2.

PARTITION.

In General.

1. **PARTITION, Character of Proceeding for Under the Codes.**—The action for partition is, under the code of Wyoming, a civil action, and not necessarily purely equitable in character. It may be or not, depending upon the nature of the title asserted and the relief sought. (Wyo.) Field v. Leiter, 997.

2. **PARTITION IN EQUITY, Limitations upon.**—Though equity granted partition in cases incapable of relief at law because of legal objections operating as obstructions to the action of the law court, but which might have been overcome by the remedial processes of courts of equity, it is not to be understood that it would furnish the remedy to estates not entitled to partition at law, unless, perhaps, partition should be found necessary as an incident to complete equitable relief in cases otherwise properly before the court. (Wyo.) Field v. Leiter, 997.

Estates Subject to Partition and Persons Affected.

3. **PARTITION, Estates Subject to.**—**None but Estates in Possession** were bound by a judgment in partition at the common law. (Wyo.) Field v. Leiter, 997.

4. **PARTITION—Persons Who Could not Sue for.**—**One Without Possession or Right of Possession** cannot compel partition at the common law. (Wyo.) Field v. Leiter, 997.

5. **PARTITION—Reversioners and Remaindermen.**—The partition of estates in remainder without the right of possession was not enforceable at the common law, nor could partition be compelled between a tenant in possession and a mere remainderman. In the absence of a statute authorizing it, partition in equity cannot be awarded any more than at law of an estate in reversion of remainder. (Wyo.) Field v. Leiter, 997.

6. **PARTITION—Tenants in Possession and Remaindermen and Reversioners.**—A partition can be had between tenants for life or for years, and also between the owner of the fee of an undivided part and a tenant for life or years of the other part, without joining the reversioner or the remainderman, though the partition in the absence of the later is temporary only. (Wyo.) Field v. Leiter, 997.

7. **PARTITION—Tenants of Estates not in Possession not Necessary Parties Thereto.**—It is no objection to a partition that it does not conclude the interests of all persons, as where there are persons having estates which are not subject to partition who are not made parties to the suit. (Wyo.) Field v. Leiter, 997.

8. **PARTITION Between Persons One of Whom has an Estate in Possession Only.**—A partition may be had between a life tenant of an undivided part and a tenant in fee of the other part at the suit of either. (Wyo.) Field v. Leiter, 997.

9. **PARTITION Based upon Equitable Title.**—One with an equitable right capable of conversion and a present legal title, with a right of possession, may compel partition. (Wyo.) Field v. Leiter, 997.

10. **PARTITION.**—**The Question of Parties in Partition** must be settled with regard to the issues in the case and the relief demanded. (Wyo.) Field v. Leiter, 997.

11. **PARTITION, Defect in Parties, How to be Presented and When Waived.**—A defect of parties in partition is a ground for demurrer if it appears on the face of the complaint. Otherwise the objection may be taken by answer, and if not raised by such answer or demurrer must be deemed waived, unless it goes to the jurisdiction of the court. (Wyo.) Field v. Leiter, 997.

12. **PARTITION Under the Code—Parties Holding Reversionary Interests not Necessary.**—The owners of reversionary interests without right of possession are not necessary parties in partition. (Wyo.) Field v. Leiter, 997.

13. **PARTITION Pending Administration.**—**Though There is an Executor of a Deceased Tenant,** his heirs may maintain a suit for partition where the executor offers no objection and his possession is only for the purposes of administration. (Wyo.) Field v. Leiter, 997.

14. **PARTITION, When not Void Because of the Absence of a Remainderman.**—If the owner in fee of an undivided part obtains a judgment in partition against a tenant for life of the other part without joining a remainderman not in possession, nor entitled thereto, the judgment is not void for want of necessary parties, but is binding between the parties to the suit. (Wyo.) Field v. Leiter, 997.

15. **PARTITION—Parties Defendant, Statute Requiring Interested Persons to be Made Parties—Remaindermen and Reversioners.**—A statute requiring each tenant in common, coparcener, or other interested person to be named as defendants does not change the rule that persons whose estates are not in possession need not be made parties. (Wyo.) Field v. Leiter, 997.

16. **PARTITION—Interests of Reversioners and Remaindermen, When Need not be Determined.**—In a suit by a tenant in fee of an undivided interest in real property against a tenant for life it is not necessary for the court to consider or determine what interests, if any, any persons not parties to the suit have in estates in reversion or remainder, nor whether they are so represented by the parties before the court that the judgment will be binding on them, the property being capable of partition by allotment without resorting to any sale. (Wyo.) Field v. Leiter, 997.

17. **PARTIES—Omission of Property Held by the Parties, Objection to, When Comes too Late.**—Where the answer consents to the partition of the property described in the complaint without suggesting any other property which ought to be included in the partition, it is too late, after the report of the commissioners, to object on the ground of the omission of other tracts. (Wyo.) Field v. Leiter, 997.

Commissions and Their Report.

18. **PARTITION—Report of the Commissioners, Form and Contents of.**—Where the statute is silent respecting the contents of the report, it will be satisfied by a report showing the general action and determination of the commissioners, without disclosing the facts concerning the situation of the premises or specially stating that the partition has been equitably or advantageously made. This question may be brought before the court upon exceptions to the action of the commissioners. (Wyo.) Field v. Leiter, 997.

19. **PARTITION—Commissioners, Setting Aside Reports of.**—The action of commissioners in partition will not be set aside on the ground of unequal allotments except in extreme cases, as where the partition appears to have been made on wrong principles, or is shown by a very clear and decided preponderance of the evidence to be grossly unequal. (Wyo.) Field v. Leiter, 997.

20. **PARTITION—Commissioners' Report—Offer of One of the Parties to Take Lands Awarded to the Other at a Lower Price.**—The fact that a party seeking to have a commissioners' report in partition vacated offers to allow for the part awarded his adversary, a sum much greater than its value as reported by the commissioners does not require the vacation of the report, when there is evidence sustaining the action and estimates of the commissioners. Such offer merely proves what is already apparent, namely; that the party excepting to the report honestly believes himself aggrieved thereby, but it does not entitle him to have his judgment substituted for that of the commissioners. (Wyo.) Field v. Leiter, 997.

21. **PARTITION—Commissioners' Report, Vacating for Undue Influence.**—Proceedings by and before commissioners in partition should be fairly conducted with an equal opportunity to all persons to be heard, and the fact that secret or undue influence has been exercised

by either party to the suit upon the action of the commissioners requires it to be vacated. (Wyo.) Field v. Leiter, 997.

22. **PARTITION—Commissioners, Undue and Improper Influence of, When not Made Out.**—The fact that the manager of one of the parties to a suit in partition accompanied the commissioners for the purpose of pointing out the property to be partitioned and answered some question relative to the lands does not entitle the other party to have the commissioners' report set aside, where there is no evidence tending to show that such manager influenced, or undertook to influence, the commissioners in the allotments made by them, though he subsequently assisted in obtaining affidavits to sustain their report and himself subscribed an affidavit in which his estimate of the lands and of the several classes thereof substantially agreed with theirs. (Wyo.) Field v. Leiter, 997.

23. **PARTITION—Commissioners, Preparation and Report of by Counsel of One of the Parties.**—That counsel of one of the parties prepared the report of the commissioners in partition where the report so prepared conformed to their judgment previously announced does not show action prejudicial to the adverse party, nor entitle him to the vacation of such report. (Wyo.) Field v. Leiter, 997.

Fraud—Purchasers and Deeds.

24. **PARTITION—Purchaser at Sale—Fraud.**—A commissioner appointed to sell land for partition cannot directly nor indirectly purchase for his own benefit. (N. C.) Tuttle v. Tuttle, 481.

25. **PARTITION—Purchasers—Fraud.**—If persons, with knowledge of the trust relation of a commissioner appointed to sell lands for partition, aid and abet him in such purchase with a view to speculate upon it on their own account, they are guilty of fraud, and cannot become innocent purchasers, nor occupy any better position than the commissioner. (N. C.) Tuttle v. Tuttle, 481.

26. **PARTITION, DEEDS IN—Fraud—Burden of Proof.**—To set aside a deed made by a defendant, as a commissioner to sell land in partition made to his codefendants, the burden of proof is upon the plaintiff to show fraud in the sale by a preponderance of the evidence only. (N. C.) Tuttle v. Tuttle, 481.

27. **PARTITION—Impeachment for Fraud—Remedy.**—The remedy to impeach proceedings for fraud of a commissioner in collusion with the purchaser at a partition sale is by civil action to set aside the deed, and not by motion in the action. (N. C.) Tuttle v. Tuttle, 481.

28. **PARTITION—Fraud—Limitations.**—If an action is commenced to set aside a sale, decree and deed, in partition, made by reason of a fraudulent agreement to deprive plaintiffs of their property, the action must be commenced within three years after actual discovery of the fraud, and if the statute of limitations is set up as a defense, the plaintiffs must reply, setting out, by way of avoidance, the time when they aver that the fraud was discovered, and the burden of proof is on them to prove the facts necessary to repel the statute. (N. C.) Tuttle v. Tuttle, 481.

PARTNERSHIP.

1. **PARTNERSHIP, Agreement to Pay All Liabilities of.**—If, on the dissolution of a partnership, one of the partners agrees to take up, pay and discharge all its debts and liabilities as the same shall fall due, he is liable to reimburse his copartners for moneys paid by the latter to satisfy a judgment recovered against the firm after its dissolution for damages sustained by the judgment creditor by false representations made by the partnership in the sale of certain securities. (Mass.) Price v. Parker, 326.

2. **PARTNERSHIP, Agreement to Pay Debts and Liabilities of, When not Illegal.**—A judgment against a dissolved partnership for damages sustained by the judgment creditor by false representations made by the firm is within the provisions of an agreement by one of the partners with the other to pay all liabilities of the firm, and, so construed, the agreement is not illegal as an attempt by one wrong doer enforce contribution against another. (Mass.) Price v. Parker, 326.

3. **PARTNERSHIP—Assumption of Debts by Retiring Partner.**—Where a retiring partner transfers his interest to the remaining partner, and the latter agrees to pay the partnership debts, as between themselves the partner assuming the debts becomes the principal and the retiring partner the surety. (N. D.) Dean & Co. v. Collins & Mahood, 610.

4. **PARTNERSHIP—Assumption of Debts by Remaining Partner.** Where one partner transfers his interest in the firm property to the other, and the latter agrees to pay the firm debts, their obligation as joint debtors to a creditor who has not assented to the transaction continues although the creditor has notice. (N. D.) Dean & Co. v. Collins & Mahood, 610.

PARTY-WALLS.

1. **PARTY-WALL AGREEMENTS—Liability Under.**—If the covenants of a party-wall agreement are clearly made binding on the heirs and assigns of the respective parties, they run with the land, and if there is a covenant by one party to pay one-half of the cost of the party-wall erected by the other before using it, the subsequent owner of the vacant lot who makes use of the wall must make payment to the person who owns the lot upon which the first building was erected. (Wash.) Hoffman v. Dickson, 907.

2. **PARTY-WALL AGREEMENTS—Vendor and Purchaser—Specific Performance.**—If, under a party-wall agreement the owner of a vacant lot agrees to pay one-half the cost of the wall before using it, and such agreement expressly runs with the land, and purports to bind the heirs and assigns of the parties, and a subsequent owner of the vacant lot agrees to convey it by warranty deed, the grantee is not entitled to a conveyance free from the encumbrance of the party-wall agreement as the encumbrance cannot at the time of demanding the conveyance be removed by the grantor, because neither the time for payment, nor the person authorized to receive it and discharge the lien can at that time be ascertained. (Wash.) Hoffman v. Dickson, 907.

3. **PARTY-WALL AGREEMENTS—Vendor and Purchaser.**—Under an agreement to convey by warranty a vacant lot subject to a party-wall agreement that the owner of the property making use of the wall shall pay one-half of the cost thereof to the owner of the adjoining lot before using the wall, the grantor cannot be compelled before making the conveyance to deposit one-half of the cost of the wall in court to await the uncertain time of payment. (Wash.) Hoffman v. Dickson, 907.

4. **PARTY-WALL AGREEMENTS—Specific Performance—Modification of Trial Decree.**—If an agreement calls for a warranty deed to a certain vacant lot, and in an action for specific performance it is found that one-half the cost of certain party-walls is an encumbrance thereon which cannot then be removed, and the trial court orders specific performance, but the decree by inadvertence recites that the grantee is entitled to a deed of warranty, "subject to the liens for one-half of the cost of constructing both of said party-walls," the decree will be modified on appeal by striking out the words quoted. (Wash.) Hoffman v. Dickson, 907.

PASSBOOKS.
See Banks and Banking, 4-6.

PASSENGERS.
See Carriers.

PASTURING CATTLE.
See Waters and Watercourses, 9, 10.

PAYMENT.
1. **PAYMENT VOLUNTARILY MADE, When cannot be Recovered.**—Where money is voluntarily paid in satisfaction of an unjust or illegal claim, with full knowledge of the facts and without any fraud, duress or extortion, it cannot be recovered back by the payor (Idaho) Kimpton v. Studebaker Bros. Co., 185.

2. **PAYMENT—Recovery of Fees Unlawfully Exacted.**—Candidates for office who have, under protest, paid fees under an unconstitutional statute in order to have their names printed on the official primary election ballot may recover the same by action. (N. D.) Johnson v. Grand Forks County, 662.

See Bills and Notes, 14-16.

PEDDLERS.
See Hawkers and Peddlers.

PENALTY.
See Damages, 1-4.

PHYSICIANS AND SURGEONS.
See Witnesses, 3-5.

PLEADING.
1. **PLEADING—Amendment of Answer, Error in Refusing to Permit.**—If a court has erroneously stricken out a part of an answer stating a good defense to the action, it is an abuse of its discretion to refuse to permit the amendment of the answer by reinstating such defense. (Idaho) Union Stock Yards Nat. Bank v. Bolan, 146.

2. **PLEADING—Demurrer to Allegations for Damages.**—In an action on the case for damages, if the declaration makes a case entitling plaintiff to any recovery whatever, though it be only nominal damages, a demurrer will not lie thereto, even if the declaration claims other or greater damages than the cause may legally entitle the plaintiff to recover. A demurrer is not the proper way to test the extent of the recovery to be had, since such questions are properly raised and settled by objections to testimony at the trial, or by instructions to the jury, or by requiring the declaration to be reformed under section 1043, Revised Statutes of 1892, and section 1433, General Statutes of 1906, when it is calculated to embarrass a fair trial of the case. (Fla.) Western Union Tel. Co. v. Milton, 1077.

3. **PLEADING—Extent of Damages Recoverable.**—Where a declaration claims damages amounting to five hundred dollars, if the declaration states any cause of action, damages not exceeding five hundred dollars could be recovered thereon. (Fla.) Western Union Tel. Co. v. Milton, 1077.

PLEDGES.

1. **PLEDGES, LIEN OF—Effect of the Statute of Limitations.**—Under section 2911 of the Civil Code of California, declaring that a lien is extinguished by the lapse of time within which an action can be brought on the principal obligation, the lien of a pledge is extinguished by the lapse of time within which an action can be brought upon the debt secured thereby. (Cal.) Puckhaber v. Henry, 75.

2. **PLEDGEES, Right of After the Debt has Become Barred by the Statute of Limitations.**—A pledgee is in the same position as a mortgagee in possession when the statute of limitations has barred the right to maintain an action on his debt. Hence, the pledgor cannot maintain an action to recover possession of the pledged property without first paying the debt. (Cal.) Puckhaber v. Henry, 75.

3. **PLEDGEE—Right to Maintain an Action on the Pledge After the Statute of Limitations has Barred the Debt.**—If a policy of insurance is assigned as security for the payment of a debt, and the statute of limitations is permitted to bar an action on such debt, the pledgee may, nevertheless, maintain an action on the policy, and thereby obtain payment of his debt, if the amount recoverable is sufficient. (Cal.) Puckhaber v. Henry, 75.

POWER OF ATTORNEY.

See Principal and Agent, 3.

PRETERMITTED CHILD.

See Wills, 17-20.

PRIMARY ELECTIONS.

See Elections.

PRINCIPAL AND AGENT.

1. **PRINCIPAL AND AGENT.—The Ratification of One Unauthorized Act is not the Ratification of Another** and entirely distinct act, nor is the acceptance of the result of a series of unauthorized acts of the same kind, the creation of an implied agency to do an entirely different thing. (Ohio St.) Hoffmaster v. Black, 679.

2. **POWERS OF ATTORNEY are Construed Strictly,** and not extended by construction. (Mich.) Kuite v. Lage, 421.

3. **POWER OF ATTORNEY—Authority to Maintain Suit.**—A special power of attorney to institute proceedings "in our name, place and stead," etc., does not confer authority upon the attorney to institute suit in his own name. (Mich.) Kuite v. Lage, 421.

See Bills and Notes, 14-16.

PRIVATE WAYS.

See Easements.

PROBATE MATTERS.

See Executors and Administrators.

PROCESS.

In General.

1. **SUMMONS, Power to Amend.**—Under the provisions of section 3862, Revised Statutes, the court has control of its process, and may order a defective summons so amended as to conform to the requirements of the statute, and after amendment may order it with-

drawn from the files and served. (Idaho) Ridenbaugh v. Sandlin, 175.

2. **SUMMONS, Right to Withdraw and Make Further Service of.** A summons once returned and filed with the papers in the case becomes a file of the court which cannot be withdrawn without permission of the court, but the court may order it withdrawn and served upon any defendant in the case. (Idaho) Ridenbaugh v. Sandlin, 175.

Service by Publication.

3. **PROCESS—Publication of Summons Against Unknown Owners.** A judgment in an action to quiet title based on a published summons which does not describe the land in controversy is void as against adverse claimants not specifically named in the summons. (N. D.) Skjelbred v. Shafer, 614.

4. **SUMMONS—Publication Against Unknown Owners.**—A published summons in a suit to quiet title which neither describes the land in controversy nor names the adverse claimants does not constitute due process against them; and a judgment taken against them is void, and subject to collateral attack. (N. D.) Fenton v. Minnesota Title Ins. etc. Co., 599.

PROHIBITION.

1. **JUDGMENTS—Prohibition.**—Want of jurisdiction in a court entertaining a cause, or rendering a judgment therein without jurisdiction, subjects it to the writ of prohibition, although there may be other remedies, regardless of the amount involved. (W. Va.) Bice v. Boothsville Tel. Co., 986.

2. **JUDGMENTS—Prohibition—Discretion.**—The rule respecting the giving of opportunity to the inferior court to correct its own error in rendering judgment, before granting a writ of prohibition is one of discretion merely, and the judgment of the lower court will not be reversed on appeal for failure to require such inferior court to require such application before granting the writ. (W. Va.) Bice v. Boothsville Tel. Co., 986.

PROPERTY.

1. **CRUDE TURPENTINE Which has Formed on the Body of the Tree,** and is called scrape, is personal property. (Wyo.) Richbourg v. Rose, 1061.

2. **CRUDE TURPENTINE—Nature of as Personal Property.**—Crude turpentine in boxes in pine trees, in a state to be dipped up, is personal property. The turpentine crop is properly classed with fructus industriales, for it is not a spontaneous product of the trees, but requires annual labor and cultivation. (Fla.) Richbourg v. Rose, 1061.

PROXIMATE CAUSE.

See Negligence, 7-14.

PUBLIC LANDS.

In General.

1. **JURISDICTION—Public Lands.—State Courts** are without jurisdiction to adjudge the equities of claimants to public lands by enjoining the prosecution of a claim before the United States land department, or requiring the relinquishment of such claim, when the title to the land is still in the United States. (Wash.) Columbia Canal Co. v. Benham, 901.

2. **PUBLIC LANDS—Title to Tide-lands.**—Lands lying between lines of ordinary high and low tides and covered and uncovered

successively by the ebb and flow thereof vest in and belong to the state by virtue of its sovereignty. (Cal.) People v. Kerber, 93.

Pueblo Lands.

3. **PUEBLO LANDS.—An Alcalde Grant After the Cession to the United States** has no force as against it nor as against the state of California, to which the title was subsequently transferred. (Cal.) People v. Kerber, 93.

4. **PUEBLO LANDS in California—Effect of the Cession to the United States.**—Whatever power any Mexican pueblo ever had before the cession of the territory in California to the United States passed to the latter on such cession, and the sole power and authority over such lands was thereupon transferred to the United States, and was by it transmitted to the state of California on its admission to the Union. (Cal.) People v. Kerber, 93.

PUBLIC STREETS.

See Municipal Corporations.

PUBLICATION OF SUMMONS.

See Process.

PUEBLO LANDS.

See Public Lands, 3-4.

QUIETING TITLE.

See Process, 3-4; Taxation, 1.

QUITCLAIM DEEDS.

See Deeds, 10, 11.

QUO WARRANTO.

1. **QUO WARRANTO—Relation of Private Person.**—Quo warranto is strictly a prerogative writ, and will issue by the supreme court on the relation of a private person only in exceptionable cases. (N. D.) State v. Nohle, 628.

2. **QUO WARRANTO—Relation of Private Person.**—The issuance of a writ of quo warranto by the supreme court is discretionary, and an application on the relation of a private person for a writ directing county officials to desist from exercising their authority, on the ground that the county has no legal existence because organized under an unconstitutional statute, will be denied when to grant it would open up strife and confusion without any corresponding benefit to the relator or other persons. (N. D.) State v. Nohle, 628.

Note.

Quo Warranto, citizens and taxpayers as relators, 635.
common-law rule respecting, when still prevails, 634.
corporation, private, offices in, title to, whether may be questioned by private person, 646.
corporation, private, right of to act, whether may be questioned by private persons as relators, 643-646.
defeated candidate who is not entitled to the office, whether can proceed by, 640.
discretion of the court in granting leave to private persons to proceed by, 635.
history, origin and purpose of, 633.

Quo Warranto, municipal corporations, title of to their corporate franchises cannot be questioned at the relation of a private person, 640-643.
office claimants as relators, 638.
office, title to, whether may be contested by a defeated candidate, 640.
private persons as relators or applicants for, 634-650.
private persons as relators, discretion of the trial court in proceeding at the instance of, 650.
private persons, discretion of the court in granting leave to apply for, 653.
private persons must have an interest in the controversy or they cannot maintain an application for, 635.
private persons, public office, cases holding that they may not question title of the incumbent by, 637.
private persons, right of to proceed by in the name of the attorney general, 648.
private persons, right of to proceed by when the attorney general refuses to act, 649.
private persons, right of to proceed by with the consent of the attorney general, 648.
private persons, when may proceed by against persons usurping an office, 635-638.
private persons, whether may proceed against municipal corporations, 640-643.
private persons, whether may question the right of an officer of a private corporation to act, 646.
private persons, whether may question the right of private corporations to act, 643-646.
private persons who are not taxpayers, and taxpayers who are not citizens, 637.
statutory regulation of, 634.
to question title to a public office, citizens and taxpayers, when may maintain, 635.

RAILROADS.

In General.

1. **PUBLIC NUISANCE—What is.**—A railroad constructed and operated on the streets and alleys of a city without authority constitutes a public nuisance, as does also the erection of a fence and gate by it across such street or alley. (Ala.) Birmingham Railway etc. Co. v. Moran, 21.

2. **LESSEE RAILWAY—Liability on Lessor's Contract.**—Where a railway company leases its property, including "all lands and interest in lands, timber rights and contracts now owned by the lessor," the lease transfers to the lessee executory contracts then existing between the lessor and third persons to furnish wood for its locomotives, and the lessee being entitled to the benefits of the contract, must assume its burdens; the primary liability on the contract, as between the lessor and lessee, is with the latter. (N. C.) Atlantic etc. R. R. Co. v. Atlantic etc. Co., 550.

3. **RAILWAYS—Negligence, Uncertainty as to Party Guilty of.**—Where the evidence leaves it uncertain whether a railway company or some unknown person was guilty of an act of negligence in leaving a switch unlocked, an employé cannot recover if injured thereby. (Utah) Edgar v. Rio Grande Western Ry. Co., 867.

4. **NEGLIGENCE—Proximate Cause—Railways.**—The leaving of a switch unlocked cannot be held to have been the proximate cause of the derailment of a locomotive, when the evidence shows that, notwithstanding the switch being unlocked, trains repeatedly passed

over the line on the same day and before the accident, and tends to show that no train running over the rail could throw the switch out. (Utah) Edgar v. Rio Grande Western Ry. Co., 867.

Injuries at Crossings.

5. **RAILROAD CROSSING.—The Obligation of a Traveler to Look and Listen** when approaching a track upon which cars are run is so well established as the duty of a prudent person that a neglect of it is negligence in law, and not a mere circumstance for the jury to consider in passing upon the question of his care. (R. I.) Price v. Rhode Island Co., 736.

6. **RAILWAYS—Negligence.—The Mere Failure to Sound a Whistle or Ring a Bell** is not sufficient to authorize a recovery, where one riding in a buggy and crossing the track is struck by a train and killed. It must further appear that such failure was a proximate cause of the accident. (Utah) Rogers v. Rio Grande Western Ry. Co., 876.

7. **RAILWAYS—Negligence, Presumption of the Exercise of Due Care, When Rebutted.**—Though a person approaching a railway will be presumed to be in the exercise of due care, this presumption may be rebutted, and it is proper to instruct the jury that the presumption is overcome, if it appears from the evidence that if the person injured had looked or listened before driving on the crossing, he must have seen or heard the train approaching. (Utah) Rogers v. Rio Grande Western Ry. Co., 876.

8. **NEGLIGENCE—Presumption of Due Care.**—The presumption that a person exercised due care in approaching and entering upon a railway crossing is well founded. (Utah) Rogers v. Rio Grande Western Ry. Co., 876.

9. **JURY TRIAL—Instruction, Refusal of Where not Based on the Evidence.**—It is proper to deny an instruction that the jury may take into consideration, on the question of contributory negligence, any testimony relating to the deceased being blinded and dazzled or deceived by the light from the headlight of the locomotive relating to the speed of the train, if there is no evidence that he saw the headlight at all, and whether he saw it or not is a mere conjecture. (Utah) Rogers v. Rio Grande Western Ry. Co., 876.

See Carriers; Master and Servant, 7, 8.

RECEIVERS.

1. **JUDICIAL SALES—Receiver—Deeds—Evidence of Authority.** A recital in a deed that it was made by a certain person as a receiver in a certain cause, and that he had authority to make it, is not sufficient to show authority for its execution. (W. Va.) Hagan v. Holderby, 960.

2. **JUDICIAL SALES—Evidence to Show Authority to Exclude Deeds.**—If a deed claimed to be executed by a receiver is offered in evidence, it is necessary to its admission that enough of the record of the court appointing the receiver appear to show that the court did authorize the conveyance of the particular property and that it had jurisdiction of the person whose property was directed to be conveyed, and that it also had jurisdiction of the subject matter. (W. Va.) Hagan v. Holderby, 960.

3. **JUDICIAL SALES—Evidence of Giving of Receiver's Bond.—If** a deed executed by a receiver is offered in evidence, it is necessary to show by the record of the court wherein the cause was pending that the receiver qualified by giving a bond as required by the court. (W. Va.) Hagan v. Holderby, 960.

RECORDS.

1. **NOTICE.—One Who Fails to Record the Title Under Which He Claims** assumes the task of actually bringing the information to the apprehension of the person affected by it. (R. I.) Bova v. Norigian, 741.

2. **NOTICE—Letter Advising of Unrecorded Lease.**—The question whether one to whom a letter was sent, not conversant with English, acquired actual knowledge of its contents, is for the jury. (R. I.) Bova v. Norigian, 741.

3. **DEEDS—Recording—Notice of Fraud.**—The recording of a deed does not put parties upon inquiry as to fraud not appearing on its face. (N. C.) Tuttle v. Tuttle, 481.

REDEMPTION.

See Taxation, 21-23.

REMAINDERS.

See Partition.

REPLEVIN.

1. **REPLEVIN Against One Out of Possession.**—Replevin cannot be maintained against a defendant not in possession at the time the demand is made or the suit is commenced. (Wash.) Andrews v. Hoeslich, 896.

2. **REPLEVIN Against One Who has Parted with Possession.**—If property has been in defendant's possession and he has wrongfully transferred it without the owner's knowledge before the commencement of the action, the rule that replevin will not lie against one not in possession at the time of the commencement of the action does not obtain. (Wash.) Andrews v. Hoeslich, 896.

3. **REPLEVIN—Tender.**—In replevin for a pawn the plaintiff keeps good his tender of the amount received on the pledge if the money is paid into court before the service of summons, and remains there even if it is not paid as alleged with the filing of the complaint. (Wash.) Andrews v. Hoeslich, 896.

4. **REPLEVIN—Lies for Personal Property Only.**—An action of replevin is one for the recovery solely of personal property, and cannot be maintained to recover real property. (Fla.) Richbourg v. Rose, 1061.

5. **REPLEVIN—Possession Necessary to be Shown.**—In replevin, the plaintiff, in order to recover, must show a right of possession in himself to the property replevied. He can recover only upon the strength of his own right of possession. (Fla.) Richbourg v. Rose, 1061.

6. **REPLEVIN—Effect of Plea of not Guilty.**—In an action of replevin a plea of not guilty puts in issue not only the right of plaintiff to the possession of the property replevied, but also the wrongful taking and detention thereof. Under such plea, defendant can give any evidence of special matter which amounts to a defense to plaintiff's cause of action, to show that the plaintiff is not entitled to the possession of the property replevied. (Fla.) Richbourg v. Rose, 1061.

7. **REPLEVIN.—Where Property Which has been Annexed to the Freehold is Severed** therefrom, it becomes personal property so as to become recoverable by an action of replevin. (Fla.) Richbourg v. Rose, 1061.

8. **REPLEVIN of Property Severed from Freehold.**—In order to maintain replevin for property which had been annexed to the free-

hold, but subsequently severed therefrom, the plaintiff must have the actual or constructive possession of the land. (Fla.) Richbourg v. Rose, 1061.

9. **REPLEVIN—Effect of Adverse Possession.**—Inasmuch as the title to land cannot be tried, ex directo in replevin, if the series of acts, by which property which had been annexed to the freehold is severed therefrom, are sufficient to create an adverse possession in the defendant, replevin cannot be maintained. But such adverse possession must be something more than a mere act of trespass. It must be so long continued, and so far yielded to, as to constitute a possession to the exclusion of others, an occupancy, as distinguished from a mere act of trespass. (Fla.) Richbourg v. Rose, 1061.

10. **REPLEVIN OF TURPENTINE—Defense of Adverse Possession.**—Where defendants were in the exclusive possession of turpentine trees and the land, their employés cutting the boxes in the trees, chipping them, dipping the turpentine and hauling it away in barrels, some six or seven thousand trees being so worked by them, and plaintiff knew these facts for months previously, but never entered the land, nor cut timber thereon, nor chipped trees, nor turpentined them, his constructive possession of the property was not sufficient to overcome the possession of the defendants, which was under a claim and color of right, and hence plaintiff could not maintain replevin for the turpentine made on the property by defendants. (Fla.) Richbourg v. Rose, 1061.

RES GESTAE.

See Evidence, 15, 16.

RES JUDICATA.

See Judgments, 4-10.

REVERSIONS.

See Partition.

RIPARIAN RIGHTS.

See Waters and Watercourses.

SALARIES.

See Mandamus; Taxation, 4.

SALES.

Delivery and Acceptance.

1. **SALES—Delivery to Carrier, Effect of.**—If goods are delivered to a common carrier to be forwarded to the purchaser, or to a place designated by him, this constitutes delivery to, and receipt by, him, and such delivery, if in the usual course of business or in pursuance of directions given by the purchaser, effects the transfer of the title to him. (Ohio St.) State v. Mullin, 710.

2. **SALES, When Complete, Though the Purchaser has not Become Entitled to Possession.**—When, upon the sale of personal property in the possession of the vendor, the terms of the sale are agreed upon by all the parties, and the vendor has fully performed all things required of him, and only delivery remains to be made, the contract is so far absolute that title passes to the purchaser, though he is not entitled to possession until the price agreed upon is paid. (Ohio St.) State v. Mullin, 710.

3. **SALE, Where Deemed to have been Made When Property is Delivered C. O. D.**—Where goods are sold and delivered to an express

company marked "C. O. D.," to be forwarded to the purchaser, the company becomes his agent to receive the goods, and the agent of the purchaser to receive the price, and the sale is deemed made and completed at the place where the goods are received by the company, though the purchaser has not paid the purchase price and is not entitled to possession until he does so. (Ohio St.) State v. Mullin, 710.

4. **SALES—Acceptance of Inferior Goods.**—By the acceptance of goods, the buyer waives his right to allege inferiority of their quality which was obvious to him. (S. C.) Brooke v. Laurens Milling Co., 780.

5. **SALES—Delivery in Installments—Refusal to Accept—Measure of Damages.**—If, under a contract for the purchase of grain to be delivered in installments with a right on the part of the seller to sell on account of the buyer, the latter refuses to accept it, the measure of damages is the difference between the market value on the day that it should have been accepted and the price which was contracted to be paid. (S. C.) Brooke v. Laurens Milling Co., 780.

Damages for Breach.

6. **SALES—Installments—Measure of Damages.**—If, in a case of a sale in installments, the time of delivery arrives before the trial, the measure of damages is the difference between the contract price and the market price at the time the goods ought to have been accepted by the purchaser. (S. C.) Brooke v. Laurens Milling Co., 780.

7. **SALES—Damages.**—If a purchaser notifies the seller before the day fixed for the acceptance of the goods that he will not accept them, and the seller then sells them, as he has a right to do under the contract, such sale does not enter into a computation of the damages for the breach of the contract of sale. (S. C.) Brooke v. Laurens Milling Co., 780.

8. **SALE—Damages for Breach of Contract.—Vendors of Goods** Who have repudiated the sale and refuse to make a delivery cannot urge, in a suit against them by the vendee to recover damages, that the title to the goods has passed by delivery and receipt. (Mich.) Driggs v. Bush, 389.

Arbitration—Grading Grain.

9. **SALES—Arbitration—Conclusiveness of Grading of Grain.**—If a contract for the sale of grain contains a stipulation that the "West Nashville Public Elevator weights and grades be accepted as final," the honest grading of the grain by the arbitrator thus selected by the parties must be accepted as final. (S. C.) Brooke v. Laurens Milling Co., 780.

SAVINGS BANKS.

See Banks and Banking, 4-6.

SEARCHES AND SEIZURES.

See Arrest.

SEAWALL.

See Navigable Waters.

Note.

Seisin. See Covenant of Seisin.

SELF-DEFENSE.

See Assault; Homicide; Mayhem, 2-4.

SEWAGE.
See Nuisances, 1-4.

SPECIFIC PERFORMANCE.
See Party-walls, 4.

STATE.
See Adverse Possession, 10.

STATUTE OF FRAUDS.
See Frauds, Statute of.

Note.

Statute of Frauds, beneficial effects of, 394.
earnest, whether may be regarded as a part payment, 394.
part payment, accepted at a date subsequent to the contract, 404.
part payment, agreement to cancel indebtedness, whether may constitute, 399.
part payment, agreement to pay a debt due to a third person, 400.
part payment, at what time must be made, 403-405.
part payment by check, 400.
part payment by giving a promissory note, 401.
part payment cannot consist of a mere agreement to pay or to give a credit on account, 398.
part payment, effect of as taking cases out of, 394.
part payment, forfeit money deposited as, whether may constitute, 402.
part payment generally takes case out of, 395-397.
part payment, in what may be, 397.
part payment need not be in money, 397.
part payment, parol agreement, whether may amount to, 399.
part payment, part performance distinguished from, 397, 398.
part payment, time when must be made is controlled by statute, 405.
part payment to an agent, 400, 401.
part payment, unaccepted tender cannot constitute, 402.
part payment, what deemed to be for the purpose of taking a case out of, 395.

STATUTE OF LIMITATIONS.
See Limitation of Actions.

STATUTES.

STATUTES—Construction—Provisos.—In construing statutes, a provision therein cannot be extended by implication to cover that which is opposed to the express language of the main enactment. (S. C.) Venning v. Atlantic Coast Line R. R. Co., 768.

Note.

Stolen Negotiable Instruments, bankers, rights of respecting, 803.
bills of exchange, rights of purchasers of, 804, 805.
bills of lading, 817.
bona fide purchasers of, rights of, 813.
bonds of the United States, 814.
bonds, public and private, 815, 816.
burden of proof in actions upon, 814, 817.
canceled before loss or theft of, 814, 815.
certificates of deposit, 817.
checks, certified, enforcement of, 816.

Stolen Negotiable Instruments, conflict of laws respecting, 805.
coupons belonging to bonds, 816.
delivery of, decisions holding it to be essential, 808-813.
delivery of, decisions holding it not to be essential, 805-808.
English law respecting, 803, 804.
forged indorsement of does not transfer title, 814.
gross negligence in purchasing, 804.
held as collateral security, 814.
history and development of the law of in England, 803.
issued without authority, 815.
national courts, rules of respecting, 804.
negotiable by delivery, 813.
negotiable by indorsement, 813-815.
state warrants, rules applicable to, 808.
United States, when bound by, 808.

STREET RAILWAYS.

Right to Resist Construction.

1, 2. **STREET RAILWAYS, Right of Municipality to Resist by Force.**—If the right of a street railway company to lay additional track has been forfeited by the lapse of time, the municipality has the right to resist by force any attempt to lay such additional track. (Cal.) Los Angeles Ry. Co. v. City of Los Angeles, 54.

Abuse and Forfeiture of Franchise.

3. **NEGLIGENCE—Abuse of Franchise.**—If a right or franchise is conferred and a corresponding duty imposed upon a person or corporation, it is answerable to a third person who sustains damage by the negligent discharge of that duty. (Me.) Milton v. Bangor Ry. etc. Co., 293.

4. **NEGLIGENCE—Abuse of Franchise.**—If a city railway company accepts a franchise coupled with the duty to keep streets used in repair, a third person injured by the neglect of such duty is entitled to recover. (Me.) Milton v. Bangor Ry. etc. Co., 293.

5. **FRANCHISE, Forfeiture of Ipso Facto.**—A statute providing for the obtaining of street railway franchises, specifying certain provisions, and declaring that a failure to comply with either of the provisions or with any of the provisions of any ordinance granting the franchise works a forfeiture of the right of way and franchise, is self-executing, and no adjudication or other judicial proceeding is necessary to declare the forfeiture. (Cal.) Los Angeles Ry. Co. v. City of Los Angeles, 54.

6. **STREET RAILWAYS, Forfeiture of Right to Lay Track of.**—Upon the breach of a condition or provision which, by the statute, has the effect of forfeiting its franchise, a street railway has no more right to lay its track than if it never had been granted such right. (Cal.) Los Angeles Ry. Co. v. City of Los Angeles, 54.

Operation—Injury to People in Street.

7. **STREET RAILWAYS—Rights of Pedestrians.**—In a city a pedestrian has the right to rely on the motorman's using due care in managing his car, and due care means having it under such control as the occasion demands at a street intersection where people and vehicles are crossing. (Idaho) Pilmer v. Boise Traction Co, 161.

8. **STREET RAILWAYS—Negligence—Failure to Look and Listen.**—It is not negligence as a matter of law to omit to look and listen before crossing a street-car track. (Idaho) Pilmer v. Boise Traction Co., 161.

9. **STREET RAILWAYS, Right to Recover Against Notwithstanding the Negligence of the Person Injured.**—In an action against a street railway company to recover for the death of a person claimed to be due to the defendant's negligence, and where it appears that the deceased was also negligent, his negligence will not prevent a recovery, if, after he was perceived by the motorman, the latter might have avoided the result of the negligence of the deceased. (Idaho) Pilmer v. Boise Traction Co., 161.

10. **NEGLIGENCE, CONTRIBUTORY, When Precludes Recovery.** In an action against a street railway company to recover for the death of a person due to the defendant's negligence, the contributory negligence which may exist to bar a recovery must concur with the negligence of the defendant in such a way that the latter is not alone the immediate and proximate cause of the accident. If the negligence of the decedent only placed him in a dangerous situation, out of which he would have come with safety had it not been for the subsequent negligence of the defendant, then there is no such concurring negligence as will exonerate the defendant. (Idaho) Pilmer v. Boise Traction Co., 161.

11. **STREET RAILWAYS.—It is the Duty of Motormen** to have their cars under control when crossing streets over which people travel. (Idaho) Pilmer v. Boise Traction Co., 161.

12. **STREET RAILWAYS Care Which Persons in the Streets may Presume will be Exercised by.**—Persons with vehicles passing over a street railway track and crossing may assume that care will be used to reduce the speed of cars when at a sufficient distance from a passing team or person, so as to enable such team or person to get out of the way. (Idaho) Pilmer v. Boise Traction Co., 161.

See Carriers, 16-28.

Note.

Streets, abutting property owners, business purposes for which may use, 350-352.
abutting property owners, rights of in, 344-346.
abutting property owners, rights of in, in addition to the general public, 344, 345.
abutting property owners, rights of in sidewalks, 345.
abutting property owners, right of to use for loading and unloading goods, 349, 350.
are held in trust for the public, 345.
areaways in, power of municipalities to authorize, 348.
automobiles remaining in, whether may be authorized by a municipality, 354.
bay windows, whether may be authorized, 346.
booths and stands in for the sale of commodities, right of municipality to authorize, 352.
bridges and viaducts in or over, power of municipalities to authorize, 347.
building materials, right to deposit and keep in, 351.
buildings, use of for moving, 351.
business in, power of municipalities to authorize, 350, 352.
coal-holes in, power of municipalities to authorize, 348.
drinking fountains in, power of municipalities to authorize, 347.
encroachments and obstructions in which a municipality may authorize, 348, 349.
fairs and carnivals in may be authorized by a municipality, 353.
fences in, power of municipalities to authorize, 348.
fireworks, exhibition of in may be authorized by a municipality, 354.
goods, loading and unloading and keeping of in which a municipality may authorize, 349, 350.

Streets, grass plots in, power of a municipality to authorize, 351, 352.
hacks, right of to stand in may be authorized by a municipality, 354.
hydrants in, power of a municipality to authorize, 347.
markets in, whether may be authorized, 346-353.
municipal corporations, power of to authorize use of for private purposes, 345.
platforms in, power of municipalities to authorize, 348.
private purposes, grants of for by municipalities, 345.
produce stands in, whether may be authorized by municipality, 353.
pumps in, power of a municipality to authorize, 347.
railways in, power of municipalities to authorize, 346.
scales for weighing commodities, whether may be maintained in, 353.
shade trees in, right of municipalities to authorize, 351, 352.
sidewalks are parts of, 345.
stairs in, power of municipality to authorize, 348.
stepping-stones in, right of a municipality to authorize, 348.
telegraph and telephone lines, power of municipalities to authorize in, 346.
structures which a municipality may authorize to be erected and maintained in, 346.
uses to which may be appropriated, 345.
wheels, shops and eating-houses upon, whether may be maintained in, 353.

SUBSTITUTION OF PARTIES.

See Appeal and Error, 1, 2.

SUCCESSION.

See Descent and Distribution.

SUMMONS.

See Process.

SUNDAY LAWS.

1. **SUNDAY LAWS.—A Check Delivered on Sunday is invalid,** and has no legal effect. The holder cannot recover thereon against the drawer, if, on due presentation, the bank fails to pay. (Mass.) Gordon v. Levine, 361.

2. **SUNDAY LAWS.—Though Receiving Payment of a Debt on Sunday may be Illegal, the Payment cannot be Disregarded,** and an action maintained to again enforce it. (Mass.) Gordon v. Levine, 361.

3. **SUNDAY—Effect of Prohibited Acts Done upon.**—A court will not aid a party to recover on a Sunday transaction, but it will not treat as a nullity that which was done on Sunday in the performance of a valid contract. It will give to the act done on a Sunday its legal effect as a defense. (Mass.) Gordon v. Levine, 361.

4. **SUNDAY LAWS.—A Negotiable Instrument, Void Because Delivered on Sunday,** is valid in the hands of a bona fide purchaser for value and without notice. (Mass.) Gordon v. Levine, 361.

5. **SUNDAY LAWS—Check Delivered on Sunday, When not Made Void by Returning the Money Received.**—If one receives a check for money, which check is invalid because delivered on Sunday, and he negotiates it and thereby obtains from a bona fide purchaser the amount for which it calls, he is not entitled to return such money and then maintain an action against the drawer for money so loaned. (Mass.) Gordon v. Levine, 361.

6. **SUNDAY LAWS—Check Invalid Because Delivered on Sunday, Failure to Present for Payment.**—If one receives a check invalid because delivered on Sunday, but which would have been paid had it been presented in due time, and fails to so present it until the bank is insolvent and ceases business, he cannot maintain an action for the money lent against the person who drew the check and recover the amount thereof from him. (Mass.) Gordon v. Levine, 361.

See Trial, 13.

TAXATION.

In General.

1. **TAXES—Payment as a Condition to Quiet Title.**—The plaintiff in a suit to remove a cloud on his title caused by a void tax sale may be required to pay the amount justly due for the taxes included in such sale. (N. D.) Fenton v. Minnesota Title Ins. etc. Co., 599.

2. **TAX TITLE—Burden to Prove Compliance with Law.**—In the absence of an enabling statute, it is incumbent upon one who claims title to land derived from a sale thereof for taxes to prove affirmatively that every mandatory provision of the law under which the sale was affected was strictly complied with. (N. D.) Blakemore v. Cooper, 574.

3. **TAXATION—Repeal of Revenue Laws.**—The repeal or revision of revenue laws has a prospective operation only, unless the intention of the legislature to the contrary clearly appears. (N. D.) Blakemore v. Cooper, 574.

Property Taxed.

4. **TAXATION—Salary of an Officer of the United States.**—Money is not exempt from state taxation on the ground that it is the proceeds of the salary of an officer of the United States. (Mass.) Dyer v. City of Melrose, 330.

5. **CONSTITUTIONAL LAW—Taxation of Insurance Companies.** A statute providing for collecting from fire insurance companies doing business in the cities and towns of the state a certain tax on every premium collected by them yearly in such city or town, and paying the fund to certain fireman's associations for the benefit of disabled firemen, gratuities to the widow or dependent of any fireman killed, his necessary funeral expenses, the purchase of accident insurance upon a member of such department, or for pensions to disabled firemen, is unconstitutional as not being a uniform tax levied for a public purpose, nor a legitimate exercise of the police power of the state, and as a violation of a constitutional provision prohibiting the granting of pensions except for military or naval service. (S. C.) Aetna Fire Ins. Co. v. Jones, 818.

Assessments.

6. **TAXATION.—A Description of the Land Assessed is Essential** to a valid tax; a defective description vitiates the assessment and all subsequent proceedings. (N. D.) State Finance Co. v. Mulberger, 650.

7. **TAXATION—Insufficient Description of Land.**—A description of land in an assessment-roll must be sufficiently accurate and definite to enable the owner to identify the property therefrom as his; otherwise the assessment is void. A sufficient description is necessary, not only for his benefit, but as a basis for future titles. (N. D.) Grand Forks County v. Frederick, 621.

8. **TAXATION—Insufficient Description of Land.**—The fact that the name of the owner of land is correctly given in the assessment-roll, and that he is not misled by an insufficient description and knows that his land was intended to be assessed, does not relieve the

Streets, grass plots in, power of a municipality to authorize, 351, 352.
hacks, right of to stand in may be authorized by a municipality, 354.
hydrants in, power of a municipality to authorize, 347.
markets in, whether may be authorized, 346-353.
municipal corporations, power of to authorize use of for private purposes, 345.
platforms in, power of municipalities to authorize, 348.
private purposes, grants of for by municipalities, 345.
produce stands in, whether may be authorized by municipality, 353.
pumps in, power of a municipality to authorize, 347.
railways in, power of municipalities to authorize, 346.
scales for weighing commodities, whether may be maintained in, 353.
shade trees in, right of municipalities to authorize, 351, 352.
sidewalks are parts of, 345.
stairs in, power of municipality to authorize, 348.
stepping-stones in, right of a municipality to authorize, 348.
telegraph and telephone lines, power of municipalities to authorize in, 346.
structures which a municipality may authorize to be erected and maintained in, 346.
uses to which may be appropriated, 345.
wheels, shops and eating-houses upon, whether may be maintained in, 353.

SUBSTITUTION OF PARTIES.

See Appeal and Error, 1, 2.

SUCCESSION.

See Descent and Distribution.

SUMMONS.

See Process.

SUNDAY LAWS.

1. **SUNDAY LAWS.—A Check Delivered on Sunday is invalid,** and has no legal effect. The holder cannot recover thereon against the drawer, if, on due presentation, the bank fails to pay. (Mass.) Gordon v. Levine, 361.

2. **SUNDAY LAWS.—Though Receiving Payment of a Debt on Sunday may be Illegal, the Payment cannot be Disregarded,** and an action maintained to again enforce it. (Mass.) Gordon v. Levine, 361.

3. **SUNDAY—Effect of Prohibited Acts Done upon.**—A court will not aid a party to recover on a Sunday transaction, but it will not treat as a nullity that which was done on Sunday in the performance of a valid contract. It will give to the act done on a Sunday its legal effect as a defense. (Mass.) Gordon v. Levine, 361.

4. **SUNDAY LAWS.—A Negotiable Instrument, Void Because Delivered on Sunday,** is valid in the hands of a bona fide purchaser for value and without notice. (Mass.) Gordon v. Levine, 361.

5. **SUNDAY LAWS—Check Delivered on Sunday, When not Made Void by Returning the Money Received.**—If one receives a check for money, which check is invalid because delivered on Sunday, and he negotiates it and thereby obtains from a bona fide purchaser the amount for which it calls, he is not entitled to return such money and then maintain an action against the drawer for money so loaned. (Mass.) Gordon v. Levine, 361.

6. **SUNDAY LAWS—Check Invalid Because Delivered on Sunday, Failure to Present for Payment.**—If one receives a check invalid because delivered on Sunday, but which would have been paid had it been presented in due time, and fails to so present it until the bank is insolvent and ceases business, he cannot maintain an action for the money lent against the person who drew the check and recover the amount thereof from him. (Mass.) Gordon v. Levine, 361.

See Trial, 13.

TAXATION.

In General.

1. **TAXES—Payment as a Condition to Quiet Title.**—The plaintiff in a suit to remove a cloud on his title caused by a void tax sale may be required to pay the amount justly due for the taxes included in such sale. (N. D.) Fenton v. Minnesota Title Ins. etc. Co., 599.

2. **TAX TITLE—Burden to Prove Compliance with Law.**—In the absence of an enabling statute, it is incumbent upon one who claims title to land derived from a sale thereof for taxes to prove affirmatively that every mandatory provision of the law under which the sale was affected was strictly complied with. (N. D.) Blakemore v. Cooper, 574.

3. **TAXATION—Repeal of Revenue Laws.**—The repeal or revision of revenue laws has a prospective operation only, unless the intention of the legislature to the contrary clearly appears. (N. D.) Blakemore v. Cooper, 574.

Property Taxed.

4. **TAXATION—Salary of an Officer of the United States.**—Money is not exempt from state taxation on the ground that it is the proceeds of the salary of an officer of the United States. (Mass.) Dyer v. City of Melrose, 330.

5. **CONSTITUTIONAL LAW—Taxation of Insurance Companies.** A statute providing for collecting from fire insurance companies doing business in the cities and towns of the state a certain tax on every premium collected by them yearly in such city or town, and paying the fund to certain fireman's associations for the benefit of disabled firemen, gratuities to the widow or dependent of any fireman killed, his necessary funeral expenses, the purchase of accident insurance upon a member of such department, or for pensions to disabled firemen, is unconstitutional as not being a uniform tax levied for a public purpose, nor a legitimate exercise of the police power of the state, and as a violation of a constitutional provision prohibiting the granting of pensions except for military or naval service. (S. C.) Aetna Fire Ins. Co. v. Jones, 818.

Assessments.

6. **TAXATION.—A Description of the Land Assessed is Essential** to a valid tax; a defective description vitiates the assessment and all subsequent proceedings. (N. D.) State Finance Co. v. Mulberger, 650.

7. **TAXATION—Insufficient Description of Land.**—A description of land in an assessment-roll must be sufficiently accurate and definite to enable the owner to identify the property therefrom as his; otherwise the assessment is void. A sufficient description is necessary, not only for his benefit, but as a basis for future titles. (N. D.) Grand Forks County v. Frederick, 621.

8. **TAXATION—Insufficient Description of Land.**—The fact that the name of the owner of land is correctly given in the assessment-roll, and that he is not misled by an insufficient description and knows that his land was intended to be assessed, does not relieve the

authorities from the necessity of proceeding regularly in assessment matters and sufficiently describing the property. (N. D.) Grand Forks County v. Frederick, 621.

9. **TAXATION.—A Curative Statute Which Legalizes** only irregularities in the assessment of taxes has no application to assessments void because of an indefinite description of the land. (N. D.) Grand Forks County v. Frederick, 621.

10. **TAXATION.—Absence of a Verification to an Assessment-roll** is fatal to the tax in a law action, but not in equitable actions. (N. D.) Grand Forks County v. Frederick, 621.

Tax Sales and Titles.

11. **TAX SALE.—A Notice of Tax Sale Published in a Newspaper** is not invalidated through the failure of the owner or manager to file with the county auditor an affidavit setting forth the paper's qualifications as required by statute. (N. D.) Blakemore v. Cooper, 574.

12. **TAXATION.—Notices of Tax Sales, and Notices** of the time when redemption will expire, must accurately describe the land, otherwise they are not effectual. (N. D.) State Finance Co. v. Mulberger, 650.

13. **TAXATION.—Service of Notice of the Time When Redemption** will expire on the holder of void tax deed as owner is ineffectual. (N. D.) State Finance Co. v. Mulberger, 650.

14. **TAXATION.—A Certificate of Sale of Land for Taxes** has no evidentiary force to establish a tax, if the sale was void, because of an insufficient description of the property. (N. D.) State Finance Co. v. Mulberger, 650.

15. **TAX TITLE — Impairment by Subsequent Legislation.**—A statute making tax deeds prima facie evidence of title enters into the contract of purchase, and thereafter the legislature cannot impair the evidentiary character of the deeds, for to do so would impair the obligation of the contract. (N. D.) Blakemore v. Cooper, 574.

16. **TAX DEEDS.—Executors are the "Assigns" of Their Testator** within the meaning of a statute authorizing the issuance of a tax deed "to the purchaser, his heirs or assigns." (N. D.) Blakemore v. Cooper, 574.

17. **TAXATION.—A Tax Deed that Runs in the Name of a County**, instead of in the name of the state, is void. (N. D.) State Finance Co. v. Mulberger, 650.

18. **DEEDS—Taxes—Validity.**—The fact that land is listed in the name of some one other than the owner does not invalidate a tax deed, unless it is shown that the true owner listed and paid the taxes on it. (N. C.) Eames v. Armstrong, 436.

19. **DEEDS—Taxes—Validity.**—If land belonging to the wife has been listed for taxes in the name of her husband, who has no interest therein, a tender to redeem made by him, notwithstanding the birth of issue, when he is not acting for her or claiming under her, does not invalidate the tax deed. (N. C.) Eames v. Armstrong, 436.

20. **DEEDS—Taxes—Right to Attack.**—No one can question the title acquired by a tax deed, without first showing that he or the person under whom he claims had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person, and a husband in whose name his wife's land was listed for taxation cannot, in his own right, attack a tax deed to the premises. (N. C.) Eames v. Armstrong, 436.

Redemption from Sale.

21. **TAXATION—Retroactive Operation of Redemption Statute.**—Statutory provisions relating to redemption from tax sales are

prospective, and do not apply to certificates issued under former statutes. (N. D.) Blakemore v. Cooper, 574.

22. **TAX SALES.—The Right to Redeem from a Contract of Sale,** under North Dakota laws of 1890, was a "right accrued" within the meaning of section 2686 of the Revised Code, which preserves actions and proceedings which had been commenced and rights which had accrued. (N. D.) Blakemore v. Cooper, 574.

23. **TAXATION—Notice Terminating Right of Redemption.—If** statutes in force when a tax sale was made require service of notice of the expiration of the right of redemption as a condition to obtaining a deed, deeds issued without such notices are invalid. (N. D.) Blakemore v. Cooper, 574.

See Adverse Possession, 8; Licenses.

TELEGRAPHS AND TELEPHONES.

1. **PLEADING—Sufficiency of Allegations of Damages Against Telegraph Company.**—Where a declaration alleges that for reward and hire the defendant telegraph company received from plaintiff for transmission a message reading: "Bought for your account today's limit 175. Am doing my best to rush bill lading"; that defendant in its transmission negligently and carelessly substituted "125" for "175," whereby plaintiff lost certain sums of money by reason of a third person not accepting certain cotton purchased for him under circumstances set forth in the declaration, it states a cause of action for at least nominal damages. (Fla.) Western Union Tel. Co. v. Milton, 1077.

2. **TELEGRAPH COMPANIES—How Duty to Transmit Messages Promptly is Created.**—The authority, franchises and privileges which a telegraph company must have and exercise in serving the public, and without which it cannot render the service, are conferred by law for the purpose of providing for the public the prompt transmission and delivery of a correct copy of messages. (Fla.) Western Union Tel. Co. v. Milton, 1077.

3. **TELEGRAPH COMPANIES—Their Duty to the Public.**—In undertaking to render the public service by virtue of the franchises and privileges conferred upon it by law, a telegraph company assumes the duty to transmit messages with care and skill and to deliver a correct copy of messages received for transmission. The compensation allowed by law to be received by the company for its services in that respect is allowed and received for a careful and skillful transmission of such messages and the delivery of correct copies of the messages transmitted. (Fla.) Western Union Tel. Co. v. Milton, 1077.

4. **UNREPEATED TELEGRAMS—Effect of Printed Blank Provisions Limiting Damages to Price of Transmission.**—In receiving a message and taking the price of transmission, a telegraph company undertakes to send and deliver it correctly, and if it fails in doing so without legal excuse, it cannot avoid its liability for such failure on the ground that the sender used a printed blank in delivering the message to it, which provided that the company "shall not be liable for mistakes and delays in the transmission or delivery of any unrepeated message"; that is, a message telegraphed back to the originating office for comparison. (Fla.) Western Union Tel. Co. v. Milton, 1077.

5. **TELEGRAPH COMPANIES are Entitled to a Reasonable Compensation,** by law, for the services which they render, and the amount charged for transmitting the message should be a reasonable compensation for the complete performance of the service undertaken—i. e., the transmission and delivery of a correct copy of the message received for transmission. (Fla.) Western Union Tel. Co. v. Milton, 1077.

6. **TELEGRAPH COMPANIES—Damages Recoverable.**—In an action in tort against a telegraph company for the breach of a public duty in negligently transmitting an incorrect copy of a message delivered to it for transmission, the damages that can be recovered are for the loss or injury sustained by the plaintiff as a proximate consequence of the defendants' negligent act, which consequence the parties contemplated, or should have contemplated, as likely to follow from a breach of the duty. (Fla.) Western Union Tel. Co. v. Milton, 1077.

7. **DAMAGES from Erroneous Telegram Stating Amount of Cotton Purchased.**—Where the plaintiff had a contract with a third person to take and receive all cotton he could buy at ten cents per pound upon a basis of middling cotton upon a report by wire of the number of bales so bought on each day, an error on the part of a telegraph company in transmitting a message of plaintiff reporting the purchase of one hundred and seventy-five bales of cotton so that the message reported only one hundred and twenty-five bales as purchased entitles the plaintiff to recover from the telegraph company the difference between the price which would have been paid by this third person if the message had been correctly transmitted and the highest market price, which was nine and one-half cents, paid for the fifty bales of cotton. (Fla.) Western Union Tel. Co. v. Milton, 1077.

8. **TELEGRAPH COMPANIES—Notice to Company of Losses from Negligent Transmission.**—Where the terms of a telegraphic message and the circumstances known to the company when the message was presented for transmission were reasonably sufficient for the defendant to contemplate therefrom that the losses sustained by the plaintiff would probably result from a negligent transmission, it will be liable in damages to the amount of loss directly sustained by plaintiff from its negligence. And it is not essential that the particular loss sustained was contemplated, it being sufficient if the loss sustained should have been contemplated as a probable and proximate result of the negligence. (Fla.) Western Union Tel. Co. v. Milton, 1077.

TIDE LANDS.

See Adverse Possession, 10; Navigable Waters; Public Lands, 2.

TIMBER.

See Statute of Frauds, 1; Vendor and Vendee.

TIME.

THE TIME Within Which to do an Act where no time is agreed on is a reasonable time. (Fla.) Patrick v. Kirkland, 1096.

TIME-BOOKS.

See Evidence, 17-19.

TORTS.

1. **TORT—Action Against Two or More, Necessity for a Single Verdict.**—In an action against two or more for a single tort, there cannot be two verdicts for different sums against different defendants upon the same trial. (Cal.) Marriott v. Williams, 87.

2. **TORTS, Joint Liability for.**—All who are guilty at all are liable for the whole amount of the actual damages arising from the injury inflicted, irrespective of the degree of culpability. (Cal.) Marriott v. Williams, 87.

3. **DAMAGES, Evidence of in Actions of Tort.**—The connection between a tortious act, the person sought to be charged with the con-

sequences of the injury, and the injury sustained must be established by a fair preponderance of the evidence before the plaintiff can be permitted to recover. Such casual connection cannot be left to conjecture, surmise or speculation, but must rest on a firm foundation of proof. (Mass.) Sullivan v. Old Colony St. Ry. Co., 378.

4. **NUISANCE, Lawful Exercise on One's Property Rights, When does not Constitute a.**—The principle that every person shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal and like right to the enjoyment of their property, nor injurious to the equal rights of the public, must always be considered and applied in the light of that other principle that every man has a right to the natural use and enjoyment of his own property, and that if, while lawfully in the enjoyment of such use without negligence or malice on his part, an unavoidable loss occurs to his neighbors, the same is damnum absque injuria. The rightful use of one's own land may, in some instances, cause damage to another and yet constitute no legal wrong, and afford the damaged person no remedy. (Idaho) City of Bellevue v. Daly, 179.

TRIAL.

In General.

1. **TRIAL—Visit of Judge to the Premises.**—An appellate court will not assume that a visit by the trial judge to the premises after the facts had been agreed upon by the parties was made without the consent of counsel, in the absence of a finding to that effect. (Conn.) Bitello v. Lipson, 126.

2. **TRIAL.—A Motion to Expunge** is an exclusive remedy, which will be granted only when the defect is plain. (Conn.) Bitello v. Lipson, 126.

Instructions.

3. **JURY TRIAL—Instruction, Construction of.**—To give an instruction its proper effect, it must be considered and construed in connection with all the other instructions given. (Utah) Rogers v. Rio Grande Western Ry. Co., 876.

4. **JURY TRIAL—Instruction, When not Deemed Prejudicial.**—If in an action by parents to recover for the death of their son, the court gives instruction respecting the measure of damages which may be erroneous, this is not a prejudicial error, if the jury finds in favor of the defendant, and their verdict can only be reconciled with the instructions given on the theory that they found the defendant was not guilty, or that the decedent was guilty of such contributory negligence as precludes a recovery for his death. (Utah) Rogers v. Rio Grande Western Ry. Co., 876.

5. **TRIAL.—Instructions Should be Read as a Whole** in determining their correctness. (Iowa) Meier v. Way, Johnson, Lee & Co., 254.

6. **TRIAL.—Instructions** which can in no way be misleading cannot be complained of. (Iowa) McGovern v. Interurban Ry. Co., 215.

7. **JURY TRIAL—Refusing Instruction Already Given.**—If all that is pertinent in an instruction asked for has already been embodied in an instruction given, the court may properly refuse to give it. (Cal.) Bonneau v. North Shore R. R. Co., 68.

8. **JURY TRIAL—Instructions Concerning Matter not in Evidence.**—The instruction, "That every particular phase of the injury may enter into the consideration of the jury in estimating compensation, loss of time with reference to the injured party's condition and ability to earn money, his loss from permanent impairment of faculties, mental and physical pain, suffering and dis-

figurement, are all elements to be considered by the jury in estimating plaintiff's damages," while correct as a general principle of law, is erroneous in a case where there is no allegation of loss of time and no evidence has been introduced showing the loss of any particular or specified time, or the value thereof or amount of damage sustained by reason of loss of time. (Idaho) Tarr v. Oregon Short Line R. R. Co., 151.

9. **JURY TRIAL—Instructions Erroneous but not Prejudicial.**—Where the court has instructed the jury that they must be governed by the evidence in assessing damages, and that they must find the data therefor within the evidence, and the entire record in the case discloses that no claim has been made for damages on account of loss of time, and no evidence has been introduced thereon, and it is reasonably clear from the record that the jury did not consider such element in assessing damages, an erroneous instruction to the effect that loss of time is a proper element to be considered in such cases is not within itself such error as will cause a reversal of the judgment. (Idaho) Tarr v. Oregon Short Line R. R. Co., 151.

10. **APPEAL AND ERROR—Jury Trial—Duty to Consider All the Instructions.**—All the instructions given in a case must be read and considered together as a whole, and where they are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the instructions as a whole rather than to an isolated portion thereof. (Idaho) Tarr v. Oregon Short Line R. R. Co., 151.

Submission of Issues and Findings.

11. **TRIAL—Submission of Issues.**—If the issues submitted to the jury fully present every phase of the controversy, their form is immaterial if under them each party has an opportunity to present evidence of the facts relied upon. (N. C.) Tuttle v. Tuttle, 481.

12. **PRACTICE—Findings, Want of.**—In an action wherein findings by the court are essential, if the record does not show that they were not waived, it will be presumed that they were made so far as required. (Cal.) Cushing-Wetmore Co. v. Gray, 47.

Verdict.

13. **TRIAL—Verdict on Sunday.**—The rendition of a verdict on Sunday is valid. (N. C.) Tuttle v. Tuttle, 481.

14. **TRIAL—Direction of Verdict.**—To justify a court in directing a verdict for the plaintiff, the evidence in support of the issues essential to a recovery must be so clear and undisputed that no question of fact is left to the jury. (Iowa) McNight v. Parsons, 265.

15. **TRIAL — Verdict — Amount of Recovery—Instructions.**—It is improper to so state a limitation to the jury as to suggest a verdict for the amount claimed, but when the verdict rendered is for a much less sum than that claimed and is reasonable, it will not be disturbed. (Iowa) McGovern v. Interurban Ry. Co., 215.

Nonsuit.

16. **NONSUIT, When Should be Granted and When Refused.**—A motion for a nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and on such motion the evidence must be interpreted most strongly against the defendant. (Idaho) Pilmer v. Boise Traction Co., 161.

17. **NONSUIT in an Action to Recover for Death.**—In an action to recover damages for the injury or death of a person, by reason of being run against and over by a street-car, a motion for a nonsuit at the close of the plaintiff's evidence should not be granted unless the facts presented by the evidence are such that but one con-

clusion could reasonably be drawn from them, and that conclusion is, that no recovery can be had under the evidence. (Idaho) Pilmer v. Boise Traction Co., 161.

18. **NONSUIT—Province of the Court and Jury.**—It is the province of the court to determine that conclusion and grant a nonsuit; but if different minds might reasonably reach different conclusions from such evidence, the motion for a nonsuit should be denied and the case submitted to the jury. (Idaho) Pilmer v. Boise Traction Co., 161.

See Criminal Law.

TRUSTS.

1. **TRUSTS—Liability for Taxes.**—A cestui que trust or beneficiary is not directly liable to one who advances money to the trustee to pay taxes on the trust property. (Ala.) Dantzler v. McInnis, 28.

2. **TRUSTS—Loan to Trustee to Pay Taxes—Acknowledgment of Liability by Beneficiary.**—If a stranger loans money to a trustee to pay taxes on the trust estate, the beneficiary does not acknowledge liability for the loan, making him personally liable therefor, by covenanting in a deed made by him to such estate that he will not demand payment of a part of the purchase money until a disputed tax matter between him and the lender is settled. (Ala.) Dantzler v. McInnis, 28.

3. **TRUSTS—Power of Sale When Created.**—A will devising property to certain persons and appointing another to sell and dispose of it as to him seemed best for the interest of such heirs, and to invest or dispose of the proceeds for their best interests, clothes him with the absolute power of disposal of the property in fee. (W. Va.) Hagan v. Holderby, 960.

See Charities; Frauds, Statute of, 4-6.

TUBERCULOSIS HOSPITAL.

See Nuisance, 9.

TURPENTINE.

See Property; Replevin, 10.

TYPEWRITTEN LETTERS.

See Evidence, 20, 21.

VENDOR AND VENDEE.

1. **AGREEMENT TO SELL Standing Timber—Revocability of License to Remove Trees.**—An agreement to sell another the wood and timber on certain land with a given time to remove it is an executory contract for the sale of chattels to take effect when the timber is severed from the land, with a license to enter, cut and remove the trees, which license is revocable at any time before the purchaser has entered and cut the trees. (Fla.) Richbourg v. Rose, 1061.

2. **TIMBER DEEDS—What Constitutes an Irrevocable Sale of Standing Timber.**—Where an instrument recites the payment of a certain sum of money, that the grantors have bargained, sold and conveyed to a certain person all of the pine timber now standing upon certain described lands, that the described lands have been granted, bargained, sold and leased to the grantee to be used for turpentine purposes and privileges, and that the grantee is granted and given the right for a certain period to enter upon and work said timber for turpentine purposes as well as to cut and remove the timber with the right of ingress and egress, which said instrument was acknowledged

and recorded, it cannot be revoked by a subsequently executed deed of conveyance of the real property made by the same grantor. (Fla.) Richbourg v. Rose, 1061.

See Deeds; Ejectment.

VERDICT.

See Trial, 13-15.

VICE-PRINCIPAL.

See Master and Servant, 1.

WATERS AND WATERCOURSES.

In General.

1. **RIPARIAN PROPRIETOR, Right of One to Recover for Injury Also Suffered by Others.**—Every riparian proprietor may maintain an action of tort for damages to the property, though such damage is precisely like that suffered by every other riparian owner. (Mass.) Stimson v. Brookline, 382.

2. **WATERS—Right to have Artificial Conditions Continued.**—Where an upper proprietor by any structure has created on his own premises an artificial condition affecting the flow of water, which condition invades no right of lower proprietors and gives indication that it is for a temporary purpose, or for a purpose that may at any time be abandoned, no obligation rests on him in favor of the lower proprietors to maintain the structure or condition, although its incidental effect has been to benefit them; and they can acquire no right by prescription to have the condition continued, for an easement arising in that way can be established only through adverse possession or continuous invasion to another's rights. (N. C.) Lake Drummond etc. Water Co. v. Burnham, 527.

3. **RIPARIAN RIGHTS—Enjoining Log-driving Company.**—A riparian proprietor may enjoin log-driving companies from retarding the flow of water in order to create artificial freshets for floating logs, where such interruption in the natural flow of the stream deprives him of water with which to operate his electric plant. (Wash.) Kalama Electric Light etc. Co. v. Kalama Driving Co., 948.

Watercourses and Their Obstruction.

4. **WATERCOURSES—Question of Fact.**—When, from the evidence, it appears that a ditch was constructed many years ago for the drainage of meadows, it is a question of fact for the jury whether it was in any sense a watercourse of any kind or anything more than a ditch for drawing off water and draining the land through which it passed. (Mass.) Stimson v. Brookline, 382.

5. **WATERCOURSE, Artificial, When Should be Treated as Natural.**—A watercourse made by the hand of man may have been created under such conditions that, so far as the rules of law and the rights of individuals are concerned, it is to be treated as if it were of natural origin. (Mass.) Stimson v. Brookline, 382.

6. **WATERCOURSE, Artificial, Effect of Acquiescence in.**—If a ditch constructed for the purpose and having the effect of draining a watercourse from or through land is permitted to remain for more than twenty years, with the acquiescence of the public authorities and of all persons interested, the same rules should be applied to it as to a natural watercourse. (Mass.) Stimson v. Brookline, 382.

7. **WATERCOURSE, Artificial, Liability for Obstructing.**—If a ditch or artificial watercourse is constructed under such circumstances that it should be treated as a natural watercourse, one who dams it

up is answerable to a riparian proprietor for damages resulting to him therefrom. (Mass.) Stimson v. Brookline, 382.

8. **NUISANCE—Obstruction of a Ditch or Watercourse.**—If a ditch which land owners have acquired the right to have treated as a natural watercourse is dammed up to the injury of one of the riparian proprietors, he may maintain an action, although similar damages may have been sustained by others of the riparian proprietors. (Mass.) Stimson v. Brookline, 382.

Easement to Maintain Ditch.

9. **EASEMENT to Maintain Water Ditch, Effect of on Right of the Land Owner to Pasture Cattle.**—The fact that a municipality uses water that it conveys to the place of use through a ditch that runs across the field of another does not of itself entitle the municipality to maintain an action against the owner of the land for a perpetual injunction restraining him from allowing his cattle to feed and graze in the field along the banks of the ditch and to cross over the same or wade through the waters thereof. (Idaho) City of Bellevue v. Daly, 179.

10. **EASEMENT to Maintain Water Ditch, Duty of Maintaining Fence Along.**—Though one has the right to maintain a water ditch through the lands of another, the latter is under no duty of fencing in such ditch before permitting his cattle or other stock having the right to range at large, to graze on his land or upon the public common or domain. (Idaho) City of Bellevue v. Daly, 179.

See Boundaries.

WAYS.

See Easements.

WILLS.

In General.

1. **WILLS—Repugnant Clauses.**—Where a will provides, "All the rest, residue, and remainder of my estate, either real, personal, or mixed, I give to my dear husband, Henry P. Wood, he to have the full use and benefit thereof unconditionally. After him, should any remain, I give the same to my sister, Clara N. Crombe, one-half, and to my sisters Hannah N. Partelo and Phoebe R. Partelo, the balance, share and share alike," the first sentence gives to the husband the rest of the estate in fee simple absolute, and the second sentence is void for repugnancy. (R. I.) Wood, for an Opinion, 738.

2. **WILLS.—The Word "Lawful" Prefixed to the Word "Heir"** is ordinarily used in wills without special meaning, and, as a rule, should not be allowed any controlling significance; it may be stricken out as meaningless, for there is no such anomaly in law as an unlawful heir. (N. C.) Harrell v. Hagan, 539.

3. **WILLS.—Extrinsic Evidence is Admissible** for the purpose of identifying the subject matter of a devise in a will. (Iowa) Whitehouse v. Whitehouse, 250.

4. **WILLS—Destroyed Will—Parol Proof—Copy.**—If a paper is offered for probate as a copy of a will which has been destroyed by the testator, parol evidence that such paper is such copy is not admissible in the absence of any physical connection between such paper and the will. (N. C.) In re Baldwin, 466.

5. **WILLS, Revocation of Probate of, What is not a Ground for.** That a will is invalid and contrary to the laws of the state relating to charitable uses is not a ground for revocation of its probate. (Cal.) Estate of Lennon, 58.

Nuncupative Will.

6. **WILLS, NUNCUPATIVE—Amendments.**—Upon the probate of a nuncupative will, the court may, in the exercise of a sound discretion, permit the alleged will and its records to be amended to conform to the facts proved. (Wash.) In re Miller's Estate, 904.

7. **WILLS, NUNCUPATIVE, at What Time may be Made.**—If a person in his last sickness, of which he subsequently dies, while impressed with the probability of his impending death, makes a nuncupative will, it is valid, though he had time and opportunity to reduce it to writing. (Wash.) In re Miller's Estate, 904.

8. **WILLS, NUNCUPATIVE—Last Sickness.**—If the last sickness of one has progressed so far that he expects and is liable to die, and in view of death, and as preparatory thereto, he makes a verbal will, and thereafter dies of such last sickness, neither prior preparation to make such will nor opportunity to make a written will at the time, or thereafter affects the validity of the nuncupation. (Wash.) In re Miller's Estate, 904.

Execution of Will.

9. **WILLS—Attestation of.**—A statutory requirement that a will to be valid shall be subscribed in the presence of the testator by at least two witnesses is mandatory. (N. C.) In re Baldwin, 466.

10. **WILLS—Insufficient Execution.**—If a paper offered for probate as a will was written by a third person who signed it as a witness before the testator signed and not in his presence, and such third person never saw the testator after the paper was signed by him and left at the residence of the testator to be executed by him, such paper does not constitute a will. (N. C.) In re Baldwin, 466.

11. **WILLS, Attestation of.**—To render a will valid, the attestation or subscription by witnesses must be on the same sheet of paper as that which contains the testator's signature, or else upon some paper physically connected therewith. (N. C.) In re Baldwin, 466.

Revocation of Will.

12. **WILLS—Revocation by Subsequent Writing.**—The statutory provisions for the revocation of a testament by will properly executed, or by some writing declaring an intention to revoke executed like a will, are neither identical nor interchangeable. The latter is evidence of a present intention, and when executed becomes of itself a complete revocation; but the former takes effect only when the will of which it forms a part becomes effective, and that can never be in the lifetime of the testator. (R. I.) Bates v. Hacking, 759.

13. **WILLS—Destruction of Revocatory Wills.**—Where a will, which contains a provision revoking prior wills, was afterward destroyed by the testator, a prior will may be admitted to probate. (R. I.) Bates v. Hacking, 759.

Estates Created.

14. **WILLS—Life Estate—Power to Sell.**—If a husband by will devises and bequeaths all his estate, both real and personal, for the use of his wife during her life, "whatever remains of said estates" at the death of his wife to his daughter, he creates a power of sale of both the real and personal property, which, being exercised by the wife, devests the title of the remainderman. (Me.) Young v. Hillier, 283.

15. **WILLS—Estates, When Determinable.**—Where a testator gives to his daughters an estate of remainder in fee, after the life estate of their mother, determinable as to each daughter's share on her dying without leaving a lawful heir, the event by which the interest of each is to be determined must be referred, not to the death of the devisor,

but to that of the several takers of the estate in remainder, respectively, without leaving a lawful heir. (N. C.) Harrell v. Hagan, 539.

Omission of Child.

16. **WILLS—Estates, When Determinable.**—Where a will gives an estate to a mother for life, and at her death or marriage to certain daughters, and if either or all of the daughters die without leaving a lawful heir, then to certain sons, the estate does not become absolute in the other daughters on the death of one of them without leaving such heir, but the determinable quality of each interest continues to affect such interest until the event occurs by which it is to be determined or the estate becomes absolute. (N. C.) Harrell v. Hagan, 539.

17. **WILLS—Omission of Child—Evidence.**—In a proceeding by a pretermitted child to establish her share in her father's estate, evidence is inadmissible that after the will was made she entered a house of ill-fame and became estranged from her father. (Mich.) Bachinski v. Bachinski's Estate, 427.

18. **WILLS—Omission of Child.—Extrinsic Evidence** is admissible to show that a testator omitted to provide for his child through mistake. (Mich.) Bachinski v. Bachinski's Estate, 427.

19. **WILLS—Omission of Child Through Mistake of Law.**—A child is entitled to inherit from her father's estate if he omits to provide for her in his will through a mistake of law, as where he relies on the opinion of the scrivener that the daughter would share in his estate notwithstanding her omission from the will. (Mich.) Bachinski v. Bachinski's Estate, 427.

20. **WILLS—Omission of Child.—Evidence of the Financial Condition** of the estate of a testator is not admissible in a proceeding by a pretermitted child to establish her share in his estate. (Mich.) Bachinski v. Bachinski's Estate, 427.

Adopted Child.

21. **WILLS—Right of Adopted Child to Inherit.**—A testator who by will makes provision for his own "child or children" by that designation includes thereby an adopted child. (Me.) Woodcock's Appeal, 291.

22. **WILLS—Right of Adopted Child to Inherit.**—If a will makes provision for a "child or children" of some other person than the testator, the adopted child of such person is not included, unless other language of the will makes it clear that it was so intended. (Me.) Woodcock's Appeal, 291.

Illegitimate Child.

23. **WILLS—Illegitimate Children.**—Where a will gives an estate to a mother for life and at her death to her daughters, and if either of the daughters dies without leaving a lawful heir, then to certain sons, two illegitimate children of one daughter who dies without ever having been married fill the description "if she should die without leaving a lawful heir," and meet the condition on which their mother's estate becomes absolute. (N. C.) Harrell v. Hagan, 539.

24. **WILLS—Legitimate Children.—Courts Readily Extend the Term "Children"** to include illegitimate children where such an intent can be gathered from the words of the will and the condition of the parties, and more especially when, from the operation of the statute, the illegitimate children come clearly within the descriptive words of the devise. (N. C.) Harrell v. Hagan, 539.

See Charities.

WITNESSES.

Examination.

1. **TRIAL EXAMINATION of Witnesses.**—If an improper question to a witness is allowed by the court over objection, there is no prejudicial error if the answer is favorable to the objecting party. (Ala.) Green v. State, 17.

Privileged Communications with Attorney or Physician.

2. **ATTORNEY AND CLIENT—Privileged Communications.**—The testimony of one who has been counsel for one of the parties to a lease cannot be objected to as a confidential communication when it was in regard to a fact necessarily known to both parties, brought out during their negotiations concerning the lease. (N. C.) Atlantic etc. R. R. Co. v. Atlantic etc. Co., 550.

3. **PHYSICIAN AND PATIENT.—Communications Between Patients and Their Physicians** were not regarded as privileged at the common law. (N. C.) Smith v. John L. Roper Lumber Co., 535.

4. **PHYSICIAN AND PATIENT.—Communications Between a Patient and His Physician** are not privileged under the North Carolina statute, unless the information they impart is necessary to enable the physician to prescribe, which question is within the discretion of the court to determine. (N. C.) Smith v. John L. Roper Lumber Co., 535.

5. **PHYSICIAN AND PATIENT—Communication Between as to Happening of an Accident.**—In an action for personal injuries received by reason of an alleged defective jackscrew, a statement made by the plaintiff in answer to his physician's inquiry as to how he received the injury, that "he was raising the engine with a jackscrew and he kicked it or wrung it out, he could not tell which, causing the engine to roll back and crush his arm," etc., cannot be excluded as a privileged communication. (N. C.) Smith v. John L. Roper Lumber Co., 535.

See Evidence.

WORDS AND PHRASES.

1. **WORDS AND PHRASES.—A "Trader" is One Who Makes It His Business** to buy merchandise, goods or chattels, to sell at a private sale. (Conn.) State v. Rosenbaum, 121.

2. **WORDS AND PHRASES.—The Primary Meaning of the Word "Family"** is the collective body of persons forming one household under one head, including parents, children, and possibly servants; and this meaning will be given the word unless the context indicates some other meaning. (Conn.) Dalton v. Knights of Columbus, 116.

3. **ALLEY—Definition.**—The word "alley" when used in connection with platted ground in a city or town usually has reference to a public alley, and when a deed conveying such platted ground refers to an alley, it means an alley platted for public purposes. (Iowa) Talbert v. Mason, 259.

WRIT OF PROHIBITION.

See Prohibition.

N 9


3 6105 063 242 643